

**Oregon State Bar**  
**Meeting of the Board of Governors**  
 June 27, 2014  
 Wildhorse Resort, Pendleton, OR  
**Open Session Agenda**

*The Open Session Meeting of the Oregon State Bar Board of Governors will begin at 2:00pm on June 27, 2014.  
 Items on the agenda will not necessarily be discussed in the order as shown.*

**Friday, June 27, 2014, 2:00pm**

**1. Call to Order / Finalization of Agenda**

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

- |    |   |        |                            |
|----|---|--------|----------------------------|
| A. | President's Report [Mr. Kranovich]                    | Inform | Exhibit                    |
| B. | President-elect's Report [Mr. Spier]                  | Inform | Exhibit                    |
|    | 1) Retreat Planning                                   |        |                            |
| C. | Executive Director's Report [Ms. Stevens]             | Inform | Exhibit                    |
| D. | Director of Regulatory Services [Ms. Evans]           | Inform |                            |
| E. | Director of Diversity & Inclusion Report [Ms. Hyland] | Inform | <a href="#">Video Link</a> |
| F. | MBA Liaison Report [Mr. Ehlers]                       | Inform |                            |
| G. | Oregon New Lawyers Division Report [Mr. Eder]         | Inform | Exhibit                    |

**3. Professional Liability Fund [Mr. Zarov]**

- |    |                                    |        |         |
|----|------------------------------------|--------|---------|
| A. | Financial Reports                  | Inform | Exhibit |
| B. | Hiring Process                     | Inform |         |
| C. | Review of Reinsurance Underwriting | Inform |         |
| D. | New Hires                          | Inform | Exhibit |

**4. OSB Committees, Sections and Councils**

- |    |   |        |         |
|----|---|--------|---------|
| A. | Public Service Advisory Committee [Ms. Pulju]                                       |        |         |
|    | 1) Expansion of Modest Means Program  | Action | Exhibit |
| B. | Military & Veterans Section [Mr. Spier]   |        |         |
|    | 1) Recommendations to Department of Defense<br>re: Uniform Code of Military Justice | Action | Exhibit |

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

- |    |  |        |         |
|----|--|--------|---------|
| A. | Board Development Committee [Ms. Mitchel-Markley]                    |        |         |
|    | 1) Committee Update  | Inform | Handout |
|    | 2) LPRC Appointments   | Action | Handout |
|    | 3) HOD Appointments  | Action | Handout |
| B. | Budget and Finance Committee [Mr. Emerick]                           |        |         |
|    | 1) Audit Report – OSB Financial Statements (2yr period end 12/31/13) | Inform | Exhibit |

- C. Public Affairs Committee [Mr. Prestwich]
  - 1) Adopt Performance Standards of Representation Reports
    - a) Criminal and Juvenile Delinquency Cases Action Exhibit
    - b) Juvenile Dependency Cases Action Exhibit
  - 2) Adopt Workgroup Reports for Submission to Senate Judiciary
    - a) SB 798 (Alternate Jurors in Criminal Cases) Action Exhibit
    - b) SB 799 (Motions for Change of Attorney) Action Exhibit
    - c) SB 812 (Motions for Change of Judge) Action Exhibit
  - 3) Reaffirm BOG Priorities and Support for Access to Justice Action Exhibit

- D. RPC 8.4 Drafting Committee [Ms. Hirschbiel]
  - 1) Final Report and Recommendations Action Exhibit

- E. Executive Director Evaluation Special Committee [Mr. Kehoe]
  - 1) Process for Selecting New Executive Director Action Exhibit

**6. Other Items**

- A. Appointments to Various Bar Committees and Boards [Ms. Edwards] Action Exhibit
- B. Request for Input on RFA 13.20(1)(b) (Student Appearance Rule) Action Exhibit
- C. Recognition of Lincoln High School’s Constitution Team [Mr. Kranovich] Action Exhibit
- D. ABA YLD Sponsorship Option [Mr. Schpak] Action Exhibit

**7. Consent Agenda**

- A. Approve Minutes of Prior BOG Meetings
  - 1) Regular Session – April 25, 2014 Action Exhibit
  - 2) Special Open & Closed Sessions – May 23, 2014 Action Exhibit
- B. Amend OSB Bylaw Section 24.6 – SLAC Records Retention Action Exhibit
- C. Amend OSB Bylaw Section 8.101(b) – Public Records Fee Schedule Action Exhibit
- D. Consider Revised Formal Ethics Opinions [Ms. Hirschbiel] Action Exhibit

**8. Default Agenda**

- A. CSF Claims Financial Report Exhibit
- B. Claims Approved by CSF Committee Exhibit
- C. ABA House of Delegates 2014 Annual Meeting Agenda Sneak Preview Exhibit
- D. Bogdanski/Goldstein Letter re: Uniform Bar Exam Exhibit
- E. OSB Support for Funding of Oregon’s Public Defense System Exhibit

**9. Closed Sessions – CLOSED Agenda**

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

**10. Good of the Order (Non-Action Comments, Information and Notice of Need for Possible Future Board Action)**

- A. Correspondence
- B. Articles of Interest

To be posted.

## **REPORT OF PRESIDENT-ELECT**

**Richard G. Spier**

**June 27, 2014**

May 1, 2014	Hispanic Metropolitan Chamber of Commerce Scholarship Award Luncheon, Oregon Convention Center
May 1, 2014	Equal Justice Conference Reception, Portland Art Museum
May 2, 2014	Speaker, Oregon State Bar Admissions Ceremony, Salem
May 5-6, 2014	Northwest Bars Group, Seattle
May 7, 2014	Discussion of large firm membership on BOG, Stoel Rives, Portland
May 23, 2014	BOG Committees and Alumni Dinner
May 30, 2014	Explore the Law, PSU, Portland
May 30, 2014	MBA Dinner, Portland
June 5, 2014	MBA Reception for Specialty Bar Associations, Perkins Coie, Portland
June 11, 2014	Meeting with Chief Justice, Salem
June 12, 2014	Interview by ABA disciplinary procedure review
June 14, 2014	Oregon Asian Pacific American Bar Association Dinner, Portland
June 19-20	PLF Board Meeting, Steamboat
June 26-28	BOG Committees and BOG Meeting, Pendleton

(Report submitted June 9, 2014; engagements thereafter are scheduled)

# OREGON STATE BAR

## Board of Governors Agenda

Meeting Date: June 27, 2014  
 From: Sylvia E. Stevens, Executive Director  
 Re: Operations and Activities Report

### OSB Programs and Operations

Department	Developments
<ul style="list-style-type: none"> <li>▪ <b>Accounting &amp; Finance/ Facilities/IT (Rod Wegener)</b></li> </ul>	<p><i>Accounting/Finance:</i></p> <ul style="list-style-type: none"> <li>▪ The work on the audit report for 2012 and 2013 will finally wrap up the week of June 16. The auditor’s report will be emailed to the Board of Governors on completion. The report took longer than usual due in part to the new bar Controller and a new field auditor participating in the audit for the first time and the seemingly growing amount of detail needed in the report.</li> <li>▪ Spencer Glantz joined the Accounting Department as the new Accounting Specialist –Accounts Payable replacing Marina Cheatham who entered graduate school.</li> <li>▪ Five bar staff participated in three demonstrations by payroll service providers with the intent for the bar to select a new web-based product. The new product will be more efficient, save time, and eliminate some redundancies. The existing product is old technology and will not be serviceable after the end of 2014.</li> </ul> <p><i>Information Technology:</i></p> <ul style="list-style-type: none"> <li>▪ Joanne Rang, the IT consultant from ITAG of Alexandria, VA, will be at the bar on June 17 and 18 to work with IT and other key bar managers to continue to define the RFP for the association management system.</li> </ul> <p><i>Facilities:</i></p> <ul style="list-style-type: none"> <li>▪ An extension of the lease with Zip Realty begins July 16, 2014. Zip was the second non-bar related tenant in the bar center. The extended lease expires September 20, 2017 with an option for another three years. The rent rate shows the difference in commercial economic conditions between early 2008 and now. In 2008 the rate began at \$22.75 and after 3% annual increases the last rate was \$25.61. The new rate is \$21.75 per s.f. Zip has been an excellent tenant.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Communications &amp; Public Services (includes RIS and Creative Services) (Kay Pulju)</b></li> </ul>	<p><i>Communications</i></p> <ul style="list-style-type: none"> <li>▪ Nominations for the 2014 OSB award presentations are due on Tuesday, July 15, in preparation for the board’s selection process.</li> <li>▪ The cover story for the May <i>Bulletin</i> celebrated the 100-year anniversary of the Oregon Supreme Court building, and the May cover featured legal aspects of possible marijuana legalization in Oregon.</li> <li>▪ Staff are tracking the results of broadcast emails sent by the OSB, including the Bar News and BOG Updates as well as marketing communications from various bar programs. Along with web analytics and other market research</li> </ul>

	<p>these efforts will help us better coordinate member communications.</p> <ul style="list-style-type: none"> <li>▪ Public education efforts include ongoing updating of the website’s public information pages as well as video production. A new program is “All Rise! Take Your Case to Small Claims Court.”</li> </ul> <p><i>Referral &amp; Information Service</i></p> <ul style="list-style-type: none"> <li>▪ RIS staff met with members of the , Workers’ Compensation, Disability and Military &amp; Veterans Sections to get input on expansion of the Modest Means Program (MMP) into these areas of law. Draft procedures were presented to and approved by the Public Service Advisory Committee (PSAC) on June 7. The procedures will be presented to the BOG for approval on June 27. If approved, the new panels will begin a one year trial period in September.</li> <li>▪ RIS expects to implement online payment of remittance fees by late summer, eliminating the need for panelists to print and mail invoiced payments.</li> <li>▪ Lawyer Referral Service (LRS) continues to exceed projected revenue, taking in \$54,892 in April. YTD revenues through April total \$167,812.</li> <li>▪ Ongoing staff recruitment and training continues in RIS. There are currently four open LRS Assistant positions due to several employees making lateral moves within the Bar. New RIS Manager Eric McClendon has been in place for two months.</li> </ul> <p><i>Creative Services</i></p> <ul style="list-style-type: none"> <li>▪ Building the foundation for a single sign on (SSO) to the bar’s website—one new password will provide access to all online bar services.</li> <li>▪ Refining a marketing campaign for CLE seminars. The new CLE seminar home page laid the foundation in January for the campaign that will continue through 2014. In preparation for CLE Seminars’ prime fall season, staff is gathering metrics from current email campaigns to refine our targets, timing and messages; reinforcing the connection with the bar through rebranding of collateral materials; creating new advertising opportunities in related publications. The marketing campaign is a collaborative effort involving staff from Creative Services, Communications and Public Services, and CLE Seminars departments.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>CLE Seminars (Karen Lee)</b></li> </ul>	<ul style="list-style-type: none"> <li>▪ The Department is starting another Lunch &amp; Learn web-cast only series of seminars from June 24 to August 12 (every Tuesday at noon, except for bar exam week). The overall topic is fraud in the workplace, with sub topics ranging from “pink collar” crime to computer forensics and fraud risk management.</li> <li>▪ A 10% online CLE discount has been implemented for members who tried OSB webcasts and on demand seminars within the last eight months. Using certificates of completion for course verification. The same discount will be available to members who have not tried webcasts or on demand seminars but do so within the next four months. Using certificates of completion for course verification.</li> <li>▪ To meet the anticipated need of returning vets, the department is cosponsoring another veterans and military law seminar with the section on August 7 and 8. The focus will be issue-spotting to provide lawyers in their</li> </ul>

	<p>intermediate years of practice a better understanding of the law and legal matters affecting veterans.</p>
<p>▪ <b>Diversity &amp; Inclusion (Mariann Hyland)</b></p>	<p><i>Clerkship Stipend Program</i></p> <ul style="list-style-type: none"> <li>▪ reopened application period due to unused awards</li> <li>▪ awarded additional 7 stipends, but 1 declined by student who also had (and used) a Public Honors Fellowship</li> </ul> <p><i>Scholarship Program</i></p> <ul style="list-style-type: none"> <li>▪ 20 applicants; awarded all 8 scholarships for 2014-15 academic year</li> </ul> <p><i>Bar Exam Grants</i></p> <ul style="list-style-type: none"> <li>▪ 23 applicants; awarded all 6 OSB grants for July exam cycle</li> <li>▪ OMLA awarded additional 11 grants to our unsuccessful candidates</li> <li>▪ committee is still working on a recommendation regarding whether and how to streamline the writing requirement for applicants</li> </ul> <p><i>OLIO</i></p> <ul style="list-style-type: none"> <li>▪ program is finished, now just finalizing a few speakers as we await confirmations</li> <li>▪ working on CLE seminar offering(s) – Using translators (confirmed) and RPC 8.4 amendment update</li> <li>▪ deadline for 1L registration is June 16, but we will likely extend the deadline as it closely coincides with the deadline for students to accept their offers of admission at the law schools</li> <li>▪ created short video clips of upper division students for schools to use when marketing to the incoming 1Ls</li> <li>▪ going to invite several OLIO alumni to assist with the creation of an OLIO Alumni Network; kick off meeting during August orientation</li> <li>▪ raised \$32,600 toward \$55,00 of the 2014-15 fundraising goal</li> </ul> <p><i>Explore the Law</i></p> <ul style="list-style-type: none"> <li>▪ 2013-14 programming year just ended; completion ceremony on 5/30 where BOG President-Elect Rich Spier gave welcoming remarks</li> <li>▪ Hon. John Acosta and student Kristina Narayan (who is attending OLIO 2014) also presented</li> <li>▪ application period for 2014-15 program year ended on May 31; there were 26 applicants and 22 will be accepted for next year</li> </ul> <p><i>Other</i></p> <ul style="list-style-type: none"> <li>▪ meeting with law schools about the possibility of a collaborative program that offers LSAT prep courses to undergraduates</li> <li>▪ meeting with stakeholders to review content of Story Wall; unveiling date scheduled for November 7, 2014 after the HOD meeting</li> <li>▪ Spring newsletter went out on May 9; unveiled Diversity Action Plan and spotlighted Miller Nash for naming 7 women as new partners</li> </ul>
<p>▪ <b>General Counsel (includes CAO and MCLE) (Helen Hirschbiel)</b></p>	<p><i>General Counsel’s Office</i></p> <ul style="list-style-type: none"> <li>▪ The May 2014 Bar Bulletin Bar Counsel Column discusses the proposed recommendations of the International Trade in Legal Services Task Force. You can find it here: <a href="http://www.osbar.org/publications/bulletin/14may/barcounsel.html">http://www.osbar.org/publications/bulletin/14may/barcounsel.html</a>.</li> <li>▪ General Counsel and Deputy General Counsel attended the ABA Center for Professional Responsibility Annual Conference at the end of May. In</li> </ul>

	<p>addition to learning about recent developments in the regulation of legal profession across the United States and around the world, we made several contacts that will be helpful in our future work for the bar, including Professor Laurel Terry, the author of one of the articles cited in the above bar counsel column who offered her assistance in the work of the OSB ITLS Task Force, and Thomas Spahn, a speaker on the topic of Teaching Lawyer Ethics who generously shared his ethics CLE materials for our use in teaching lawyer ethics here in Oregon.</p> <p><i>Client Assistance Office</i></p> <ul style="list-style-type: none"> <li>▪ Troy Wood presented at Ethics School. Scott Morrill is working with planners for next session.</li> <li>▪ Staff is working with the Accessibility Review Team to develop a policy that is compliant with our ADA requirements.</li> <li>▪ Staff met with Member Services Team to improve understanding of their respective functions and roles.</li> </ul> <p><i>MCLE</i></p> <ul style="list-style-type: none"> <li>▪ The Court recently amended MCLE Rules 3.2, 3.3, 3.5, and 5.5 to include the elder abuse reporting credit requirement (amendments effective January 1, 2015) and Rule 5.2(d) to allow credit for service on the Oregon Judicial Conference Judicial Conduct Committee (amendment effective June 1, 2014).</li> <li>▪ So far in 2014, we have processed 3,604 accreditation applications, including 558 requests for other types of CLE activities.</li> <li>▪ On June 5, the Supreme Court suspended seventeen members for failure to comply with the MCLE Rules.</li> <li>▪ The MCLE Committee met at the OSB Center on Thursday, June 12. Agenda items included a request for CLE credit for Classroom Law Project volunteer attorneys and a request from Oregon Women Lawyers regarding partial waivers of sponsor fees.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Human Resources (Christine Kennedy)</b></li> </ul>	<ul style="list-style-type: none"> <li>▪ Hired a replacement Discipline Legal Secretary.</li> <li>▪ Replaced the CLE Customer Service Specialist and a Receptionist with current employees.</li> <li>▪ Recruiting for replacements for a Design and Production Artist and for Referral and Information Services Assistants to include bilingual candidates.</li> <li>▪ Recruiting for a new position – Discipline Paralegal/Trial Assistant.</li> <li>▪ Renewed the Employment Practices Liability/Directors and Officers insurance policy for a \$613 annual premium increase (7.63%). This reflects industry-wide premium increases due to more claims being filled as a result of the economic difficulties during the past few years.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Legal Publications (Linda Kruschke)</b></li> </ul>	<ul style="list-style-type: none"> <li>▪ The following have been posted to BarBooks™ since my last report:             <ul style="list-style-type: none"> <li>○ One revised <i>Uniform Criminal Jury Instruction</i>.</li> <li>○ Thirty-three reviewed or revised <i>Uniform Civil Jury Instructions</i>.</li> <li>○ Three chapters of the <i>Oregon Real Estate Deskbook</i>.</li> <li>○ The final PDF of <i>Appeal and Review: Beyond the Basics</i>.</li> </ul> </li> </ul>

	<ul style="list-style-type: none"><li>○ Two chapters of <i>Health Law in Oregon</i>.</li><li>○ Three UPL Opinions.</li><li>○ Two revised <i>Fee Agreement Compendium</i> forms.</li><li>▪ Print book revenue year-to-date is \$129,187 (compared to \$233,277 budget for the year).<ul style="list-style-type: none"><li>○ Backlist sales account for \$23,842 of that revenue, which is an average of \$4,500 per month.</li></ul></li><li>▪ <i>Appeal and Review: Beyond the Basics</i> went to the printer in May and has brought in \$7,968 in revenue. This is only half of what was budgeted, but the expenses were significantly lower because the book was much smaller than anticipated.</li><li>▪ <i>Oregon Formal Ethics Opinions</i> supplement is scheduled to go to the printer in early July. We have preorders with revenue of \$4,865 to date, with a revenue budget of \$4,400.</li><li>▪ OSB Legal Pubs has received the ACLEA’s Best Award of Outstanding Achievement in Publications for <i>Oregon Constitutional Law</i>, published in 2013. The award will be accepted by Lorraine Jacobs at the ACLEA Annual Meeting in Boston in August and displayed in the OSB Center lobby.</li><li>▪ We launched our <i>Family Law</i> series eBooks on Amazon.com and have already had two sales. We are now working on <i>Consumer Law</i> titles to launch this summer.</li><li>▪ Our new blog at <a href="http://legalpubs.osbar.org">http://legalpubs.osbar.org</a> has had 4,913 visitors to date. We have had 76 visitors who have found the blog through Google searches and several others from other search engines.</li></ul>
<ul style="list-style-type: none"><li>▪ <b>Legal Services Program (Judith Baker) (includes LRAP, Pro Bono and an OLF report)</b></li></ul>	<ul style="list-style-type: none"><li>▪ The LSP Committee completed an update to its web page to make the information easier to understand. (The updates to the Standards and Guidelines are in draft form.) Visit the update page at <a href="http://www.osbar.org/lsp">http://www.osbar.org/lsp</a>.</li><li>▪ LSP staff met with legal aid to discuss ways to improve the oversight function of the OSB Legal Services Program.</li><li>▪ LSP staff and representatives from legal aid attended part of the Public Affairs Dept. retreat to discuss legal aid funding issues.</li></ul> <p><i>Loan Repayment Assistance Program</i></p> <ul style="list-style-type: none"><li>▪ 25 public service attorneys applied for forgivable loans, and 12 new participants were selected at the May 10 meeting of the Advisory Committee.</li></ul> <p><i>Pro Bono</i></p> <ul style="list-style-type: none"><li>▪ On June 12 the Pro Bono Committee hosted representatives from eleven Certified Pro Bono Programs at a Pro Bono Summit designed to support and encourage the organizations as they develop social media plans. The Pro Bono Coordinator will continue to work with the providers as they move forward with social media plans.</li><li>▪ The Pro Bono Committee has done a soft launch of a pro bono email service to connect law students with lawyers seeking assistance on pro</li></ul>

	<p>bono matters. A more visible launch will take place in October.</p> <p><i>Oregon Law Foundation</i></p> <ul style="list-style-type: none"> <li>▪ The OLF continues to work with banks to achieve the maximum return on IOLTA accounts as possible. Umpqua Bank has agreed to pay an increased rate on all the Sterling IOLTA deposits it has acquired. We are cautiously optimistic that Columbia Bank will join the ranks of leadership banks that pay a higher, more supportive interest rate.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Media Relations (Kateri Walsh)</b></li> </ul>	<ul style="list-style-type: none"> <li>▪ Participated in a strategy session with OLC, CEJ, OLF and the Public Affairs staff about messaging and media relations in current and future legal services funding initiatives.</li> <li>▪ Presented a Media Relations program for criminal defense lawyers at the OCDLA conference June 20 in Bend.</li> <li>▪ Served as faculty for the New Judge Orientation during the week of June 16, with presentation on managing a high-profile case.</li> <li>▪ Drafting a media strategy to inform the public about the problem of notarios, particularly in Spanish language media.</li> <li>▪ Commenced planning for next year’s annual Building a Culture of Dialogue event with the Oregon Bar Press Broadcasters Council. (Pat Ehlers attended this year’s event – the first time we’ve had a BOG member participate).</li> <li>▪ Published the OSB Judicial Voters Guide for the May primary. Beginning prep for the JVG for the fall General Election.</li> <li>▪ Managing ongoing media management of 8 to 10 current disciplinary matters.</li> <li>▪ Kateri on Sabbatical July 11-Oct 2. Prepping various staff members to provide coverage.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Member Services (Dani Edwards)</b></li> </ul>	<ul style="list-style-type: none"> <li>▪ The ABA Young Lawyer House of Delegates election closed on May 12. Andrew Schpak will serve as the new young lawyer delegate beginning in August of this year.</li> <li>▪ The preference poll for the 7<sup>th</sup> Judicial District position ended in May. The race included five candidates and resulted in a 57% voter response. Karen Ostrye received the highest number votes. The Governor has not yet made an appointment.</li> <li>▪ Summer marks recruitment season for the Member Services Department. Staff continue to work with the Board Development Committee in the recruitment of lawyer and non-member volunteers interested in serving on bar boards, committees, and councils.</li> <li>▪ The deadline for BOG election candidates passed. Region 4, 5, 6, and 7 each have one seat open this year and all of the races are contested. The full candidate list is available online at <a href="http://www.osbar.org/leadership/bog">http://www.osbar.org/leadership/bog</a>.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>New Lawyer Mentoring (Kateri Walsh)</b></li> </ul>	<ul style="list-style-type: none"> <li>▪ Processing new members from May swearing-in: getting participants informed, enrolled and prepared for the NLMP, and beginning matching process.</li> <li>▪ Continuing a rollout of a targeted mentor recruitment plan, broken down by region and by practice area.</li> <li>▪ Planning for a mentoring component to several programs in development</li> </ul>

	<p>by the Oregon Bench Bar Commission on Professionalism, largely focusing on law schools.</p> <ul style="list-style-type: none"> <li>▪ Hosted a CLE and Social Event for mentor/new lawyer pairs at the OSB May 15. Approximately 60 participants, including Chief Justice Balmer and Justice Laundau from the Supreme Court.</li> <li>▪ Attended the conference of the National Legal Mentoring Consortium in Ohio in May. Kateri had also recruited Paul De Muniz to be a featured speaker at the conference, to share Oregon’s experience with a national audience.</li> <li>▪ In early stages of building a social media presence for the NLMP.</li> <li>▪ Developing a Mentoring through Pro Bono track for NLMP participants.</li> <li>▪ Kateri on Sabbatical July 11-Oct 2. Prepping various staff members to provide coverage.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Public Affairs (Susan Grabe)</b></li> </ul>	<ul style="list-style-type: none"> <li>▪ <i>Summary.</i> With the 2014 Legislative Session over, the Public Affairs Department has focused on looking ahead to the 2015 Legislative Session.</li> <li>▪ <i>2015 Law Improvement Package.</i> On behalf of the Board of Governors, the Public Affairs Committee forwarded its package of 22 Law Improvement proposals to Legislative Counsel’s office for pre-session filing and drafting for the 2015 Legislative Session. Outreach to both internal and external interest groups will take place over the next few months.</li> <li>▪ <i>2014 Oregon Legislation Highlights Publication.</i> The Public Affairs staff has prepared the 2014 Session edition of the Legislation Highlights Notebook which summarizes the highlights of the short session. The publications has been posted to Barbooks and is available to bar members.</li> <li>▪ <i>Liaison activities.</i> The PAD continues to monitor and liaison with external stakeholder groups such as the Council on Court Procedures, the various Oregon Law Commission workgroups including judicial selection and Probate Modernization, as well as the OSB/OJD eCourt Task Force. Public Affairs has been actively working with OJD to educate bar members about Oregon eCourt implementation and how it will affect their practice.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Regulatory Services (Dawn Evans)</b></li> </ul>	<p><i>Admissions</i></p> <ul style="list-style-type: none"> <li>▪ 503 applicants are registered for the July 29-30, 2014 bar exam. This compares with 507 takers in July of 2013 and 483 in July of 2012.</li> <li>▪ 140 applicants passed the February 2014 bar exam, representing a 66% pass rate. Included in that calculation was an 80% pass rate for first-time takers. Over the past 10 years, the average pass rate for the February exam has been 66%.</li> <li>▪ Staff attended the June 20 meeting of the Oregon Council on Legal Education and Admission to the Bar (OCLEAB). The group, which is comprised of representative of the Supreme Court, the dean of each Oregon law school and a member of the faculty selected by each dean, and the members of the Board of Bar Examiners, meets annually to discuss items of mutual interest.</li> <li>▪ The National Conference of Bar Examiners annual conference was held in Seattle on May 1-4, including sessions about ADA issues in both bar applications and bar examinations and a primer about the recently issued DSM V, among other topics. Those in attendance from Oregon included</li> </ul>

	<p>Justice Rives Kistler, Board of Bar Examiners members Randall Green and David White, Disciplinary Counsel Dawn Evans, Admissions Director Charles Schulz, and Admissions Coordinator Vickie Hansen.</p> <p><i>Disciplinary Counsel’s Office</i></p> <ul style="list-style-type: none"> <li>▪ A meeting with DCO lawyers and several disciplinary defense counsel was held on April 30, 2014 at the Bar Center, in order for the defense counsel to meet Dawn Evans, new Director of Regulatory Services and Disciplinary Counsel. Another meeting was held to facilitate connections with defense counsel who could not attend the April 30<sup>th</sup> meeting on June 19, 2014, in Eugene.</li> <li>▪ Dawn Evans met with the PLF staff attorneys on May 13, 2014, to introduce herself and learn more about how DCO and PLF could forge working relationships, cognizant of the confidentiality of information acquired by PLF. A future meeting with PLF attorneys and DCO attorneys is being planned. Ms. Evans had a similar meeting with the head of the OAAP and arranged a joint meeting with OAAP staff and DCO attorneys, scheduled for July 8, 2014.</li> <li>▪ Dawn Evans and Amber Bevacqua-Lynott met with Rod Underhill and his senior managers at the Multnomah District Attorney’s office on May 27, 2014, to share information about DCO procedures.</li> <li>▪ Ms. Evans and Ms. Bevacqua-Lynott met with Lisa Norris-Lampe, the attorney coordinator with the Oregon Supreme Court, on June 15, 2014, to answer questions and gain information about each other’s processes and procedures.</li> <li>▪ Ms. Evans and Ms. Bevacqua-Lynott are scheduling meetings with several of local bar associations throughout the summer, to provide education about the disciplinary process and build relationships between members and DCO.</li> <li>▪ As of May 31, DCO has received 162 complaints in this calendar year, compared with 153 in 2013 and 165 in 2012 during the same period. Complaints include matters referred by the Client Assistance Office, matters resulting from trust account overdraft notification notices, and matters initiated by the DCO.</li> <li>▪ Emily Schwartz began employment as a legal secretary with the DCO on June 9, 2014</li> <li>▪ The ABA Discipline System Evaluation took place June 10-13, 2014, during which time the ABA team met with various stakeholders in the discipline system, including defense counsel, complainants, volunteers who work in the system as members of the SPRB or Disciplinary Board, as well as DCO staff, Executive Director Sylvia Stevens, representatives from Bar leadership, and members of the Supreme Court.</li> </ul>
--	---

**Executive Director’s Activities November 25, 2013 – February 21, 2014**

Date	Event
5/1	Equal Justice Conference Reception
5/2	Lunch with Supreme Court and Swearing-In Ceremony
5/5-6	NW Bars Conference (Seattle)

5/10	Client Security Fund Committee (The Dalles)
5/13	Meeting with Columbia Bank
5/21	ED’s Breakfast Meeting
5/21	Lunch @ Miller Nash
5/22	Partners in Diversity “Say Hey” Event
5/23	BOG Committees & BOG Alumni Dinner
5/28-/31	ABA Conf. on Prof. Responsibility & Nat’l. Client Protection Forum
6/3	Lunch @ Jordan Ramis
6/10	Dinner with ABA Evaluation Team
6/11	Meeting with Chief Justice
6/20	PLF Board Meeting
6/24-26	Central/Eastern Oregon Local Bars Tour
6/26-27	BOG Meeting (Pendleton)

## Notes from Meeting with Chief Justice Balmer

June 11, 2014

Supreme Court Conference Room

Present: Chief Justice Balmer, Tom Kranovich, Richard Spier, Sylvia Stevens, Helen Hirschbiel, Kingsley Click, Lisa Norris-Lampe, Phil Lemman.

1. The Chief Justice reported that the roll-out of eCourt in Multnomah County is going very well. Ten million case registries were converted from OJIN to Odyssey. Electronic filing for lawyers will begin July 7 and will likely be mandatory by the end of 2014. Document access is available in several counties; a comprehensive notice about who is entitled to view which documents is forthcoming. The CJ wants to publicize the successful implementation of a state technology project; Mr. Kranovich suggested that Kateri Walsh can work with the eCourt Committee to develop a human interest story and possibly an editorial.
2. The CJ discussed the availability of funds for courthouse improvements, as well as a protocol for determining the priority of projects.
3. The CJ reported that the Court made a “coastal tour” in May, visiting with local bars and conducting hearings at local high schools. All members of the Court found it to be a valuable opportunity.
4. The CJ expressed thanks for everyone’s work on the Operating Principles between the OSB and the BBX. He will meet with the BBX in the next week or so to discuss his support for a statutory amendment that will clarify the responsibility of the OSB for the admission function.
5. Mr. Kranovich reported on the BOG’s meeting with the law school deans. The CJ mentioned the upcoming meeting of the Oregon Council on Legal Education and Admission to the Bar and recommended that the BOG have a representative at the meeting. Mr. Kranovich indicated he would attend.
6. Ms. Hirschbiel reported on the new RPC 8.4 proposal that will be reviewed by the BOG on June 27 with a view to putting it on the HOD agenda for November 7. The new draft was approved unanimously by the work group.
7. Ms. Stevens reported that the ABA Evaluation Team was on site and confirmed its interview with the Court on Friday, June 13. She explained the BOG’s plan to convene a “stakeholders” committee to review the team’s report and make recommendations to the BOG. The CJ indicated his support for the review and his hope that the process will continue moving forward as expeditiously as possible.
8. Ms. Stevens discussed the challenges associated with aging lawyers and the possibility of amending the custodianship statute to facilitate the bar’s assistance when lawyers become disabled or die without adequate arrangements for winding down their practices.

9. Ms. Grabe provided a legislative update, including a review of the interim committees formed at the request of the Judiciary Committee to review bills relating to alternate jurors in criminal cases, recusal of judges in rural counties, and motions to withdraw from representation. The CJ recognizes that affidaviting judges has a long history and that change would be difficult; at the same time, consideration must be given to the difficulties such affidavits cause in small counties where conflict issues also result in disqualification.
10. Ms. Grabe reported briefly on the recent meeting of the Citizens' Coalition for Court Funding. The business community's involvement has been very effective with the legislature and the group is focusing on increasing its geographic diversity. A meeting with legislators is planned for September 17.

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** June 27, 2014  
**Memo Date:** June 13, 2014  
**From:** Dawn M. Evans, Disciplinary Counsel  
**Re:** Disciplinary/Regulatory Counsel's Status Report

---

### 1. Decisions Received.

#### a. Supreme Court

Since the Board of Governors last met in April 2014, the Supreme Court took the following action in disciplinary matters:

- Issued an order in *In re Marc T. Andersen*, accepting this Bend lawyer's stipulation to a 6-month plus 1-day suspension;
- Issued an order in *In re Kevin J. Kinney*, accepting this Newberg lawyer's stipulation to a 1-year suspension, all but 60 days stayed, pending a 1-year probation;
- Issued an order in *In re Theodore M. Roe*, accepting this Portland lawyer's stipulation to a 2-year suspension, all but 6 months stayed, pending a 2-year probation;
- Issued an order in *In re Mitchell R. Barker*, accepting this Boise, Idaho, lawyer's stipulation to a 1-year suspension;
- Issued an order in *In re Peter M. Schannauer*, dismissing as moot this matter following an earlier trial panel opinion disbaring this Bend lawyer;
- Accepted the Form B resignation from Forest Grove lawyer *Robert A. Browning*; and
- Approved the SPRB recommendation that this Manhattan Beach, California, lawyer *Julie A. Sione* be reprimanded following her public reproof with 1-year probation in California for intentional failure to render competent legal services by deciding not to appear for trial, failure to cooperate and participate in a disciplinary investigation, and failure to timely comply with conditions set forth in a signed stipulation.

#### b. Disciplinary Board

No appeals were filed in the following cases and those trial panel opinions are now final:

- *In re Peter M. Schannauer* of Bend (disbarment with restitution) became final on May 13, 2014; and
- *In re Justin E. Throne* of Klamath Falls (1-year suspension, all stayed, 2-year probation) became final on May 28, 2014.

Disciplinary Board trial panels have not issued any opinions since April 2014.

In addition to these trial panel opinions, the Disciplinary Board approved stipulations for discipline in: *In re Francisco C. Segarra* of Eugene (90-day suspension, all but 30 days stayed, probation); *In re John P. Eckrem* of Medford (90-day suspension, all but 30 days stayed, 2-year probation); *In re Paige Alina De Muniz* of Portland (30-day suspension); and *In re John P. Salisbury* of Clatskanie (60-day suspension, all stayed, 1-year probation – successful completion of 1-year probation will reduce the sanction to a reprimand).

The Disciplinary Board Chairperson approved the BR 7.1 suspension in *In re Theodore F. Sumner* of Beaverton.

## 2. Decisions Pending.

The following matters are pending before the Supreme Court:

- In re Michael Spencer* – 60-day suspension; accused appealed; under advisement
- In re Daniel J. Gatti* – 6-month suspension; accused appealed; under advisement
- In re Barnes H. Ellis and Lois O. Rosenbaum* – reprimand; accuseds and OSB appealed; under advisement
- In re Rick Sanai* – reciprocal discipline matter referred to Disciplinary Board for trial
- In re David Herman*—disbarment; accused appealed; oral argument September 16, 2014
- In re James C. Jagger*—90-day suspension; accused appealed; awaits briefs
- In re Karl W. Kime*—reciprocal discipline matter pending
- In re Karl W. Kime*—BR 3.4 petition pending
- In re Matthew R. Aylworth* -- reciprocal discipline matter referred to Disciplinary Board for trial
- In re Eric Einhorn* – 3-year suspension, 30 months stayed, probation; OSB appealed; settlement pending

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

*In re Eric Kaufman* – August 21, 2013 (sanction memo filed)  
*In re Jeff Wilson Richards* – October 7, 2013 (sanction memo filed)  
*In re Debbe J. vonBlumenstein* – February 27, 2014 (sanctions memo filed)  
*In re Jennifer L. Perez* – April 30, 2014 (sanctions memo filed)

**3. Trials.**

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

*In re Lynn M. Murphy* – July 9, 2014  
*In re Gary B. Bertoni* – August 15, 18-21, 2014

**4. Diversions.**

The SPRB approved the following diversion agreement since February 2014:

*In re Tami S. P. Beach* – effective May 17, 2014  
*In re Craig Wymetalek* – effective May 30, 2014  
*In re Rebecca Dougan* – effective June 1, 2014

**5. Admonitions.**

The SPRB issued 8 letters of admonition in April and May. The outcome in this matter is as follows:

- 8 lawyers have accepted their admonitions;
- 0 lawyers have rejected their admonitions;
- 0 lawyer has asked for reconsideration;
- 0 lawyers have time in which to accept or reject their admonitions.

**6. New Matters.**

Below is a table of complaint numbers in 2014, compared to prior years, showing both complaints (first #) and the number of lawyers named in those complaints (second #):

<b>MONTH</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>
January	29/29	19/20	46/49	21/21	29/31
February	24/25	35/36	27/27	23/23	24/25
March	26/26	21/25	38/39	30/30	41/45
April	30/30	40/42	35/38	42/43	45/47
May	119/119*	143/146*	19/20	37/37	23/24
June	23/26	20/20	39/40	31/31	
July	29/34	27/28	22/22	28/30	
August	24/25	22/23	35/35	33/36	
September	33/36	29/29	22/22	26/27	
October	27/33	22/23	23/23	26/26	
November	21/21	27/27	18/18	25/26	
December	24/24	39/40	26/26	19/19	
<b>TOTALS</b>	<b>409/428</b>	<b>444/459</b>	<b>350/359</b>	<b>341/349</b>	<b>162/172</b>

\* = includes IOLTA compliance matters

As of June 1, 2014, there were 232 new matters awaiting disposition by Disciplinary Counsel staff or the SPRB. Of these matters, 38% are less than three months old, 18% are three to six months old, and 45% are more than six months old. Thirteen of these matters are on the SPRB agenda in June.

**7. Reinstatements.**

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

DME/rh

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** June 27, 2014  
**Memo Date:** June 13, 2014  
**From:** Ben Eder, Oregon New Lawyers Division Chair  
**Re:** ONLD Report

---

Since the last BOG meeting the ONLD Executive Committee met twice to conduct business. Below is a list of updates on the ONLD's work since April.

- In conjunction with our April Executive Committee meeting in Salem we held an access to justice CLE program focusing on human trafficking in Oregon. The event was followed by a social with local practitioners and law students.
- In June we traveled to Bend and presented a CLE seminar on Liability releases and waivers. The program was well received by local practitioners as was the social held afterward.
- We have continued with our brown bag lunch CLE programs in Portland with topics including access to justice, business litigation, cross examination, employment Law, and ethics.
- In late May we hosted a two-day CLE program at the OSB Center for members new to practicing family law. The program included information from the client interview through modifications and tips from the bench.
- The Law Related Education Subcommittee concluded the inaugural ONLD art contest for middle and junior high school students. Participants were challenged to submit a piece of work that focused on American Democracy and the Rule of Law: Why Every Vote Matters. The topic was mirrored the ABA's theme for Law Day this year. The winning piece will be displayed in Attorney General Ellen Rosenblum's office until the end of the year.
- The Member Services Subcommittee sponsored social events in Portland the last week of April and May.
- We continue to work on a resource webpage with resources for new lawyers and recent graduates regarding student debt information. The first phase of the project will make the online resource available and include information about assessing the situation and understanding your options. The second phase of the project will take it a step further and provide resources on financial planning. The OAAP, in union with the ONLD, has agreed to record a program focusing on these topics. The first phase is expected to launch in September.
- The ONLD's annual raft trip will take place on July 19. Members of the division and guests are invited to participate in the whitewater rafting event on the Deschutes River. This is a purely social event sponsored by the Member Services Subcommittee and draws nearly 50 members from across the state each year.

**Oregon State Bar  
Professional Liability Fund  
Financial Statements  
4/30/2014**

**TABLE OF CONTENTS**

<u>Page</u>	<u>Description</u>
2	Combined Statement of Net Position
3	Primary Program Statement of Revenues, Expenses and Changes in Net Position
4	Primary Program Operating Expenses
5	Excess Program Statement of Revenues, Expenses and Changes in Net Position
6	Excess Program Operating Expenses
7	Combined Investment Schedule

**Oregon State Bar  
Professional Liability Fund  
Combined Primary and Excess Programs  
Statement of Net Position  
4/30/2014**

**ASSETS**

	<b><u>THIS YEAR</u></b>	<b><u>LAST YEAR</u></b>
Cash	\$2,060,405.41	\$1,324,493.54
Investments at Fair Value	52,210,174.85	49,291,732.52
Assessment Installment Receivable	6,058,529.08	6,105,044.88
Due from Reinsurers	51,421.37	66,973.96
Other Current Assets	78,279.11	76,607.82
Net Fixed Assets	861,880.81	931,770.53
Claim Receivables	35,426.75	58,890.72
Other Long Term Assets	<u>9,825.00</u>	<u>9,825.00</u>
<b>TOTAL ASSETS</b>	<b><u>\$61,365,942.38</u></b>	<b><u>\$57,865,338.97</u></b>

**LIABILITIES AND FUND POSITION**

	<b><u>THIS YEAR</u></b>	<b><u>LAST YEAR</u></b>
<b>Liabilities:</b>		
Accounts Payable and Other Current Liabilities	\$150,991.40	\$89,996.85
Due to Reinsurers	\$966,220.95	\$941,779.88
Liability for Compensated Absences	370,817.99	445,620.51
Liability for Indemnity	11,341,313.23	13,693,964.59
Liability for Claim Expense	14,720,589.62	13,196,655.36
Liability for Future ERC Claims	2,400,000.00	2,700,000.00
Liability for Suspense Files	1,500,000.00	1,400,000.00
Liability for Future Claims Administration (AOE)	2,300,000.00	2,400,000.00
Excess Ceding Commission Allocated for Rest of Year	538,236.90	493,269.71
Assessment and Installment Service Charge Allocated for Rest of Year	<u>16,517,621.78</u>	<u>16,788,036.67</u>
<b>Total Liabilities</b>	<b><u>\$50,805,791.87</u></b>	<b><u>\$52,149,323.57</u></b>
<b>Change in Net Position:</b>		
Retained Earnings (Deficit) Beginning of the Year	\$9,270,287.61	\$4,047,255.11
Year to Date Net Income (Loss)	<u>1,289,862.90</u>	<u>1,668,760.29</u>
<b>Net Position</b>	<b><u>\$10,560,150.51</u></b>	<b><u>\$5,716,015.40</u></b>
<b>TOTAL LIABILITIES AND FUND POSITION</b>	<b><u>\$61,365,942.38</u></b>	<b><u>\$57,865,338.97</u></b>

**Oregon State Bar  
Professional Liability Fund  
Primary Program  
Statement of Revenues, Expenses, and Changes in Net Position  
4 Months Ended 4/30/2014**

	YEAR TO DATE <u>ACTUAL</u>	YEAR TO DATE <u>BUDGET</u>	<u>VARIANCE</u>	YEAR TO DATE <u>LAST YEAR</u>	<u>ANNUAL BUDGET</u>
<b><u>REVENUE</u></b>					
Assessments	\$8,148,014.56	\$8,374,333.32	\$226,318.76	\$8,264,342.33	\$25,123,000.00
Installment Service Charge	110,796.33	130,000.00	19,203.67	129,676.00	390,000.00
Other Income	30,100.00	0.00	(30,100.00)	20,801.00	0.00
Investment Return	<u>1,058,838.40</u>	<u>897,421.32</u>	<u>(161,417.08)</u>	<u>2,036,445.05</u>	<u>2,692,264.00</u>
<b>TOTAL REVENUE</b>	<b><u>\$9,347,749.29</u></b>	<b><u>\$9,401,754.64</u></b>	<b><u>\$54,005.35</u></b>	<b><u>\$10,451,264.38</u></b>	<b><u>\$28,205,264.00</u></b>
<b><u>EXPENSE</u></b>					
<b>Provision For Claims:</b>					
New Claims at Average Cost	\$5,964,000.00			\$6,680,000.00	
Coverage Opinions	25,767.21			51,063.24	
General Expense	7,922.08			73,477.33	
Less Recoveries & Contributions	(68.71)			(2,951.28)	
Budget for Claims Expense		<u>\$6,890,880.00</u>			<u>\$20,672,640.00</u>
<b>Total Provision For Claims</b>	<b><u>\$5,997,620.58</u></b>	<b><u>\$6,890,880.00</u></b>	<b><u>\$893,259.42</u></b>	<b><u>\$6,801,589.29</u></b>	<b><u>\$20,672,640.00</u></b>
<b>Expense from Operations:</b>					
Administrative Department	\$776,008.46	\$827,457.40	\$51,448.94	\$695,744.96	\$2,482,372.00
Accounting Department	207,872.66	212,553.96	4,681.30	261,578.68	637,662.00
Loss Prevention Department	569,620.18	693,674.68	124,054.50	592,701.81	2,081,023.00
Claims Department	860,264.82	888,155.88	27,891.06	841,634.34	2,664,467.00
Allocated to Excess Program	<u>(373,596.32)</u>	<u>(373,596.32)</u>	<u>0.00</u>	<u>(368,368.00)</u>	<u>(1,120,789.00)</u>
<b>Total Expense from Operations</b>	<b><u>\$2,040,169.80</u></b>	<b><u>\$2,248,245.60</u></b>	<b><u>\$208,075.80</u></b>	<b><u>\$2,023,291.79</u></b>	<b><u>\$6,744,735.00</u></b>
Contingency (4% of Operating Exp)	\$0.00	\$104,900.32	\$104,900.32	\$0.00	\$314,701.00
Depreciation and Amortization	\$54,238.08	\$56,600.00	\$2,361.92	\$56,763.80	\$169,800.00
Allocated Depreciation	<u>(8,122.00)</u>	<u>(8,122.00)</u>	<u>0.00</u>	<u>(10,018.68)</u>	<u>(24,366.00)</u>
<b>TOTAL EXPENSE</b>	<b><u>\$8,083,906.46</u></b>	<b><u>\$9,292,503.92</u></b>	<b><u>\$1,208,597.46</u></b>	<b><u>\$8,871,626.20</u></b>	<b><u>\$27,877,510.00</u></b>
<b>NET POSITION - INCOME (LOSS)</b>	<b><u>\$1,263,842.83</u></b>	<b><u>\$108,584.04</u></b>	<b><u>(\$1,155,258.79)</u></b>	<b><u>\$1,579,638.18</u></b>	<b><u>\$325,754.00</u></b>

**Oregon State Bar  
Professional Liability Fund  
Primary Program  
Statement of Operating Expense  
4 Months Ended 4/30/2014**

<u>EXPENSE:</u>	<u>CURRENT</u> <u>MONTH</u>	<u>YEAR</u> <u>TO DATE</u> <u>ACTUAL</u>	<u>YEAR</u> <u>TO DATE</u> <u>BUDGET</u>	<u>VARIANCE</u>	<u>YEAR</u> <u>TO DATE</u> <u>LAST YEAR</u>	<u>ANNUAL</u> <u>BUDGET</u>
Salaries	\$339,099.89	\$1,368,044.42	\$1,444,463.32	\$76,418.90	\$1,378,683.88	\$4,333,390.00
Benefits and Payroll Taxes	131,150.61	505,001.95	537,842.08	32,840.13	482,039.02	1,613,526.00
Investment Services	0.00	6,753.75	9,333.32	2,579.57	6,876.75	28,000.00
Legal Services	0.00	0.00	4,333.32	4,333.32	2,589.50	13,000.00
Financial Audit Services	13,000.00	13,000.00	7,933.32	(5,066.68)	15,000.00	23,800.00
Actuarial Services	0.00	11,340.00	7,333.32	(4,006.68)	6,448.75	22,000.00
Information Services	2,221.00	11,656.67	32,533.36	20,876.69	32,197.66	97,600.00
Document Scanning Services	0.00	0.00	21,666.68	21,666.68	1,229.61	65,000.00
Other Professional Services	12,572.57	31,884.62	23,410.00	(8,474.62)	18,105.20	70,230.00
Staff Travel	223.29	3,093.93	5,016.68	1,922.75	1,306.52	15,050.00
Board Travel	2,119.59	4,370.38	12,999.96	8,629.58	2,060.17	39,000.00
NABRICO	0.00	0.00	3,533.32	3,533.32	100.00	10,600.00
Training	3,029.50	9,927.36	7,333.32	(2,594.04)	10,495.04	22,000.00
Rent	42,777.25	170,160.74	176,959.68	6,798.94	167,646.08	530,879.00
Printing and Supplies	10,607.63	27,820.86	20,333.36	(7,487.50)	15,849.65	61,000.00
Postage and Delivery	1,894.00	8,029.14	11,583.36	3,554.22	13,485.11	34,750.00
Equipment Rent & Maintenance	736.86	14,666.38	13,500.00	(1,166.38)	16,618.41	40,500.00
Telephone	3,917.32	14,863.35	19,320.00	4,456.65	15,829.40	57,960.00
L P Programs (less Salary & Benefits)	31,492.73	101,583.12	148,265.00	46,681.88	99,412.07	444,794.00
Defense Panel Training	0.00	0.00	500.04	500.04	49.90	1,500.00
Bar Books Grant	16,666.67	66,666.68	66,666.68	0.00	66,666.68	200,000.00
Insurance	0.00	8,221.00	13,048.32	4,827.32	8,432.00	39,145.00
Library	2,948.55	7,834.52	11,000.00	3,165.48	10,107.18	33,000.00
Subscriptions, Memberships & Other	1,350.10	20,437.56	14,933.32	(5,504.24)	20,431.21	44,800.00
Allocated to Excess Program	<u>(93,399.08)</u>	<u>(373,596.32)</u>	<u>(373,596.32)</u>	<u>0.00</u>	<u>(368,368.00)</u>	<u>(1,120,789.00)</u>
<b>TOTAL EXPENSE</b>	<b><u>\$522,408.48</u></b>	<b><u>\$2,031,760.11</u></b>	<b><u>\$2,240,245.44</u></b>	<b><u>\$208,485.33</u></b>	<b><u>\$2,023,291.79</u></b>	<b><u>\$6,720,735.00</u></b>

**Oregon State Bar  
Professional Liability Fund  
Excess Program  
Statement of Revenue, Expenses, and Changes in Net Position  
4 Months Ended 4/30/2014**

	YEAR TO DATE <u>ACTUAL</u>	YEAR TO DATE <u>BUDGET</u>	<u>VARIANCE</u>	YEAR TO DATE <u>LAST YEAR</u>	<u>ANNUAL BUDGET</u>
<b><u>REVENUE</u></b>					
Ceding Commission	\$269,118.45	\$253,333.32	(\$15,785.13)	\$246,634.86	\$760,000.00
Prior Year Adj. (Net of Reins.)	3,446.70	500.00	(2,946.70)	3,371.55	1,500.00
Installment Service Charge	39,808.00	14,000.00	(25,808.00)	41,433.00	42,000.00
Investment Return	<u>135,357.42</u>	<u>67,547.68</u>	<u>(67,809.74)</u>	<u>209,282.61</u>	<u>202,643.00</u>
<b>TOTAL REVENUE</b>	<b><u>\$447,730.57</u></b>	<b><u>\$335,381.00</u></b>	<b><u>(\$112,349.57)</u></b>	<b><u>\$500,722.02</u></b>	<b><u>\$1,006,143.00</u></b>
<b><u>EXPENSE</u></b>					
Operating Expenses (See Page 6)	\$413,588.50	\$416,233.68	\$2,645.18	\$401,581.23	\$1,248,701.00
Allocated Depreciation	<u>\$8,122.00</u>	<u>\$8,122.00</u>	<u>\$0.00</u>	<u>\$10,018.68</u>	<u>\$24,366.00</u>
<b>NET POSITION - INCOME (LOSS)</b>	<b><u>\$26,020.07</u></b>	<b><u>(\$88,974.68)</u></b>	<b><u>(\$114,994.75)</u></b>	<b><u>\$89,122.11</u></b>	<b><u>(\$266,924.00)</u></b>

**Oregon State Bar  
Professional Liability Fund  
Excess Program  
Statement of Operating Expense  
4 Months Ended 4/30/2014**

	<u>CURRENT</u> <u>MONTH</u>	<u>YEAR</u> <u>TO DATE</u> <u>ACTUAL</u>	<u>YEAR</u> <u>TO DATE</u> <u>BUDGET</u>	<u>VARIANCE</u>	<u>YEAR</u> <u>TO DATE</u> <u>LAST YEAR</u>	<u>ANNUAL</u> <u>BUDGET</u>
<b><u>EXPENSE:</u></b>						
Salaries	\$58,191.10	\$232,764.40	\$232,764.32	(\$0.08)	\$223,217.92	\$698,293.00
Benefits and Payroll Taxes	21,551.82	86,209.56	85,667.36	(542.20)	83,589.68	257,002.00
Investment Services	0.00	746.25	833.32	87.07	623.25	2,500.00
Office Expense	0.00	0.00	0.00	0.00	0.00	0.00
Allocation of Primary Overhead	22,533.84	90,135.36	90,135.32	(0.04)	92,958.00	270,406.00
Reinsurance Placement & Travel	919.93	1,432.93	1,666.68	233.75	0.00	5,000.00
Training	0.00	0.00	166.68	166.68	0.00	500.00
Printing and Mailing	0.00	0.00	1,833.32	1,833.32	92.38	5,500.00
Program Promotion	500.00	2,300.00	2,500.00	200.00	1,100.00	7,500.00
Other Professional Services	0.00	0.00	666.68	666.68	0.00	2,000.00
Software Development	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>
<b>TOTAL EXPENSE</b>	<b><u>\$103,696.69</u></b>	<b><u>\$413,588.50</u></b>	<b><u>\$416,233.68</u></b>	<b><u>\$2,645.18</u></b>	<b><u>\$401,581.23</u></b>	<b><u>\$1,248,701.00</u></b>

**Oregon State Bar  
Professional Liability Fund  
Combined Investment Schedule  
4 Months Ended 4/30/2014**

	<u>CURRENT MONTH THIS YEAR</u>	<u>YEAR TO DATE THIS YEAR</u>	<u>CURRENT MONTH LAST YEAR</u>	<u>YEAR TO DATE LAST YEAR</u>
<b>Dividends and Interest:</b>				
Short Term Bond Fund	\$13,367.38	\$50,551.95	\$25,820.80	\$90,622.76
Intermediate Term Bond Funds	8,204.44	75,279.68	23,781.28	73,383.74
Domestic Common Stock Funds	4,226.00	118,321.97	0.00	38,480.25
International Equity Fund	0.00	0.00	0.00	0.00
Real Estate	0.00	38,384.18	0.00	9,468.82
Hedge Fund of Funds	0.00	0.00	0.00	0.00
Real Return Strategy	<u>0.00</u>	<u>97,934.18</u>	<u>0.00</u>	<u>38,894.23</u>
<b>Total Dividends and Interest</b>	<b><u>\$25,797.82</u></b>	<b><u>\$380,471.96</u></b>	<b><u>\$49,602.08</u></b>	<b><u>\$250,849.80</u></b>
<b>Gain (Loss) in Fair Value:</b>				
Short Term Bond Fund	\$19,262.41	\$44,056.43	\$33,985.92	\$23,727.79
Intermediate Term Bond Funds	41,930.03	154,584.37	73,840.27	73,916.27
Domestic Common Stock Funds	(18,893.99)	62,407.50	115,066.02	899,057.03
International Equity Fund	45,358.03	198,008.05	404,472.85	654,780.05
Real Estate	0.00	58,342.79	0.00	64,304.55
Hedge Fund of Funds	0.00	0.00	35,781.33	226,364.91
Real Return Strategy	<u>89,324.01</u>	<u>296,324.72</u>	<u>69,498.16</u>	<u>52,727.26</u>
<b>Total Gain (Loss) in Fair Value</b>	<b><u>\$176,980.49</u></b>	<b><u>\$813,723.86</u></b>	<b><u>\$732,644.55</u></b>	<b><u>\$1,994,877.86</u></b>
<b>TOTAL RETURN</b>	<b><u>\$202,778.31</u></b>	<b><u>\$1,194,195.82</u></b>	<b><u>\$782,246.63</u></b>	<b><u>\$2,245,727.66</u></b>
<b>Portions Allocated to Excess Program:</b>				
Dividends and Interest	\$1,929.68	\$37,523.84	\$4,518.75	\$25,872.67
Gain (Loss) in Fair Value	<u>13,238.14</u>	<u>97,833.58</u>	<u>66,743.92</u>	<u>183,409.94</u>
<b>TOTAL ALLOCATED TO EXCESS PROGRAM</b>	<b><u>\$15,167.82</u></b>	<b><u>\$135,357.42</u></b>	<b><u>\$71,262.67</u></b>	<b><u>\$209,282.61</u></b>

**Oregon State Bar  
Professional Liability Fund  
Excess Program  
Balance Sheet  
4/30/2014**

**ASSETS**

	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Cash	\$1,125,134.34	\$521,287.63
Assessment Installment Receivable	631,391.20	570,653.50
Due from Reinsurers	51,421.37	66,973.96
Investments at Fair Value	<u>2,451,732.64</u>	<u>3,150,558.97</u>
<b>TOTAL ASSETS</b>	<b><u>\$4,259,679.55</u></b>	<b><u>\$4,309,474.06</u></b>

**LIABILITIES AND FUND EQUITY**

	<u>THIS YEAR</u>	<u>LAST YEAR</u>
<b>Liabilities:</b>		
Accounts Payable & Refunds Payable	\$40.60	\$89.04
Due to Primary Fund	\$20,589.56	(\$6,265.38)
Due to Reinsurers	966,220.95	941,779.88
Ceding Commision Allocated for Remainder of Year	<u>538,236.90</u>	<u>493,269.71</u>
<b>Total Liabilities</b>	<b><u>\$1,525,088.01</u></b>	<b><u>\$1,428,873.25</u></b>
<b>Fund Equity:</b>		
Retained Earnings (Deficit) Beginning of Year	\$2,708,571.47	\$2,791,478.70
Year to Date Net Income (Loss)	<u>26,020.07</u>	<u>89,122.11</u>
<b>Total Fund Equity</b>	<b><u>\$2,734,591.54</u></b>	<b><u>\$2,880,600.81</u></b>
<b>TOTAL LIABILITIES AND FUND EQUITY</b>	<b><u>\$4,259,679.55</u></b>	<b><u>\$4,309,474.06</u></b>

**Oregon State Bar  
Professional Liability Fund  
Primary Program  
Balance Sheet  
4/30/2014**

**ASSETS**

	<b><u>THIS YEAR</u></b>	<b><u>LAST YEAR</u></b>
Cash	\$935,271.07	\$803,205.91
Investments at Fair Value	49,758,442.21	46,141,173.55
Assessment Installment Receivable	5,427,137.88	5,534,391.38
Due From Excess Fund	20,589.56	(6,265.38)
Other Current Assets	57,689.55	82,873.20
Net Fixed Assets	861,880.81	931,770.53
Claim Receivables	35,426.75	58,890.72
Other Long Term Assets	<u>9,825.00</u>	<u>9,825.00</u>
<b>TOTAL ASSETS</b>	<b><u>\$57,106,262.83</u></b>	<b><u>\$53,555,864.91</u></b>

**LIABILITIES AND FUND EQUITY**

	<b><u>THIS YEAR</u></b>	<b><u>LAST YEAR</u></b>
<b>Liabilities:</b>		
Accounts Payable and Other Current Liabilities	\$130,361.24	\$96,173.19
Liability for Compensated Absences	370,817.99	445,620.51
Liability for Indemnity	11,341,313.23	13,693,964.59
Liability for Claim Expense	14,720,589.62	13,196,655.36
Liability for Future ERC Claims	2,400,000.00	2,700,000.00
Liability for Suspense Files	1,500,000.00	1,400,000.00
Liability for Future Claims Administration (ULAE)	2,300,000.00	2,400,000.00
Assessment and Installment Service Charge Allocated for Remainder of Year	<u>16,517,621.78</u>	<u>16,788,036.67</u>
<b>Total Liabilities</b>	<b><u>\$49,280,703.86</u></b>	<b><u>\$50,720,450.32</u></b>
<b>Fund Equity:</b>		
Retained Earnings (Deficit) Beginning of the Year	\$6,561,716.14	\$1,255,776.41
Year to Date Net Income (Loss)	<u>1,263,842.83</u>	<u>1,579,638.18</u>
<b>Total Fund Equity</b>	<b><u>\$7,825,558.97</u></b>	<b><u>\$2,835,414.59</u></b>
<b>TOTAL LIABILITIES AND FUND EQUITY</b>	<b><u>\$57,106,262.83</u></b>	<b><u>\$53,555,864.91</u></b>

# OREGON STATE BAR

## Board of Governors Agenda

---

**Memo Date:** June 16, 2014  
**From:** Eric McClendon, Referral & Information Services Manager  
Kay Pulju, Communications & Public Services Director  
**Re:** Modest Means Program Expansion Injured Workers Panels

---

### Actions Recommended

1. Approve a new “Disability Benefits and Injured Workers” panel for the Modest Means Program (MMP) for a one-year trial period.
2. Approve related and housekeeping revisions to the Modest Means Program Policies and Procedures.

### Background

On November 13, 2013, the Board of Governors (BOG) approved expansion of the Modest Means Program into the following areas of law: SSI/SSD, VA Disability Benefits and Workers’ Compensation. This action was the result of several months of research and communication with practitioners concerned that the adoption of percentage fees for the Lawyer Referral Service (LRS) would have a disproportionate impact on certain areas of law, and as a result could impede access to justice for potential clients.

LRS staff and the Public Service Advisory Committee (PSAC) have worked with current panelists and experienced attorneys in these specific practice areas to develop criteria for the new panels. The SSI/SSD proposal is based on information provided by practitioner Cheryl Coon on behalf of the bar’s Disability Law Section; the VA Benefits proposal was developed with guidance from the Military and Veterans Law Section; the workers compensation proposal was discussed with the Workers’ Compensation Section and developed through a focus-group discussion of LRS Workers’ Compensation panelists. The board should note that members of the focus group preferred a panel with no client income screening, while members of the Workers’ Compensation Section, including Rob Guarrasi (who addressed the BOG in September of 2013 and has offered additional comments here), maintain their position that all Workers’ Compensation claims should be considered Modest Means or otherwise exempt from LRS percentage fees.

The current MMP fee structure, which is based on hourly rates, is not workable for the new panels because lawyers working in these areas of law do not typically charge hourly rates. In addition, a new approach to client means testing is appropriate given the special needs of these potential clients. Rather than establishing a reduced-fee schedule, this proposal identifies areas

of practice within the panel for which attorney fees are already limited to MMP levels by statute or rule.

Income eligibility for clients of the new panel will be set at the top MMP tier of 225% of the federal poverty guidelines. Unlike other MMP panels, the initial client screening will be conducted by panel attorneys, who are in a better position than staff to determine which clients and claims meet the MMP criteria.

For administrative simplicity and to allow for tracking of results during the pilot period, the new panel will be open only to active LRS panelists, who are already subject to reporting requirements. Potential clients will continue to be referred through LRS, with no additional application required. Any LRS panelist working in these areas of law will have the option, after consulting with a potential client, to determine that the client and case are MMP-eligible, at which point the panelist will self-report that the matter has been designated modest means. Reporting requirements will continue but no percentage fee remittances will be assessed. The reporting requirement will allow staff to gather the data necessary to review the effectiveness of the panel throughout the pilot period for review by the PSAC and BOG.

### **Disability Benefits and Injured Workers Panel**

The MMP “Disability Benefits and Injured Workers” panel will include SSI, SSD, Veteran’s Benefits, and Workers’ Compensation subpanels.

Current Modest Means Policies and Procedures apply to the new panel, with the following exceptions and additions;

- 1) Panelist Requirements.
  - a. “Disability Benefits and Injured Workers” panelists will not charge an initial consultation fee.
  - b. Panelists must participate in both Modest Means and Lawyer Referral Service.
  - c. Panelists must report on all fees collected.
  - d. Any related claims (i.e., wrongful termination, discrimination, wage and hour, etc.) will not be eligible for modest means. For related claims, the panelist will have the discretion to either:
    - i. Accept as Lawyer Referral Service matters (subject to remittance);  
or
    - ii. Refer the case back to the Lawyer Referral Service.
- 2) Client Eligibility.
  - a. Applicants will not be required to submit a written application at the time of the referral, however;

- i. Panelists will conduct an initial screening with the client to determine income available to the client and household size.
- ii. Panelists will determine income eligibility according to the Federal Poverty Guidelines. Clients who are at 225% of the Federal Poverty Guidelines will be considered Modest Means eligible.

3) Case Type Eligibility.

a. SSI and SSD.

All case types. Panelists will charge legal fees in accordance with 42 U.S.C. § 406(a)(2)(A) and 42 U.S.C. § 1383(d)(2)(A), which cap attorney fee recovery at the *lesser* of 25% of sums recovered or \$6,000.

b. Veteran's Benefits.

All case types. Panelists will charge fees in accordance with 38 C.F.R. § 14.636(e)-(g), which presumptively caps attorney fee recovery at 20% of sums recovered. If a panelist charges a fee beyond 20%, the panelist will notify the Lawyer Referral Service and be subject to the 12% remittance fee.

b. Workers' Compensation.

Cases in front of the Department of Consumer and Business Services ("The Division"); mental health and stress claims; and appeals of first decisions, including any employer or insurer denial of compensability of a claim or condition, as well as any appeal from a decision of an Administrative Law Judge.

### **Modest Means Program Policy Revisions**

The attached **policy revisions** incorporate recent changes to the LRS policies, which formerly were incorporated by reference. The revision also includes language enabling the special pilot panels discussed above.

CHERYL F. COON\*  
JAMES S. COON  
CHRIS C. FROST  
CHARLEY B. GEE  
MELISSA M. HAGBERTY  
CYNTHIA F. NEWTON\*\*  
RAYMOND F. THOMAS

\*ADMITTED IN OR, PA., D.C., U.S.V.I  
\*\*ADMITTED IN OR, CA AND WA

FOUNDING PARTNERS

MICHAEL D. ROYCE  
(1980 - 1994)

DOUGLAS A. SWANSON  
(1980 - 2004)

**SWANSON, THOMAS, COON & NEWTON  
ATTORNEYS AT LAW**

THE THOMAS MANN BUILDING  
SUITE 200  
820 S.W. SECOND AVENUE  
PORTLAND, OREGON 97204  
FAX (503) 273-9175

TELEPHONE (503) 228-5222  
WWW.STC-LAW.COM

STAFF:  
NORA COON  
ERIN DANIELS  
DIANE FULTON  
HANNAH JACOBBER  
DANNEE KEBBLER  
KRISTIN KIDD  
DAVINA KINDONEN  
CHRISTINA LACY  
AARON MCCURRIE  
LYNNE MCHARRY  
MARISA PARADA  
COURTNEY PENTEK  
LESLIE RAMER  
KAYLA SMITH  
HOLLY THOMPSON  
AMANDA R. ULRICH

October 23, 2013

Dear Board of Governors,

On behalf of the Disability Section of the Oregon Bar Association, I would like to thank you for the time you afforded me at your recent meeting to acquaint you with our reasons for advocating that social security disability benefits cases should be exempt from the lawyers referral fee or should otherwise be addressed by creation of a new Modest Means Panel. We appreciate your continuing consideration of the issue.

What follows is a suggestion for how the Board of Governors (BOG) might structure such an exemption. As always, I am indebted to your excellent staff for the discussions they have had with me to help me to understand how best to accomplish the goals of providing access to justice for claimants and adequate fees to attorneys to insure that lawyers represent all claimants, regardless of income and resources.

Social Security Disability Benefits

- There are two<sup>1</sup> types of social security disability benefits available to claimants who have become unable to participate in full-time competitive employment due to physical or mental disability, or both.
  - Title II (SSDI) is a program for disabled adults with a significant work history.
  - Title XVI (SSI) is a program for children, adults and refugees who have not had a significant work history or have not worked in a long time, and who meet strict income and resource limits.
  - Many veterans who are low-income or homeless seek SSI benefits because of the prolonged length of time it takes to obtain Veterans' Disability benefits.
- Regardless of the type of disability benefit a claimant is seeking, social

---

<sup>1</sup> Some claimants file for both Title II and Title XVI benefits. This is known as concurrent applications. It occurs when an individual's potential Title II benefits are so low, due to past earnings, that he or she would otherwise receive less than the federally-set monthly payment provided by Title XVI.

---

security disability attorneys are paid only if they win, only out of back benefits, and even then fees are capped by federal law at \$6000.

- An average concurrent or Title XVI case will result in a \$2000 fee not including costs<sup>2</sup>. The length of time that an attorney works on such a case usually exceeds two years and may take more than that.
- Many legal services offices, including Disability Rights Oregon, no longer offer representation for social security disability benefits.

### Veterans' Disability Benefits

- There are multiple types of veterans' benefits. Service-connected disability compensation is for veterans who are at least 10% disabled because of injuries or diseases that were incurred in or aggravated during their service
- Just as for social security disability claims, there are multiple stages of review and the process takes years.
- Just as for social security disability claims, attorneys are paid only if they win. The industry standard is a 20% fee. The VA must approve a fee. However, there is no dollar cap on the fee that can be earned.
  - For example, where back benefits of \$80,000 cannot result in a social security attorney fee that exceeds \$6000, the same back benefits in a veterans disability case would result in a fee of \$20,000.

### Proposal for a new "Disability Modest Means Panel"

The BOG's goals can be met through creation of a new Disability Modest Means panel that would encourage attorney representation of disabled veterans and others in their efforts to obtain disability benefits.

#### Goals:

- To encourage attorneys to represent disabled veterans in their claims for both veterans' disability benefits and social security disability benefits (Title II, Title XVI and concurrent); and
- To make legal services for disability benefits available to the most disadvantaged clients, including low-income, homeless and refugees.

---

<sup>2</sup> Most fee retainer agreements provide for client payment of costs but in our experience, nearly 50% of clients in this area of law fail to repay costs. Not only must a social security disability attorney acquire and submit all of a claimant's medical records, but also best practices dictate that an attorney should acquire a treating physician opinion as well, at an average cost of \$225. Costs per client range from \$300-\$1200.

Approach

- Clients must meet income requirements applicable to all modest means panels. However, because in order to apply for Supplemental Security Income (SSI) or concurrent SSI and SSD, an individual must meet stringent financial limitations on income and resources that are lower than those permitted by clients in modest means, no additional information will be required. For veterans who are seeking legal advice solely about veterans' disability benefits (and therefore are not subject to the social security limitations on resources), an application will be required.
- Because lawyers are not permitted to charge consultation fees and fees are set by federal law, the \$60/\$80/\$100 provisions do not apply to this panel.

Thank you for your consideration of our views on this important matter.

Sincerely,



Cheryl Coon

Board Member of the Disability Bar Section, on behalf of the Disability Section

cc: Board members of the Disability Bar Section  
George Wolff  
Kay Pulju

**From:** Rob Guarrasi [mailto:rob3151@comcast.net]

**Sent:** Thursday, June 12, 2014 4:41 PM

**To:** Jodie Anne Phillips Polich; Kay Pulju; Eric McClendon; Helen Hierschbiel

**Cc:** Ronald Fontana; Colin Hackett; Sara Gabin; giovanna@hollanderlaw.com; Chris Frost; Evohl Malagon; doctorofcomp@msn.com; Martin Alvey; rob kinney; Christopher D. Moore; Julene Quinn; steve@schoenfeldlawyers.com; Martin J. McKeown; Art Stevens; phil garrow; keith semple; John Oswald; Connie Wold; Shamus Lynsky; mike casey; Peter Orion Hansen; shelley edling; Carrie Wipplinger; Isanchez630@hotmail.com; Timothy L. Williams; Jim Edmunson

**Subject:** Re: Proposed MM ExpansionRonald Fontana

Hi Kay and Eric:

I appreciate all of your hard work on the LRS revisions and your willingness to listen to the concerns of the Claimant's Bar. I also look forward to meeting with Eric (or, at least, speaking to him in the future).

I have spoken to many members of the (ever shrinking) Claimant's Bar over the past 12 to 18 months (Many of whom have reached out to me as a former member of the Work Comp Executive Committee for 7 of the last 8 years).

As I expressed to Kay, I began my membership with LRS back, as I recall, in 1988 and, to the best of my recollection, remained an LRS participant continuously, until the LRS started requiring the 12% fee remittance (at which time I dropped out of the program).

Over the past 5 to 10 years of my membership, most of the work entailed Pro Bono advice to frustrated workers' who found it increasingly difficult to find competent experienced attorneys who were willing to handle their claims. Many of the other cases were pretty much break-even propositions. Once, every two to three years, a case would result in a "decent" fee (meaning \$5,000.00 to \$7,500.00). Usually, however, those cases involved 12 to 18 months of litigation before a decision of the Hearings' Division or Board became final. Given the current LRS Setup (and the proposed revisions), a participant would now be required to remit back \$600.00 to \$900.00. At a quick glance, that might not seem to be too bad, but when you take into account the amount of work involved in handling most WC cases, in Oregon, as well as the delays inherent in getting paid, and the number of cases involved where no fee is generated, the LRS program simply is no longer a viable option for experienced attorneys (even with the Proposed Changes).

Anecdotally, I was contacted by an IW at the end of December 2012 on a complicated infectious disease case. At the time I was retained, on 1/3/13, it was my professional opinion that the chances of prevailing on the claim were less than 10%. Nonetheless, the young attorney, on the Coast, who referred the Client, asked me for a favor as the Workers and his wife would face financial ruin if they lost their case. Against my better judgment I took the case and worked on it and worked on it and worked on it.

After some good medical evidence developed and after much sweat, SAIF did the unthinkable. Two days or so before the hearing, SAIF withdrew their denial (in early June). SAIF was accordingly required to pay me an attorney fee out of their pocket. The Fee they proposed was, in my opinion, inadequate. As such, an ALJ was asked to rule on the fee, which eventually occurred . . . . . **on NOVEMBER 12, 2013 ! Yep, that's right . . .**

Despite the fact that what was at stake was over \$130,000.00 in medical bills, the Fee awarded was, in my opinion, low (\$6,000.00). On 11/15/2013, I appealed the Fee to the WCB. On 4/25/14, the Board affirmed the AF Award (that decision is now on appeal to the Court of Appeals - which means that a decision ultimately won't be made for about another 12 months or so).

SAIF did finally pay the \$6,000.00 fee in early May of this year (almost a year and a half after I was retained).

I use this case as an illustration to highlight the fact that the prospect of a remittance of 12% to LRS would have tipped my decision to forego the representation of this particular Claimant. If I decide to work so hard for so little financial remuneration, so distant in the future, why should my professional fee be further diluted by the Oregon State Bar's Referral Program?

All in all, even with the revisions that are currently being proposed, what is likely to result, in my humble opinion, is the development of a group of LRS panelists who lack the training and experience to handle the majority of PCs who contact LRS for referrals.

Such a situation simply is not beneficial for Injured Workers' and their families as well as Administrative Law Judges who will be increasingly called upon to deal with Claimants who are represented by members of the Oregon Bar who may very well be ill-equipped to tackle the complicated issues surrounding Work Comp cases in the year 2014 and beyond. Of course, I suspect, many of the LRS referred cases won't ever make it to litigation if the inexperienced Counsel settles the claim "short" (i.e., for a "low-ball" offer that the Defense Attorney conveys knowing that the Claimant's lawyer lacks the knowledge, training, experience, and financial resources to advance the necessary costs to effectively and professionally get a case ready for hearing).

In terms of full disclosure and in terms of the Professional Responsibility of the Lawyer Referral Service, I wonder if it is \made known to the members of the public who look to the LRS as a referral source, that the LRS Panelist may or may not have any experience in handling a Claimant's case?

My inherent curiosity (spurred on by the many emails on the subject that have been generated

most recently), caused me to review the LRS information that is available to members of the public. The Oregon State Bar website states the following:

"While we cannot provide any legal advice or answer any legal questions, we can refer you to a

lawyer **who may be able to assist you with your legal matter**.

When you call us for a referral we will ask you for your name, phone number, email address, preferred location, and a brief description of your legal problem. We will then provide you with the name and telephone number of a lawyer who may be able to help you with your legal matter and who is close to you or the location where assistance is needed. We can also send a confirmation to your email address so that you have the lawyer's contact information for future reference. You will need to contact the lawyer within two business days in order to make an appointment for an initial consultation about your legal issues.

You are entitled to an initial consultation of up to 30 minutes for a maximum fee of \$35. Any additional fees must be arranged between you and the lawyer. We do not set a limit on the fees attorneys charge beyond the initial consultation.

Please note that all of our lawyers do charge for their services. The Lawyer Referral Service does not have any free or pro bono lawyers.

If you are unsure whether you need to speak with a lawyer, you may still want to call the Lawyer Referral Service. We can help you figure out what kind of assistance you may need and give you more information about other Oregon State Bar, government, and community service programs that may be able to assist you."

In the Public Interest, wouldn't it be appropriate, useful and ethically appropriate to indicate that the Bar makes no representations as to the competency of the particular lawyer who is the subject of a particular referral ? or that the Bar does not screen members of the LRS Panels?

DR 1.1 COMPETENCE states : " A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Should there be some mention that a Referral to a particular attorney is not an endorsement of that attorney and that a Referral should not be construed as an indication that a particular attorney is competent to handle the Client's particular case and situation?

Should there be some mention that Workers' Compensation cases, in Oregon, are often complicated, and that there are other sources available to those seeking legal representation ? or that the Workers' Compensation Ombudsman is a source of information and assistance to Injured Workers? Has LRS considered providing a link to the Ombudsman's Website : <http://www.oregon.gov/DCBS/oiw/pages/index.aspx> ?

The Ombudsman's Website provides the following information:

"Although the Ombudsman can provide you information regarding the workers' compensation claim process and can contact the insurer to help resolve some issues, the Ombudsman cannot provide you legal advice.

If your claim has been denied and you're considering appealing the decision, you are considering a claim settlement or you have a dispute that may result in a loss or reduction of your benefits, we strongly encourage you to seek legal representation. You may want to consult with an attorney who specializes in workers' compensation. You can locate an attorney for a free consultation through the Yellow Pages, online, or by contacting the Oregon State Bar referral service (the \$35 referral fee does *not* apply to workers' compensation cases).

**Oregon State Bar Lawyer Referral Service**

Hours: 8 a.m. to 5 p.m. Monday through Friday

Phone: 503-684-3763"

Would LRS consider adding the language above : "You can locate an attorney for a free consultation through the Yellow Pages, online, or by contacting the Oregon State Bar referral service."

Finally, It has always been my belief that Lawyers' have a responsibility to try their best to effectively communicate to a prospective and current client.

DR 1.4 touches upon COMMUNICATION and provides :

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

It is my hope (and expectation) that LRS would consider, in its Communications, on the Web and on the phone, to PCs, that LRS is not making any comments upon the Competency of a given lawyer and that is is up to the Client to make that particular determination.

It seems fair to infer, that a percentage of the public that contacts LRS, is acting on the assumption that somehow the bar is "endorsing" the Panelists or otherwise screening those attorneys whose names are being given out. Clear communication, in that regard, would hopefully effectively communicate that a referral is simply that and nothing more.

In conclusion, I sincerely appreciate Kay's hours of work and patience in dealing with these complex issues and do not wish to come across as ungrateful for her willingness to tackle hard issues.

The fundamental ability to "Access Justice" and the continued viability of an entire group of lawyers who devote their professional skills to advancing the legal rights of hard working Oregonians are at stake. It is my sincere hope that the Board of Governor's will acknowledge that it is time to fully exempt Work Comp cases from the Fee Program and act accordingly.

Sincerely,

Rob Guarrasi

## **I. Program**

---

### **A. Overview**

The Modest Means Program (MMP) is designed to make legal services available to lower income people who are unable to afford regular attorney fees.

### **B. Operation**

The Referral & Information Services (RIS) ~~Administrator~~ Manager shall develop and revise referral procedures and shall be responsible for the operation of the program. Procedures and rules shall be consistent with the program goals and the following guidelines:

1. RIS Staff ("Staff") may not comment on the qualifications of a participating MMP Panelist Attorney ("Panelist") and may not guarantee the quality or value of legal services.
2. Staff shall not make referrals on the basis of race, sex, age, religion, sexual orientation, or national origin.
3. No more than three referrals may be made to an applicant for the same legal problem.
4. Staff may provide legal information and referrals to social service agencies for callers for whom a legal referral would not be appropriate, and may develop agency resource lists.
5. Callers complaining about possible ethical violations by Panelists shall be referred to the Oregon State Bar Client Assistance Office.

### **C. Client Eligibility and Attorney Fees**

1. To be eligible, applicant income must be less than or equal to at least one current eligibility tier of the MMP ("Tier"). Tiers are based upon set percentages of the current Federal Poverty Guidelines, with allowable adjustments based on guidelines of the Legal Services Corporation.
2. Attorneys' fee levels ("Levels") shall be set to correspond with the Tiers, after giving due consideration to the most recent edition of the Oregon State Bar Economic Survey and common billing practices for each area of law addressed by the MMP. In consultation with the Public Service Advisory Committee, Staff shall periodically adjust the Tiers and Levels. Tier and Level adjustments may be reviewed by the Board of Governors, who shall determine whether the adjustments were reasonable. The client fee for an initial consultation shall not exceed \$35. MMP attorneys are entitled to request a reduced initial retainer deposit ("Reduced Retainer"). "Reduced Retainer" shall mean an amount that is less than the amount of an initial retainer deposit requested for non-MMP cases of similar complexity and duration.
3. [Panels with separate eligibility and attorney fee guidelines may be adopted periodically on a trial basis. Please contact RIS staff for more information.](#)

## **II. Panelists**

---

### **A. Eligibility**

Attorneys satisfying the following requirements shall be eligible for participation in the program:  
The attorney must:

1. be in private practice; and
2. be an active member of the Oregon State Bar who is in good standing; and
3. maintain malpractice coverage with the Professional Liability Fund; and
4. have no Disciplinary Proceedings pending.

“Disciplinary Proceedings” shall include those authorized to be filed pursuant to Rule 2.6 of the Rules of Procedure.

## **B. Registration**

1. Qualifying attorneys shall be accepted as Panelists upon submission of the signed registration form which includes an agreement to abide by MMP Policies and Procedures.
2. Applications for special subject matter panels shall be reviewed by Staff in accordance with eligibility guidelines set by the Board of Governors. Challenges to a Staff decision on eligibility shall be reviewed by the Public Service Advisory Committee [\(PSAC\)](#), whose decision is final.

## **C. Enforcement**

1. Panelists against whom Disciplinary Proceedings have been approved for filing shall be immediately removed from MMP until those charges have been resolved. A disciplinary matter shall not be considered resolved until all matters relating to the Disciplinary Proceedings, including appeals, have been concluded and the matter is no longer pending in any form.
2. [A Panelist whose status changes from “active member of the Oregon State Bar who is in good standing” shall be automatically removed from the MMP. A Panelist may be removed from the program or any MMP panel if the Panelist fails to continue to maintain eligibility or otherwise violates the Rules for Panelists. Upon written request, the PSAC will review a decision to remove a panelist at its next regularly scheduled meeting. Such written request must be submitted to the PSAC within 30 calendar days of the date notice of the decision is given to the removed panelist. The PSAC’s decision regarding removal is final.](#)

## **D. Rules For Panelists**

1. [Each panelist shall continuously](#) be an active member of the Oregon State Bar who is in good standing with malpractice coverage from the Professional Liability Fund and have no pending Disciplinary Proceedings;
2. [Panelists agree to charge potential clients who live in Oregon and are referred by the MMP no more than \\$35 for an initial 30-minute consultation, except that no consultation fee may be charged where: \(a\) such charge would conflict with a statute or rule regarding attorneys’ fees in a particular type of case \(e.g., workers’ compensation cases\), or \(b\) the panelist customarily offers or advertises a free consultation to the public for a particular type of case;](#)
3. [If the potential client and panelist agree to continue consulting beyond the first 30 minutes, the panelist must make clear what additional fees will apply;](#)
4. [Panelists will participate only on those panels and subpanels within the panelist’s competence and where the LRS has approved the panelist to participate on one or more special subject matter panels, as applicable;](#)
5. [Panelists will use a written fee agreement for any services provided beyond the initial consultation;](#)
6. [Panelists will communicate regularly with MMP staff, including updating online profiles and providing notice if a panelist is unable to accept referrals for a period of time due to vacation, leave of absence, heavy caseload or any other reason;](#)

7. Panelists will keep clients reasonably informed about the status of their matters and respond promptly to reasonable requests for information. Panelists will return calls and emails promptly and will provide clients with copies of important papers and letters;

8. Panelists agree to ~~Submit~~ submit any fee disputes with clients referred by MMP to the Oregon State Bar Fee Arbitration Program.



DEPARTMENT OF DEFENSE  
OFFICE OF THE GENERAL COUNSEL

1600 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1600

May 6, 2014

Tom Kranovich, Esquire  
President  
Board of Governors  
Oregon State Bar  
P.O. Box 231935  
Tigard, OR 97281-1935

RECEIVED

MAY 12 2014

Oregon State Bar  
Executive Director

Dear Mr. Kranovich:

I am writing to inform you that the Department of Defense (DoD) is conducting a comprehensive review of the military justice system and to invite the Oregon State Bar to provide advice or recommendations to improve the military justice system.

The comprehensive review, which was ordered by Secretary of Defense Chuck Hagel, is being conducted by the Military Justice Review Group (MJRG), which was established by the General Counsel of the Department of Defense. The MJRG is headed by the Honorable Andrew S. Effron, who is a distinguished former Chief Judge of the Court of Appeals for the Armed Forces. The MJRG's senior advisors are Senior Judge David Sentelle of the United States Court of Appeals for the District of Columbia Circuit, and the Honorable Judith Miller, a former DoD General Counsel. The Department of Justice has provided an advisor to the MJRG, which also includes senior civilian DoD and military lawyers.

While DoD is happy to receive public suggestions to improve the military justice system at any time, input for the MJRG's consideration would be most helpful if submitted before July 1, 2014. The best means to provide input is by email, which may be sent to [OSD.UCMJ@mail.mil](mailto:OSD.UCMJ@mail.mil). Alternatively, you can provide input by standard mail, though due to security precautions, such mail is often delayed before reaching recipients in the Pentagon. Suggestions may be mailed to: Military Justice Review, Office of General Counsel, Room 3B747, 1600 Defense Pentagon, Washington, DC 20301-1600. The Office of General Counsel will forward any submissions to the MJRG.

We look forward to receiving any suggestions that the Oregon State Bar might have as we work to improve the military justice system.

Sincerely,

Paul S. Koffsky  
Deputy General Counsel  
(Personnel & Health Policy)



---

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** June 27, 2014  
**From:** Richard Spier, President-Elect & BOG Contact to MVLS  
**Re:** Military & Veterans Law Section Military Justice Recommendations

---

### **Action Recommended**

Authorize President Kranovich to sign a letter substantially in the form of the attached draft.

### **Discussion**

In May, the bar received an invitation from the Department of Defense Office of General Counsel to offer recommendations to improve the military justice system. The invitation was in conjunction with a comprehensive review ordered by Secretary of Defense Hagel that is being conducted by the Military Justice Review Group.

President Kranovich asked the Military & Veterans Law Section to review the request and formulate appropriate recommendations. The Section has done so and provided a draft letter for BOG review. If the BOG approves the form of the letter, a final version will be prepared for President Kranovich's signature. The deadline for submissions is July 1, 2014.

Military Justice Review Group  
Office of the General Counsel  
Room 3B747  
1600 Defense Pentagon  
Washington, DC 20301-1600

Dear Chief Judge Efron:

As the Military Justice Review Group (MJRG) conducts its “Comprehensive Review of the Uniform Code of Military Justice,” per Secretary Hagel’s 18 October 2013 direction, Deputy General Counsel Koffsky has requested the input of the Oregon State Bar (OSB) concerning the administration of military justice.

The mission of the OSB 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. The OSB was established in 1935 by the Oregon Legislative Assembly to license and discipline lawyers, regulate the practice of law and provide a variety of services to bar members and the public. The bar is a public corporation and an instrumentality of the Oregon Judicial Department.

In furtherance of our mission, we are pleased to address two concerns that we believe should be considered in any comprehensive report on the administration of Military Justice in the U.S. Military.

1. Post-service consequences of military justice and other disciplinary actions.
2. Inherent conflicts of interest in criminal defense representation in courts-martial.

### **Post-service consequences of military disciplinary actions**

We believe that statutory language should be considered to require military decision makers to consider post-service consequences of military disciplinary actions.

Oregon is proud to contribute citizens of our state to facilitate the important federal Constitutional requirement to provide for the common defense. It is essentially important to all Oregonians that our citizens are provided adequate due process in any military disciplinary proceeding and that adequate resources are provided to care for veterans for as long as they and their loved ones experience the consequences of their service.

But due process only addresses the proceeding itself, and post-service care address problems which have already occurred. We have been unable to locate anything in the Uniform Code of Military Justice, other statutes, Rules for Court-Martial, or in any Service Regulations which directs military authorities to ensure that post-service consequences of military disciplinary decisions are considered.

At court-martial, for example, the sum total of the guidance that military panel members receive about post-service consequences of punitive discharges is this:

The stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and

will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that (he) (she) has served honorably. A punitive discharge will affect an accused's future with regard to (his) (her) legal rights, economic opportunities, and social acceptability... This court may adjudge either a dishonorable discharge or a bad-conduct discharge. Such a discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Army establishment. Department of the Army Pamphlet 27-9, para 2-5-22.

Nothing is provided to military panel members which orients them to the consequences of their decisions to larger society as well as to the individual Accused. The interests of the several States, which are left completely responsible for veterans who receive punitive discharges, are not addressed at all.

Similarly, we are unable to locate any guidance concerning Administrative Separations which would assist military decision makers in understanding and incorporating into their decision process the profound post-service consequences of negative characterizations of service.

The applicable Department of Defense Instruction, DODI 1332.14, Enclosure 4, paragraph 1.b., merely directs military decisions makers as follows:

- (4) The following factors may be considered on the issue of retention or separation, depending on the circumstances of the case:
  - (a) The seriousness of the circumstances forming the basis for initiation of separation proceedings, and the effect of the Service member's continued retention on military discipline, good order, and morale.
  - (b) The likelihood of continuation or recurrence of the circumstances forming the basis for initiation of separation proceedings.
  - (c) The likelihood that the Service member will be a disruptive or undesirable influence in present or future duty assignments.
  - (d) The ability of the Service member to perform duties effectively in the present and in the future, including potential for advancement or leadership.
  - (e) The Service member's rehabilitative potential.
  - (f) The Service member's entire military record.

With respect to characterization of service, the DODI merely states, at Enclosure 4, para 3.b(1)

- (a) Characterization at separation shall be based upon the quality of the Service member's service, including the reason for separation ... and the time-honored customs and traditions of military service.
- (b) ...[C]onduct that is of a nature to bring discredit on the Military Services or is prejudicial to good order and discipline [and] conduct in the civilian community.

(c) The reasons for separation...

(d) [T]he Service member's age, length of service, grade, aptitude, physical and mental condition, and the standards of acceptable conduct and performance of duty.

Guidance on characterization appears to completely disregard the balance of the young Service Members' lives, years when the military has no further use for these former Service Members.

It is our contention that even badly-behaving former Service Members may mature to be productive and law-abiding citizens of the several States; and it is our further contention that the Services should be directed to consider the larger and long-term good of society alongside short-term military efficacy. Because the Services must always maintain an overwhelming focus on fighting and winning our Nation's wars, we believe this issue merits evaluation for statutory repair.

### **Inherent conflicts of interest in criminal defense representation in courts-martial**

The Oregon State Bar, under the ultimate authority of the Oregon Supreme Court, regulates the practice of law in Oregon for the protection of the public. In its regulatory role, the OSB is responsible for the admission, discipline and reinstatement of lawyers who practice in Oregon, and has tremendous knowledge and experience with attorneys' professional responsibilities, including compliance with their ethical obligations.

Instead of creating and administering a military bar association to license and regulate the practice of law in the military, the DoD has chosen to require military lawyers to have current membership in the bar of one of the several States or the District of Columbia. In other words, the DoD asks the Oregon State Bar to give its *imprimatur* to lawyers practicing in military service but licensed in Oregon, especially as there is no further licensing requirement for military service.

As such, the OSB has an interest in ensuring that Oregon-licensed lawyers are practicing in a manner that does not place them at risk of inadvertently violating our rules of practice. Specifically, Oregon RPC 1.8(k) provides that "[w]hile lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them." What constitutes a "firm" is open to some interpretation, especially in the context of military practice; however, at no time in Oregon have counsel working for the same supervisor been allowed to represent adverse litigants.

As for the applicability of our rules, RPC 8.5(a) provides,

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

The Oregon Rules of Professional Conduct require that attorneys must avoid conflicts of interest in the representation of their clients. We are concerned that it appears to be an actual conflict of interest for attorneys in the same legal organization, whether public or private, to simultaneously represent parties with adverse interests. We understand that the military services have criminal defense organizations within their Judge Advocate General's Corps. The judge, the prosecution, and the defense in courts-martial all report to the same ultimate supervisor, the Judge Advocate General of that service.

In formulating our recommendations for the MJRG, we have considered the Group's ability to propose incremental or evolutionary reforms to Secretary Hagel. Our review of the provision of criminal defense services over the history of our Nation shows a steady progression of increasing independence in the provision of criminal defense representation to Service Members. The creation of the Army's Trial Defense Service in the 1980s was a watershed moment in the evolution of due process in military jurisprudence. However, the Services do not appear to have seen any need for further evolution of the defense function in the intervening 34 years. We would like to propose to the MJRG that it consider the obvious conflict of interest the current system embodies.

While we acknowledge that it is better for an Accused Service Member to have an ostensibly independent TDS attorney than a Prosecutor also serving the Defense Counsel function, we are hard-pressed to see what military exigencies compel the DoD to retain the respective Service Trial Defense organizations solely in Service Channels. Instead, we have considered the current arrangements as step on the way to a fully independent Joint Criminal Defense Organization, either within the DoD (if military exigencies demand that compromise) or independent of the entire military chain of command (if possible). The OSB is certainly in no position to presume expertise over those military exigencies, but we are pleased to raise the issue for the MJRG's consideration.

Very truly yours,

Tom Kranovich, President

## Brief to the Oregon State Bar (OSB) Board of Governors (BoG) concerning the proposed submission to the Military Justice Review Group (MJRG)

The Military & Veteran Section has prepared the proposed submission and this brief in order to assist the BoG in determining whether to formally submit an OSB response to Department of Defense (DoD) Deputy General Counsel Koffsky's solicitation to the OSB for comment on the MJRG review of Military Justice. We have prepared this brief to provide some context for what is, admittedly, an esoteric area of practice for most members of the BoG. Lieutenant Colonel Crowe and Lieutenant Colonel Ronning, both retired Judge Advocates and both current advocates for veterans, will be present to discuss our submission and to answer further questions about the practice of law under military control.

### **Post-service consequences of military disciplinary actions**

As can be seen from the proposed submission, practically no formal guidance is given to the post-service consequences of military disciplinary actions, notwithstanding the fact that Oregon retains lifetime residual responsibility for disciplinary actions taken by the military against our citizens. In practical effect, Oregon bears a significant burden for former Service Members who labor under lifetime ineligibility due to adverse characterizations of service but the only consideration given is dependent on the discretion of individual military leaders. We believe this is an oversight in the construction of the military disciplinary process and is a worthy observation to be made in response to the solicitation from the DoD to the OSB for our input.

Military Status can only end in one of nine ways—six administrative and three punitive (*i.e.*, via a court-martial).<sup>1</sup> Those possible characterizations of service are:

1. No Characterization
  - a. Entry Level Separation (within 180 days of enlistment, elective for the military)
  - b. Order of Release from the Custody and Control of the Military Services (by reason of void enlistment or induction)
  - c. Dropped from Rolls (for Service Members apparently in an extended period of unauthorized absence)
2. Administrative Separations
  - a. Honorable Discharge (all VA and post-service benefits generally available, with potential exceptions for G.I. Bill for early termination of service)
  - b. General, under Honorable Conditions, Discharge (may jeopardize a member's ability to benefit from the G.I. Bill; member will not normally be allowed to reenlist or enter a different military service; will often have a lower-priority for VA medical care)
  - c. Other than Honorable Discharge (effectively, VA and post-service benefits unavailable; not eligible for notice of discharge to employers (which may affect

---

<sup>1</sup> Service Members killed in battle are posthumously Honorably Discharge. Those listed as Missing in Action are considered to be in a casualty status, with statutory benefits accruing to family members much akin to Honorably Discharged veterans.

unemployment benefits))

3. Punitive Discharges (only adjudged by court-martial; such a discharge deprives one of substantially all VA and post-service benefits for life)
  - a. Dishonorable Discharge (“A dishonorable discharge should be reserved for those who in the opinion of the court should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment.”)
  - b. Bad Conduct Discharge (“A bad-conduct discharge is a severe punishment, although less severe than a dishonorable discharge, and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct even though such bad conduct may not include the commission of serious offenses of a military or civil nature.”)
  - c. Dismissal (equivalent of Dishonorable Discharge for Officers)

When Service Members are separated from the military, they are issued a Department of Defense (DD) Form 214, Discharge Certificate. The DD214 lists the characterization of service. This form is a necessary prerequisite for access to post-service care through the Veteran Affairs (VA) system, as well as greatly affecting access to post-service disability determinations. The DD214 is also a gatekeeping device which allows post-service employers to determine employability.

There is *no* automatic upgrading of military discharges.<sup>2</sup> A punitive or Other than Honorable discharge is still available to the military for one-time use of marijuana or homosexual acts. Under the law, no consideration is directed to be given to post-service consequences of any discharge.

The law provides that Veterans may petition the appropriate Service Discharge Review Board (DRB) for a discharge upgrade or a change in the discharge reason. Each Service Secretary is directed by statute to establish its Service DRB. 10 U.S.C. §1553. When a case is submitted to a Service DRB, the petitioner must convince the board that their discharge reason or characterization was "inequitable" (defined as “*inconsistent with the policies and traditions of the service*”) or "improper" (defined as “*false, or violative of a regulation or a law*”).

### **Conflict of interest in criminal defense representation in courts-martial**

In 1775, the Continental Congress adopted the British Articles of War. One of our nation’s first court-martial was against Benedict Arnold, in which General Washington appointed one officer to serve as both Prosecutor and Defense Counsel. Discipline in the Sea Services was contained in the Articles for the Government of the Navy.

In the Articles of War passed by Congress in 1916, separate Defense Counsel (appointed by the Commander convening the court-martial) was guaranteed “if such counsel be reasonably available,” but there was no provision for appealing convictions.

---

<sup>2</sup> Except for pre-1975 Army veterans whose cases were covered by *Giles v. Secretary of the Army*, Civil Action No. 77-0904 (D.C. Circuit, 1979) (OTAs issued for compelled urinalysis testing for the purpose of drug rehabilitation).

In November 1917, a court-martial tried sixty-three members of the Army's all-black Twenty-fourth Infantry Division. The Defendants were charged with a variety of offenses, including mutiny and murder, stemming from a race riot in Houston in which over a dozen people had died. The court-martial convicted fifty-eight men. Thirteen were sentenced to death and hanged the following morning.

From 1775 until 1950, little about military justice changed. The Bill of Rights was infrequently applied, and the primary purpose of the military justice system was to maintain good order and discipline. This culminated in World War II, when over 1.5 million courts-martial were conducted from 1941-1945—one of three of all criminal trials conducted during that period.

Based on their own experience, the new generation of Congressmen and Senators who came into office after the war assisted in pushing through the Uniform Code of Military Justice (UCMJ) in 1949, which enshrined concepts like a right against compulsory self-incrimination, the right of trial by jury, the right to a military judge, an appellate procedure, and the right to defense counsel.

However, the UCMJ right to Defense Counsel was imperfectly implemented by the Services, which have customarily fought every military justice innovation bitterly. Up until 1980, the Defense Counsel was supervised by the Staff Judge Advocate for a particular Command and appointed on a case-by-case basis. After 1980, The Judge Advocate General (TJAG) of the Army created a subordinate organization known as the Army Trial Defense Service in order to address persistent concerns that having the prosecutor and the defense counsel report to the same boss was a conflict of interest. The chain of command still runs exclusively in service channels (that is, TJAG of the Navy still appoints both the prosecutors and the defense counsel)—the potential conflict of interest was “addressed” by simply moving the reporting official higher up the chain of command.

From the inception of American military justice, the idea of representation by defense counsel has steadily evolved—from Benedict Arnold's unitary Prosecutor/Defense Counsel to 1916's separate Defense Counsel “if reasonably available” to the UCMJ's right to Defense Counsel (chosen by the local Staff Judge Advocate) to today's right to Defense Counsel (chosen by the Service TJAG).

Today, in Courts-Martial the particular Service's JAG Corps selects the judge, the prosecutor, and the defense counsel. The JAG Corps also control the appeals process. In other words, uniformed lawyers, or “Judge Advocates,” control both judging, prosecuting, and defending. Each JAG Corps has an “in-house” Trial Defense organization which provides criminal defense representation to the members of that particular Service.

Judge Advocates are assigned by their JAG Leaders back and forth between Administrative, Prosecutorial, and Defense functions during their careers, always doing less and less defense work as they are promoted into “position of greater responsibility.” Assignments are “at will” and Defense Counsel are routinely rotated in and out of criminal defense slots with minimal notice.

In other words, Judge Advocates who are temporarily assigned as defense attorneys are expected to fight zealously for their clients against the JAG leaders that select, train, employ, evaluate, and promote (or don't promote) these same Judge Advocates. This system places tremendous pressure on Judge Advocates in Defense Counsel slots to "play team ball," which means "fight hard, but not too hard."

As the BoG membership already knows, the "other" federal system of justice separates the U.S. Attorneys from the Federal Public Defenders. To address any perceptions of untoward influence or conflict of interest, the Federal Public Defender system has been removed entirely from the Executive Branch. In everything other than the military context, the idea of separating the supervisory chain of prosecutors and defense counsel is completely uncontroversial. In fact, RPC 1.8(k) provides that "While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them." It is unclear to us whether the SPRB has ever been asked what constitutes a "firm" for military purposes or whether the issue of prosecutors and defense counsel reporting to the same military chain of command represents any kind of conflict of interest for Oregon lawyers.

We believe this solicitation of input from the MJRG is an opportunity for the OSB BoG to nudge the military one step further along the road to truly independent defense counsel, either entirely removed from the Department of Defense or simply seconded into a Joint Criminal Defense Organization that is truly independent from Service TJAG Control.

---

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** June 27, 2014  
**Memo Date:** June 18, 2014  
**From:** Rod Wegener, CFO  
**Re:** Audit Report of the OSB Financial Statements for the two-year period ending December 31, 2013

---

### Action Recommended

Acknowledge receipt of the audit report of the bar's combined 2012 and 2013 financial statements from Moss Adams LLP.

### Background

The audit report and a 5-page document entitled "Communication with Those Charged with Governance and Internal Control Related Matters" (with bar staff's one-page response) will be distributed to the board under separate cover prior to the board meeting. The report will include an unqualified opinion for the bar and report no "deficiencies in internal control that we (the auditors) consider to be material weaknesses."

The report is the combination and summary of all bar-related financial operations – results of operational departments, the building fund (Fanno Creek Place), Client Security Fund, Diversity & Inclusion, Legal Services, sections, and the investment portfolio activity. Since the report is a summary of two years and includes all financial activity, the outcome is revenue of almost \$40 million and a "Change in Net Position," i.e. a net expense (loss) of \$802,571.

The net expense is a startling amount, but the "Management's Discussion and Analysis" (MD&A) on page 4-5 explains the reason.

First, due to the large volume and amount of Client Security Fund claims, the CSF program operated at a combined net expense of \$556,332 in 2012 and 2013 (the MD&A refers to only assessments collected and claims paid). This is 69% of the net expense total.

Second, the largest expense of bar operations after personnel is depreciation. Depreciation is a non-cash expense and totaled \$1,470,360 (\$1,011,003 is applicable to the building) for the two years. This expense will continue to remain large and likely will lead to the bar's audit report reflecting a negative "Change in Net Position" for the next few years.

Nancy Young, the lead auditor for Moss Adams, will be present by phone at the Budget & Finance Committee meeting. Her presence intends to satisfy Statement on Auditing Standards (SAS) 114 which requires the auditor to meet with "those charged with governance" and report any significant findings from the audit. Also, SAS 115 requires the auditor to report any internal control matters if any are identified in the audit.

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** June 27, 2014  
**From:** Travis Prestwich, Public Affairs Committee Chair  
**Re:** Best Practices for Indigent Defense and Juvenile Dependency Providers

---

### Issue

Whether to adopt proposed changes to the following standards to provide guidance to criminal and juvenile practitioners:

- 1) Specific Standards for Representation in Adult Criminal and Juvenile Delinquency Cases, and
- 2) Specific Standards of Representation in Juvenile Dependency Cases.

### Options

Adopt proposed changes to the Specific Standards for Representation in Adult Criminal and Juvenile Delinquency Cases and the Specific Standards of Representation in Juvenile Dependency Cases and update the current foreword: a statement of intent that these guidelines are not intended to establish a legal standard of care.

Adopt proposed changes to the Specific Standards for Representation in Adult Criminal and Juvenile Delinquency Cases and the Specific Standards of Representation in Juvenile Dependency Cases to provide guidance to practitioner.

Decline to adopt proposed changes to the Specific Standards for Representation in Adult Criminal and Juvenile Delinquency Cases and the Specific Standards of Representation in Juvenile Dependency Cases.

### Discussion

The Oregon State Bar has a history of concern for the quality of representation provided to persons in criminal, delinquency, dependency, civil commitment, and post-conviction proceeding. There have been at least four OSB task forces devoted to this subject.

In 1996, the Oregon State Bar Board of Governors first approved the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases. Adoption of the performance standards by the Bar was a key recommendation of the first task force.

These standards include a forward and five sections:

- 1) General Standards,
- 2) Specific Standards for Representation in Criminal and Juvenile Delinquency Cases,
- 3) Specific Standards for Representation in Juvenile Dependency Cases,
- 4) Specific Standards for Representation in Civil Commitment Proceedings, and

5) Maximum Caseload Standards for Defense Counsel.

In 2006, the Board revised the 1996 standards. In 2012, two separate task forces were created to revise sections 2 and 3. The first task force addressed criminal and delinquency cases and the second addressed juvenile dependency cases. The remaining standards were not addressed as they have been updated since 2006.

The standards have become a critical component of training and education efforts for lawyers practicing in these areas. Keeping them updated and relevant is important.

Nonetheless, concerns have been raised that the standards might create a standard of care and create a malpractice trap for practitioners. At the request of the Public Affairs Committee a forward has been included with the standards similar to what is contained in the 2006 version and quoted below:

"These guidelines are not rules of practice and are not intended to establish a legal standard of care. Some of the guidelines incorporate existing standards, such as the Oregon Rules of Professional Conduct, however, which are mandatory."

Identical language was included as well in the foreword to the standards for post-conviction relief practitioners, which the BOG adopted in 2009.

**Proposed Revised Standards**

Attached are the new standards produced by the criminal workgroup which replace what is published on the OSB website as "Specific Standards for Representation in Criminal and Juvenile Delinquency Cases." In addition, the juvenile workgroup has updated the "Specific Standards for Representation in Juvenile and Dependency Cases." These changes to sections 2 and 3 will make the "general standards" in Section 1 unnecessary.

*Specific Standards for Representation in Criminal and Juvenile Delinquency Cases*

The criminal and juvenile delinquency cases task force included academia, the bench, private practice, and public defender offices. Task force members were Margie Paris, Professor of Law, University of Oregon; Shaun McCrea, in private practice in Eugene; the Honorable Lisa Grief, Jackson County Circuit Court; Lane Borg, Executive Director, Metropolitan Public Defender; Julie McFarlane, Supervising Attorney, Youth, Rights & Justice; Shawn Wiley, Chief Deputy Defender, Appellate Division, Office of Public Defense Services. Paul Levy, General Counsel, Office of Public Defense Services, served as chair of the task force.

The task force examined existing standards and reviewed other state and national standards. The task force found that although Oregon's standards are grounded in the standards promulgated by the National Legal Aid and Defender Association (NLADA) in 1994, Oregon's standards differed. In addition, the task force also benefited from National Juvenile Defense Standards (2012), which present a systematic approach to defense practice in juvenile court. (The NJDC standards are available at <http://www.njdc.info/publications.php>.) While the revision recognizes this work as establishing a national norm for representation in delinquency cases, it melds parts of this work into Oregon standards.

The task force maintained a format of a short statement of a standard, followed by more detailed implementation language. New for this revision, and in keeping with the NLADA and many other state standards, is commentary following many of the standards, which provides additional background and guidance regarding a particular aspect of criminal or delinquency defense.

*Specific Standards of Representation in Juvenile Dependency Cases*

The task force created to address Juvenile Dependency standards included members from academia as well as from both private practice and public defender offices. Task force members were Julie McFarlane, Supervising Attorney, Youth, Rights & Justice; Shannon Storey, Office of Public Defense Services; Joseph Hagedorn, Metro Public Defender; Leslie Harris, University of Oregon Law School; Tahra Sinks, private practice in Salem; LeAnn Easton, Dorsay & Easton LLP; and Joanne Southey, Department of Justice Civil Enforcement Division.

It became very clear to members of the task force throughout this process that customs and practices in juvenile dependency cases vary widely from county to county in Oregon. While some of these differences may be more stylistic than substantive, some may have a significant impact on the rights of children and parents. One of the goals in writing the action and commentary sections of the standards was identify for attorneys best practices that may differ from the custom in their jurisdiction.

The goal of this task force was to create a revised set of standards that was both easy for the practitioner to read and understand and also provide relevant detail and explanations as necessary. As with the criminal standards, this task force sought to include, in addition to the rules and implementation sections, commentary to both explain the rationale behind the individual standards and to provide relevant real world examples when possible.

These revisions, if approved by the BOG, will serve as useful tools for both the new and experienced lawyer as a guide on the best practices for diligent and high quality representation. The revision may also serve as a helpful guide for courts, clients, the media and who wish to understand the expectations for defense lawyers in criminal and delinquency cases and juvenile dependency lawyers representing both juveniles and parents.

In conclusion, the revised standards may serve to increase Oregon Lawyers' expertise while not increasing exposure to malpractice claims.

Oregon State Bar

# Report of the Task Force on Standards of Representation in Criminal and Juvenile Delinquency Cases

**April 25, 2014**

# Foreword

The original version of the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases (hereafter, the performance standards) was approved by the Board of Governors on September 25, 1996. Significant changes to the original performance standards were adopted in 2006, and an additional set of standards pertaining to representation in post-conviction standards were adopted in 2009.

As noted in the earlier revision, in order for the performance standards to continue to serve as valuable tools for practitioners and the public, they must be current and accurate in their reference to federal and state laws and they must incorporate evolving best practices.

The Foreword to the original performance standards noted that “[t]he object of these [g]uidelines is to alert the attorney to possible courses of action that may be necessary, advisable, or appropriate, and thereby to assist the attorney in deciding upon the particular actions that must be taken in a case to ensure that the client receives the best representation possible.” This continues to be the case, as does the following, which was noted in both the Foreword in the 2006 revision and the Foreword to the 2009 post-conviction standards:

“These guidelines, as such, are not rules or requirements of practice and are not intended, nor should they be used, to establish a legal standard of care. Some of the guidelines incorporate existing standards, such as the Oregon Rules of Professional Conduct, however which are mandatory. Questions as to whether a particular decision or course of action meets a legal standard of care must be answered in light of all the circumstances presented.”

We hope that the revised Performance Standards, like the originals, will serve as a valuable tool both to the new lawyer or the lawyer who does not have significant experience in criminal and juvenile cases, and to the experienced lawyer who may look to them in each new case as a reminder of the components of competent, diligent, high quality legal representation.



Tom Kranovich  
Oregon State Bar President

# Table of Contents

<b>Summary and Background</b> .....	<b>1</b>
<b>Introduction to the Revised Standards</b> .....	<b>4</b>
<b>Specific Standards for Representation in Criminal and Juvenile Delinquency Cases</b> .....	<b>6</b>
<u>Standard 1.1 - Role of Defense Counsel</u> .....	6
<u>Standard 1.2 - Education, Training and Experience of Defense Counsel</u> .....	9
<u>Standard 1.3 - Obligations of Defense Counsel Regarding Workload</u> .....	11
<u>Standard 2.1 - Obligations of Defense Counsel at Initial Appearance</u> .....	12
<u>Standard 2.2 - Client Contact and Communication</u> .....	14
<u>Standard 2.3 - Release of Client</u> .....	17
<u>Standard 3 - Investigation</u> .....	18
<u>Standard 4.1 - Discovery</u> .....	21
<u>Standard 4.2 - Theory of the Case</u> .....	22
<u>Standard 5.1 - Pretrial Motions and Notices</u> .....	23
<u>Standard 5.2 - Filing and Arguing Pretrial Motions</u> .....	25
<u>Standard 5.3 - Pretrial Determination of Client’s Fitness to Proceed</u> .....	26
<u>Standard 5.4 - Continuing Obligations to File or Renew Pretrial Motions or Notices</u> .....	27
<u>Standard 6.1 - Exploration of Disposition without Trial</u> .....	28
<u>Standard 6.2 - Entry of Dispositional Plea or Admission</u> .....	32
<u>Standard 7.1 - General Trial Preparation</u> .....	33
<u>Standard 7.2 - Voir Dire and Jury Selection</u> .....	35
<u>Standard 7.3 - Opening Statement</u> .....	37
<u>Standard 7.4 - Confronting the Prosecution’s Case</u> .....	39
<u>Standard 7.5 - Presenting the Defense Case</u> .....	41
<u>Standard 7.6 - Closing Argument</u> .....	43
<u>Standard 7.7 - Jury Instructions</u> .....	44
<u>Standard 8.1 - Obligations of Counsel Concerning Sentencing or Disposition</u> .....	45
<u>Standard 9.1 - Consequences of Plea on Appeal</u> .....	53
<u>Standard 9.2 - Preservation of Issues for Appellate Review</u> .....	54
<u>Standard 9.3 - Undertaking an Appeal</u> .....	55
<u>Standard 9.4 - Post Sentencing and Disposition Procedures</u> .....	57
<u>Standard 9.5 - Maintain Regular Contact with Youth Following Disposition</u> .....	59

# **Report of the Task Force on Standards of Representation in Criminal and Juvenile Delinquency Cases**

## **Summary and Background**

In September of 1996, the Oregon State Bar Board of Governors approved the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases. In May of 2006, the Board accepted revisions to the 1996 standards. In 2012, at the direction of the OSB Board of Governors, the two separate task forces began meeting to work on significant revisions to the standards in criminal delinquency and dependency cases. One group focused on juvenile dependency standards, and the other on adult criminal and juvenile delinquency standards.

On the following pages the criminal task force has provided updated standards which are recommended to replace what is currently published on the OSB website as the specific standard “Specific Standards for Representation in Criminal and Juvenile Delinquency Cases.” These changes, when combined with the proposed revisions to the third specific standard (juvenile dependency – expected to be completed soon), will make the “general standards” in Section 1 unnecessary.

The task force included representative from academia, the bench and from both private practice and public defender offices. Task force members were Margie Paris, Professor of Law, University of Oregon; Shaun McCrea, in private practice in Eugene; The Honorable Lisa Grief, Jackson County Circuit Court; Lane Borg, Executive Director, Metropolitan Public Defender; Julie McFarlane, Supervising Attorney, Youth, Rights & Justice; Shawn Wiley, Chief Deputy Defender, Appellate Division, Office of Public Defense Services. Paul Levy, General Counsel, Office of Public Defense Services, served as chair of the task force.

The task force began its work by conducting a detailed examination of the existing standards and a review of other states' standards and the standards of national organizations. The task force found that although Oregon's standards, like those of most other states, are firmly grounded in the standards first promulgated by the National Legal Aid and Defender Association (NLADA) in 1994, the structure and substance of Oregon's standards had significant modifications.

The task force determined that the variations from the NLADA standards were both good and bad. On the positive side, through an earlier revision of the Bar standards in 2005, they reflected a growing recognition that the role of a juvenile defender is highly specialized and complex, requiring knowledge and skills unique to delinquency cases in addition to those required in adult criminal cases. The standards also placed emphasis on the collateral consequences of criminal convictions, presaging the U.S. Supreme Court's seminal decision on that subject.<sup>1</sup> Indeed, overall, the existing Oregon standards serve as strong and valid guideposts to effective criminal and juvenile defense.

But the task force also found that the structure of the standards was confusing and unhelpful. Why, for instance, should Oregon recognize five "general standards," only to repeat them again in another set of "specific standards"? And is it really necessary to set out in the standards specific provisions of the Oregon Rules of Professional Conduct when those obligations already exist for all attorneys in the state? More fundamentally, since the last revision in 2005, the defense of both criminal and delinquency cases has become increasingly complex and challenging. Advances in neuroscience, for instance, have challenged traditional notions of accountability in both delinquency and adult criminal cases. Adult criminal defense has changed dramatically with the evolution of constitutional doctrine applying the right to jury trial to some sentencing proceedings.

The ubiquity of computers and smartphones has also dramatically changed the type of evidence lawyers are likely to encounter, as well as how lawyers are likely to do their own work.

The task force decided that the original organization of NLADA's standards provided the best structure for our own standards, while preserving much of the good work that had already been done to update the Oregon standards prior to our revision. Thus, within a new structure, the task force maintained a format of a short statement of a standard followed by more detailed implementation language. New for this revision, and in keeping with the NLADA and many other state standards, is commentary following many of the standards, which provides

---

<sup>1</sup> *Padilla v. Kentucky*, 559 U.S. 356 (2010).

additional background and guidance regarding a particular aspect of criminal or delinquency defense.

The task force also had the benefit of recently published National Juvenile Defense Standards (2012), a work of the highly regarded National Juvenile Defender Center, which present a systematic approach to defense practice in juvenile court. While the new revision specifically recognizes this work as establishing a national norm for representation in delinquency cases, it also incorporates specific elements of this work into relevant Oregon standards.

The task force also brought its own considerable expertise and perspective to the review of existing standards and the drafting of revisions, consulting as required with other practitioners with recognized expertise in certain areas of practice. Building on an existing set of very good standards, the revision, if approved by the BOG, will serve as a useful tool for both the lawyer new to criminal and delinquency defense and the experienced lawyer who seeks guidance on the best practices for diligent and high quality representation. As such, the revision should be a useful tool for lawyers and law firms providing training for new lawyers. And they should serve as a helpful guide for courts, clients, the media and others in the interested public who wish to understand the expectations for defense lawyers in criminal and delinquency cases.

## Introduction to the Revised Standards

Since 2005, when these performance standards were last revised, the defense of criminal and delinquency cases has become increasingly complex and challenging. Advances in neuroscience, for instance, have challenged traditional notions of the legal status of juveniles under the United States Constitution, as reflected in cases limiting the authority of states to impose the most severe penalties on juvenile offenders<sup>2</sup> and requiring consideration of a youth's age in determining whether *Miranda* warnings should be given.<sup>3</sup> Likewise, adult criminal defense has changed dramatically with the evolution of constitutional doctrine applying the right to jury trial to sentencing proceedings<sup>4</sup> and expanding the obligations of lawyers to advise clients concerning the collateral consequences of guilty pleas.<sup>5</sup> The performance standards that follow reflect new best practices that have developed in response to these and other developments in the law, science and professional responsibilities of lawyers.

As in earlier versions of these standards, most of the guidance that follows applies in both adult criminal and juvenile delinquency cases. However, this revision reflects a growing recognition, already evident in the 2005 revision, that the role of a juvenile defender is highly specialized and complex, requiring knowledge and skills unique to the duties of counsel in delinquency cases in addition to those required to perform most of the functions of counsel in an adult criminal case. In addition, since the last revision, the National Juvenile Defender Center has published the *National Juvenile Defense Standards (2012)*, which present a systematic approach to defense practice in juvenile court and establish a national norm for this work. These new standards have informed the standards presented here but should also be consulted directly for detailed guidance on the obligations of counsel in delinquency cases.

The standards that follow do not address the special obligations of counsel in capital cases. While lawyers representing clients facing the death penalty will ordinarily be expected to meet the standards that follow here, additional duties of counsel in capital cases are presented and explained in detail in the *American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003)*. Lawyers in death penalty cases should continue to consult the ABA standards as well as the standards in this revision.

---

<sup>2</sup> *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

<sup>3</sup> *J.D.B. v. North Carolina*, 131 S. Ct. 502 (2011).

<sup>4</sup> *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004).

<sup>5</sup> *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010).

As noted in earlier versions of these standards, the guidance here will serve as a valuable tool for both the lawyer new to criminal or delinquency cases but also the experienced lawyer who seeks guidance on the best practices for diligent and high quality legal representation. But these standards should serve others as well. While they are not intended, nor should they be used, to establish a mandatory course of action in every case, they do reflect the current best practices for representation in criminal and delinquency cases. As such, they are a useful tool for lawyers and organizations providing training for new lawyers. They should also serve as a helpful guide for courts, clients, the media and others in the interested public who wish to understand the expectations for defense lawyers in criminal and delinquency cases.

# Specific Standards for Representation in Criminal and Juvenile Delinquency Cases

## STANDARD 1.1 – ROLE OF DEFENSE COUNSEL

The lawyer for a defendant in a criminal case and for a youth in a delinquency case should provide quality and zealous representation at all stages of the case, advocating at all times for the client's expressed interests. The lawyer shall abide by the Oregon Rules of Professional Conduct and applicable rules of court.

### Implementation:

1. In abiding by the Oregon Rules of Professional Conduct, a lawyer should ensure that each client receives competent, conflict-free representation in which the lawyer keeps the client informed about the representation and promptly responds to reasonable requests for information.
2. The defense of a delinquency case requires knowledge and skills specific to juvenile defense in addition to what is required for the defense of an adult criminal case. Lawyers representing clients in juvenile court should be familiar with and follow the National Juvenile Defender Center's *National Juvenile Defense Standards (2012)*.
3. In both criminal and juvenile delinquency cases, a lawyer is bound by the client's definition of his or her interests and should not substitute the lawyer's judgment for that of the client regarding the objectives of the representation. In delinquency cases, a lawyer should explain to the client and, where appropriate, to the client's parents that the lawyer may not substitute either his or her own view of the client's best interests or a parent's interests or view of the client's best interests for those expressed by the client.
4. A lawyer should provide candid advice to the client regarding the probable success and consequences of pursuing a particular position in the case and give the client the information necessary to make informed decisions. A lawyer should consult with the client regarding the assertion or waiver of any right or position of the client.

5. A lawyer should consult with the client on the strategy and means by which the client's objectives are to be pursued and exercise the lawyer's professional judgment concerning technical and tactical decisions involved in the representation.

Commentary:

The paramount obligation of a lawyer is to advocate for a client's cause with zeal, skill and devotion. It is wrong to assert that the vague notion that a lawyer's role as an "officer of the court" should temper a lawyer's commitment to a client's cause. "The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the [client's] counselor and advocate with courage and devotion and to render effective, quality representation."<sup>6</sup> Indeed, a former Oregon State Bar General Counsel and Executive Director has argued convincingly that "the notion that [lawyers] have ethical duties to courts and judges as 'officers of the court' is erroneous and confusing."<sup>7</sup>

Especially in criminal and delinquency cases, where lawyers often represent troubled clients accused of conduct that may be widely condemned, the overarching duty of counsel is a "vigorous advocacy of the client's cause," guided by "a duty of loyalty" and the employment of the skill and knowledge necessary for a reliable adversarial system of justice.<sup>8</sup> As a matter of professional responsibility, "[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."<sup>9</sup>

The same obligations of counsel in criminal cases apply with equal force in representing youth in juvenile delinquency proceedings. "At each stage of the case, juvenile defense counsel acts as the client's voice in the proceedings, advocating for the client's expressed interests, not the client's 'best interest' as determined by counsel, the client's parents or guardian, the probation officer, the prosecutor, or the judge."<sup>10</sup> Likewise, "[t]here is no exception to attorney-client confidentiality in juvenile cases for parents or guardians," nor in service of what counsel

---

<sup>6</sup> *ABA Standards for Criminal Justice, Standard 4.1.2 The Function of Defense Counsel* (3d ed. 1993).

<sup>7</sup> *Officers of the Court: What does it mean?* George Riemer, Bar Counsel Column, Oregon State Bar Bulletin, August 2001.

<sup>8</sup> *Strickland v. Washington*, 446 U.S. 668, 104 S. Ct. 2052 (1984).

<sup>9</sup> *ABA Model Rules of Professional Conduct, Commentary to Rule 1.3*, ABA Center for Professional Responsibility (2007).

<sup>10</sup> *The Role of Juvenile Defense Counsel in Delinquency Court*, p. 7, National Juvenile Defender Center (2009).

or others consider the client’s “best interest.”<sup>11</sup> Nor does a juvenile’s minority status “automatically constitute diminished capacity such that a juvenile defense attorney can decline to represent the client’s expressed interests.”<sup>12</sup>

In both delinquency and criminal cases, “[c]ertain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel.”<sup>13</sup> In both circumstances, however, decisions by either the client or lawyer should be made after full consultation. The ABA standards identify decisions for the client as what pleas to enter, whether to accept a plea agreement, whether to waive jury trial, whether to testify in his or her own behalf and whether to appeal. The ABA standards likewise identify strategic and tactical decisions made by the lawyer to include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions to make, and what evidence should be introduced.

As noted, that allocation of decisional authority applies with equal force in delinquency cases.<sup>14</sup> However, in delinquency cases, a lawyer may need to emphasize that the client is “in charge” of the critical decisions in the case. “In clear, concise, and developmentally appropriate terms, counsel must exercise special care at the outset of representing a client to clarify the scope and boundaries of the attorney-client relationship.”<sup>15</sup>

Although Standard 1.1 calls for a strong client-centered model of advocacy, “[d]efense counsel is the professional representative of the accused, not the accused’s alter ego.”<sup>16</sup> Thus, defense counsel “has no duty to execute any directive of the accused which does not comport with law” or with the lawyer’s obligations under standards of professional conduct. *Id.* Moreover, in those areas of strategic and tactical decision making that are committed to the informed judgment of counsel after consultation with the client, there is no obligation on counsel “to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to press those points.”<sup>17</sup> Indeed, it would be an abdication of counsel’s professional responsibilities to acquiesce to a client’s ill-advised directions in these matters for the sake of expediency or to mollify a difficult client.

---

<sup>11</sup> *Id.* p. 12.

<sup>12</sup> *Id.* p. 10.

<sup>13</sup> *ABA Standards for Criminal Justice, The Defense Function, Standard 4-5.2, Control and Direction of the Case* (3d ed. 1993).

<sup>14</sup> See, *National Juvenile Defense Standards, Standard 2.2, Explain the Attorney-Client Relationship*, National Juvenile Defender Center (2012).

<sup>15</sup> *Id.*

<sup>16</sup> *ABA Standards for Criminal Justice, Standard 4.1.2 The Function of Defense Counsel* (3d ed. 1993).

<sup>17</sup> *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308 (1983).

Previous versions of these standards often repeated verbatim are applicable provisions of the Oregon Rules of Professional Conduct and predecessor rules of professional responsibility. The absence of specific reference to the Rules of Professional Conduct in the current version of these standards should not be taken as reflecting a position that they apply with any less force to defense counsel.

## **STANDARD 1.2 – EDUCATION, TRAINING AND EXPERIENCE OF DEFENSE COUNSEL**

- A. To provide quality representation, a lawyer must be familiar with the applicable substantive and procedural law, and its application in the particular jurisdiction where counsel provides representation. A lawyer has a continuing obligation to stay current with changes and developments in the law and with changing best practices for providing quality representation in criminal and delinquency cases. Where appropriate, a lawyer should also be informed of the practices of the specific judge before whom a case is pending.**
  
- B. Prior to handling a criminal or delinquency matter, a lawyer should have sufficient experience or training to provide quality representation.**

### **Implementation:**

1. In order to remain proficient in the law, court rules and practice applicable to criminal and delinquency cases, a lawyer should regularly monitor the work of Oregon and pertinent Federal appellate courts and the Oregon State Legislature.
  
2. To stay current with developments in the law and practice of criminal and delinquency cases, a lawyer should maintain membership in state and national organizations that focus on education and training in the practice of criminal and delinquency cases and subscribe to listservs, consult available online resources, and attend continuing legal education programs devoted to the practice of criminal and delinquency cases.
  
3. A lawyer practicing criminal or juvenile delinquency law should complete at least 10 hours of continuing legal education training in criminal and delinquency law each year.
  
4. A lawyer practicing in criminal or juvenile delinquency law should become familiar with the basics of immigration law pertinent to the possible immigration consequences of a criminal conviction or an adjudication in a delinquency case for noncitizen clients. At

least two hours of a lawyer's mandatory continuing legal education training requirements each year should involve training on such immigration consequences. Lawyers should also be familiar with other non-penal consequences of a criminal conviction or delinquency adjudication, such as those affecting driving privileges, public benefits, sex offender registration, residency restrictions, student financial aid, opportunities for military service, professional licensing, firearms possession, DNA sampling, HIV testing, among others.

5. Before undertaking representation in a criminal or delinquency case, a less experienced lawyer should obtain training in the relevant areas of practice and should consult with others in the field, including nonlawyers. A less experienced lawyer should observe and, when possible, serve as co-counsel to more experienced lawyers prior to accepting sole responsibility for a criminal or delinquency case. More experienced lawyers should mentor less experienced lawyers.
6. Lawyers in delinquency cases and, where relevant, in criminal cases, should develop a basic knowledge of child and adolescent development, including information concerning emotional, social and neurological development that could impact effective communication by the lawyer with clients and the defense of charges against the client. Lawyers in delinquency cases should have training in communicating with youth in a developmentally appropriate way.
7. Lawyers representing youth who are prosecuted in the adult criminal system should have the specialized training and experience of a juvenile defender in addition to the training and experience required to handle the most serious adult criminal cases.
8. A lawyer providing representation in criminal and juvenile delinquency cases should be familiar with key agencies and services typically involved in those cases, such as the Oregon Department of Corrections, local community corrections programs, the Oregon Youth Authority, the Department of Human Services, county Juvenile Departments, private treatment facilities and programs, along with other services and programs available as dispositional alternatives to detention and custody.

Commentary:

The complexity and seriousness of criminal and juvenile delinquency cases require specialized training and expertise in a broad area of law and practical skills. Moreover, as the practice of law in these areas continues to develop, lawyers must devote a substantial amount

of time to on-going training. From complex, ever-changing sentencing schemes to the increased role of scientific evidence and forensic experts, defense lawyers must master not only the skills of trial advocacy but also the complex legal and factual issues attendant to many cases. For instance, recent advances in neuroscience and the understanding of infant and adolescent brain development undermine traditional notions of culpability and blameworthiness for both juvenile and adult offenders, requiring defense lawyers to learn the pertinent scientific principles and present them as evidence in appropriate cases. Likewise, as computers, smartphones and other electronic devices become an integral part of everyday life for most youth and adults, counsel must understand and utilize their evidentiary potential.

As criminal and delinquency cases have become more serious and complex, the collateral consequences of convictions and adjudications have become more numerous and significant. Lawyers must now understand and explain the immigration consequences of a criminal conviction to noncitizen clients in order to fulfill the Sixth Amendment rights of those clients.<sup>18</sup> Depending upon the particular circumstances of a client, other collateral consequences may be just as important as deportation, requiring a lawyer to understand and seek to mitigate the impact of a conviction on a client's employment, housing, public assistance, schooling and other fundamental life activities.

The increased complexity and seriousness of criminal and delinquency cases require lawyers to take advantage of membership organizations that provide not only seminars and other training but also access to blogs, listservs, videos, motions and memoranda, and other online resources that alert lawyers to the latest developments in a pertinent area of law, provide a forum to seek case-specific guidance, and promote a culture of zealous, client-centered representation. The days of the solo practitioner toiling alone are in the past. In Oregon, the Oregon Criminal Defense Lawyers Association, the Oregon State Bar, the National Association of Criminal Defense Lawyers and the National Juvenile Defender Center help provide the tools essential to successful practice in these areas. While direct peer-to-peer consultation, mentoring or guidance remains important, membership in an organization focused on criminal and juvenile defense has become the norm for best practices in Oregon.

### **STANDARD 1.3 – OBLIGATIONS OF DEFENSE COUNSEL REGARDING WORKLOAD**

**Before agreeing to act as counsel or accept appointment by a court, a lawyer has an obligation to make sure that he or she has sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a criminal matter or a youth in a**

---

<sup>18</sup> *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L Ed 2d 284 (2010).

**delinquency case. If it later appears that the lawyer is unable to offer quality representation in the case, the lawyer should move to withdraw.**

Implementation:

1. A lawyer, whether court-appointed or privately retained, should not accept workloads that, by reason of size or complexity, interfere with the ability of the lawyer to meet professional obligations to each client.
2. A lawyer should have access to sufficient support services and resources to allow for quality representation.

Commentary:

In 2007, the Oregon State Bar (OSB) Board of Governors approved Formal Ethics Opinion No. 2007-178, which was based upon the American Bar Association Formal Ethic Opinion No. 06-441, entitled “Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation.” The OSB opinion, which makes clear that it addresses appointed and retained counsel, commands lawyers to control their workloads to enable them to discharge their ethical obligations “to provide each client with competent and diligent representation, keep each client reasonably informed about the status of his or her case, explain each matter to the extent necessary to permit the client to make informed decisions regarding the representation, and abide by the decisions that the client is entitled to make.” The opinion observes, quoting the ABA opinion, that for every client a lawyer is required to “keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; and communicate effectively on behalf of and with clients[.]” The opinion observes that a “lawyer who is unable to perform these duties may not undertake or continue with representation of a client.”

**STANDARD 2.1 – OBLIGATIONS OF DEFENSE COUNSEL AT INITIAL APPEARANCE**

**At the initial court appearance in a criminal or delinquency case, a lawyer should inform the client of the offenses alleged in the charging instrument or petition, assert pertinent statutory and constitutional rights of the client on the record and, where appropriate, attempt to secure the pretrial release of detained clients under the conditions most favorable and acceptable to the client.**

### Implementation:

1. A lawyer should be familiar with the law regarding initial appearance, arraignment, and juvenile detention.
2. A lawyer should be familiar with the local practice regarding case docketing and processing so that the lawyer may inform the client regarding expected case events and the dates for upcoming court appearances.
3. A lawyer should be prepared to enter an appropriate assertion that preserves the client's rights and demands due process, whether that is a not guilty plea or a denial of the allegations in a delinquency petition, demand for preliminary hearing or request for some other further proceeding. A lawyer should make clear that the defendant reserves the following rights in the present and any other matter:
  - a. Right to remain silent under State and Federal Constitutions;
  - b. Right to counsel under State and Federal Constitutions;
  - c. Right to file challenges to the charging instrument or petition;
  - d. Right to file challenges to the evidence;
  - e. Right to file notices of affirmative defenses; and
  - f. Right to a speedy trial.
4. A lawyer should be prepared to object to the court's failure to comply with the law regarding the initial appearance process, such as the statute requiring an ability to confer confidentially with the client during a video arraignment.
5. If the client is in custody, a lawyer should seek release from custody or detention (See Standard 2.3).
6. A lawyer should obtain all relevant documents and orders that pertain to the client's initial appearance.
7. A lawyer may waive formal reading of the allegations and advice of rights by the court, providing the lawyer advises the client what rights are waived, the nature of the charges, and the potential consequences of relinquishing his rights.

8. If the adjudicatory judge is assigned at the initial appearance, the lawyer must be familiar with the law and local practice for filing motions to disqualify a judge, discuss this with the client, and be prepared to timely file appropriate documents challenging an assigned judge.

Commentary:

While substantive law has been largely standardized throughout the state, court procedural rules still vary significantly by county or judicial district. A lawyer should be familiar with the local practice codified in the Supplementary Local Rules (SLRs) as well as those preserved only as oral tradition (the local unwritten rules). Because Oregon allows for self-bail on posting security, the lawyer should be familiar with local sheriff office practices regarding posting security and when deposited moneys will be available to clients.

Jurisdictions vary on when a trial judge is actually assigned and, therefore, the time for filing motions for change of judge will vary. Some counties require all plea discussions to occur prior to entry of the not guilty plea, but will often set over plea entry to allow for discovery and negotiations. Some counties will stick closely to the time requirements in the Uniform Trial Court Rules, but constitutional due process rights may trump a jurisdiction's procedural requirements or administrative rules.<sup>19</sup>

## **STANDARD 2.2 – CLIENT CONTACT AND COMMUNICATION**

**A lawyer should conduct a client interview as soon as practicable after representation begins and thereafter establish a procedure to maintain regular contact with the client in order to explain the allegations and nature of the proceedings, meet the ongoing needs of the client, obtaining necessary information from the client, consult with the client about decisions affecting the course of the defense and to respond to requests from the client for information or assistance concerning the case.**

Implementation:

1. A lawyer should provide a clear explanation, in developmentally appropriate language, of the role of both the client and the lawyer, and demonstrate appropriate commitment to the client's expressed interests in the outcome of the proceedings. A lawyer should

---

<sup>19</sup> *State v. Owens*, 68 Or. App. 343 (1984).

elicit the client's point of view and encourage the client's full participation in the defense of the case.

2. The initial interview should be in person, in a private setting that allows for a confidential conversation. When the client is a youth, a lawyer should not allow parents or other people to participate in the initial meeting with the client, in order to maintain privileges and assure that the client knows the communication is confidential.
3. If the client is in custody and a release or detention hearing is pending, the lawyer should be familiar with the law regarding detention, the criteria for release and discuss with the client release factors and resources available to the client to obtain pretrial release.
4. At the initial meeting, the lawyer should review the charges facing the client and be prepared to discuss the necessary elements of the charges, the procedure the client will be facing in subsequent court appearances, and inquire if the client has any immediate needs regarding securing evidence or obtaining release.
5. Prior to all meetings, the lawyer should:
  - a. Be familiar with the elements of the charged offense(s) and the potential punishment;
  - b. Obtain copies of any relevant documents that are available including any charging documents, recommendations and reports made by agencies concerning pretrial release and law enforcement reports that might be available;
  - c. Be familiar with the legal procedure the client will encounter and be prepared to discuss the process with the client;
  - d. If a client is in custody, be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release, and in a juvenile proceeding be prepared to discuss the process of ongoing detention review.
6. During an initial interview with the client, a lawyer should:
  - a. Obtain information concerning:
    - 1) The client's ties to the community, including the length of time he or she has lived at current and former addresses, family relationships, immigration status (if applicable), employment record and history;

- 2) The client's history of service in the military, if any;
  - 3) The client's physical and mental health, educational and military services records;
  - 4) The client's immediate medical needs;
  - 5) The client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether he or she is on probation or parole and the client's past or present performance under supervision;
  - 6) The ability of the client to meet any financial conditions of release;
  - 7) The names of individuals, or other sources, that counsel can contact to verify the information provided by the client; and the client's permission to contact these individuals;
- b. Provide to the client information including but not limited to:
- 1) An explanation of the procedures that will be followed in setting the conditions of pretrial release;
  - 2) An explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;
  - 3) An explanation of the lawyer-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the lawyer;
  - 4) The charges and the potential penalties, as well as potential collateral consequences, of any conviction and sentence;
  - 5) A general procedural overview of the progression of the case, where possible;
  - 6) Advice that communication with people other than the defense team is not privileged and, if the client is in custody, may be monitored.
7. A lawyer should use any contact with the client as an opportunity to gather timely information relevant to preparation of the defense. Such information may include, but is not limited to:
- a. The facts surrounding the charges against the client;
  - b. Any evidence of improper police investigative practices or prosecutorial conduct that affects the client's rights;

- c. Any possible witnesses who should be located;
- d. Any evidence that should be preserved;
- e. Where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense.

Commentary:

The purpose of the initial contact is to quickly ascertain and identify work that needs to be done to prepare for the defense, including documenting the status or condition of evidence that could be lost, such as injuries to the defendant or crime scene conditions; establishing a relationship with the client; informing the client of the charges against him or her and the possible consequences; and reviewing next steps such as preparing for a release hearing or preliminary hearing. The relationship between a criminal defendant or youth charged with delinquency and a lawyer will be directly affected by the quality of their communication, which starts with the initial interview where the lawyer can provide the client important information and obtain relevant case information from the client. There is a strong correlation between good lawyer/client communication and the lack of complaints from clients about poor representation or requests for substitute counsel. If this correlation is more than coincidence then it is likely that the key to successful representation is good communication that begins with a timely and thorough initial interview.

The duty to communicate is found in Oregon Rule of Professional Conduct 1.4 and forms a core duty that the lawyer owes the client. Aside from addressing the immediate needs of the client to secure release or preserve evidence, the initial interview (along with subsequent meetings) forms the source of another core duty, the duty to investigate. A review of information with the client may assist in determining who needs to be interviewed or what evidence may need expert evaluation.

Communication and contact with the client is an important source for the lawyer to assess the client's mental status to understand the proceedings. The lawyer should make note of concerns and consult appropriate experts regarding concerns over competency.

**STANDARD 2.3 – RELEASE OF CLIENT**

- A. A lawyer has a duty to seek release from custody or detention of clients under the conditions most favorable and acceptable to the client.**
  
- B. Release should be sought at the earliest possible opportunity and if not successful a lawyer should continue to seek release at appropriate subsequent hearings.**

### Implementation:

1. If the client is in custody or detention, the lawyer should review the documents supporting probable cause and, if appropriate, challenge any finding of probable cause. In all cases where detention continues, the lawyer should move for release if appropriate or ask that bail be reduced to an amount the client can afford.
2. If the court will not consider release at initial appearance, the lawyer should request a release hearing and decision within the statutory time requirements. In delinquency proceedings, the lawyer should be familiar with the law and procedures for detention hearings and the risk factors that the court is likely or required to consider. In criminal cases, at any release hearing, the lawyer should be familiar with the statutory criteria for release and be prepared to address those release factors on the record.
3. In preparation for a release hearing the lawyer should discuss statutory release criteria with the client and be prepared to address the court regarding these factors including residence, employment, compliance with release conditions such as no contact with victims and any release compliance monitoring.
4. If the client is subject to release on security, the lawyer should be familiar with the rules and requirements to post security, including procedures for client “self-bailing” with funds from an inmate account, posting a security interest in property, or third party posting requirements.

### **STANDARD 3 - INVESTIGATION**

**A lawyer has the duty to conduct an independent review of the case, regardless of the client’s admissions or statements to the lawyer of facts constituting guilt or the client’s stated desire to plead guilty or admit guilt. Where appropriate, the lawyer should engage in a full investigation, which should be conducted as promptly as possible and should include all information, research, and discovery necessary to assess the strengths and weaknesses of the case, to prepare the case for trial or hearing, and to best advise the client as to the possibility and consequences of conviction or adverse adjudication. The lawyer should not knowingly use illegal means to obtain evidence or instruct others to do so.**

## Implementation:

1. A lawyer should obtain copies of all charging documents and should examine them to determine the specific charges that have been brought against the client.
2. A lawyer should engage in research, including a review of all relevant statutes and case law, in order to determine:
  - a. The necessary elements of the charged offenses;
  - b. Any defects in the charging instrument, both constitutional and non-constitutional, including statute of limitations and double jeopardy;
  - c. Whether the court's jurisdiction can be challenged;
  - d. Applicability of defenses, ordinary and affirmative, including defenses based on mental disease or defect, diminished capacity, or partial responsibility, and whether any notice of such defenses is required and specific timelines for giving notice; and
  - e. Potential consequences of conviction or adverse adjudication, including those relating to immigration and possible deportation.
3. A lawyer should conduct an in-depth interview with the client as described in Standard 2.2. The interview should be used to identify:
  - a. Additional sources of information concerning the incidents or events giving rise to the charges and to any defenses;
  - b. Evidence concerning improper conduct or practices by law enforcement, juvenile authorities, mental health departments, or the prosecution, which may affect the client's rights or the admissibility of evidence;
  - c. Information relevant to the court's jurisdiction;
  - d. Information relevant to pretrial or prehearing release and possible pretrial or prehearing disposition; and
  - e. Information relevant to sentencing or disposition and potential consequences of conviction or adverse adjudication.
4. A lawyer should consider whether to interview potential witnesses, whether adverse, neutral, or favorable, and when new evidence is revealed during the course of witness interviews, the lawyer should locate and assess its value to the client. Witness interviews should be conducted by an investigator or in the presence of a third person who will be available, if necessary, to testify as a defense witness at the trial or hearing.

When speaking with third parties, the lawyer has a duty to comply with the Oregon Rules of Professional Conduct, including Rule 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 4.2 (Communication with Person Represented by Counsel), and 4.3 (Dealing with Unrepresented Persons). The lawyer also has a duty, where appropriate, to comply with statutory rights of victims, such as those embodied in ORS 135.970(2) and (3).

5. A lawyer should attempt to interview all law enforcement officers involved in the arrest and investigation of the case and should obtain all pertinent information in the possession of the prosecution, juvenile authorities, or law enforcement, including, where relevant, law enforcement personnel records and documentation of prior officer misconduct. In cases involving child witnesses or victims, the lawyer should seek records of counseling sessions with those children. The lawyer should pursue formal and informal discovery with authorities as described in Standard 4.1.
6. Where appropriate, a lawyer should inspect the scene of the alleged offense under circumstances (including weather, lighting conditions, and time of day) as similar as possible to those existing at the time of the alleged incident.
7. Where appropriate, a lawyer should obtain school, mental health, medical, drug and alcohol, immigration, and prior criminal offense and juvenile records of the client and witnesses.

#### Commentary:

A skilled and knowledgeable lawyer will be of little use to a client without a thorough understanding of the facts of a case. As explained in the Commentary to the *National Juvenile Defense Standards*:

Most cases are won on facts, not legal arguments, and it is investigation that uncovers the facts. The facts are counsel's most important asset, not only in litigating the case at trial, but in every other function counsel performs, including negotiating for reduced or dismissed charges, diversion, or a plea agreement, as well as influencing a favorable disposition.

An investigation is important even when the client has admitted culpability or expresses a desire to plead guilty. An investigation may yield evidence that can lead to suppression of key state evidence, negate or block the

admissibility of state evidence, or limit the client's liability. Even if the investigation does not result in an acquittal or dismissal, it may yield evidence that can be useful in negotiating a more favorable plea agreement or mitigation of disposition.<sup>20</sup>

## **STANDARD 4.1 – DISCOVERY**

**A lawyer has the duty to pursue formal and informal discovery in a prompt fashion and to continue to pursue opportunities for discovery throughout the case.**

### **Implementation:**

1. A lawyer should be familiar with all applicable statutes, rules and case law governing discovery, including those concerning the processes for filing motions to compel discovery or to preserve evidence, as well as those making sanctions available when the prosecution has engaged in discovery violations.
2. A lawyer should also be familiar with and observe the applicable statutes, rules and case law governing the obligation of the defense to provide discovery. A lawyer should file motions for protective orders or otherwise resist discovery where a lawful basis exists to shield information in the possession of the defense from disclosure.
3. A lawyer should make a prompt and comprehensive demand for discovery pursuant to applicable rules and constitutional provisions and should continually seek all information to which the client is entitled, especially any exculpatory, impeaching and mitigating evidence. Discovery should include, but is not limited to, the following:
  - a. Potentially exculpatory, impeaching and mitigating information;
  - b. Law enforcement reports and notes, 911 recordings and transcripts, inter-officer transmissions, dispatch reports, and reports or notes of searches or seizures and the circumstances in which they were accomplished;
  - c. Written communications, including emails, between prosecution, law enforcement and/or witnesses;
  - d. Names and addresses of prosecution witnesses, their prior statements, their prior criminal records and their relevant digital, electronic and social media postings;

---

<sup>20</sup> National Juvenile Defender Center, *National Juvenile Defense Standards*, Sec. 4.1, at 68-69 (citations omitted).

- e. Oral or written statements by the client and the circumstances under which those statements were made;
  - f. The client's prior criminal or juvenile record and evidence of any other misconduct that the prosecution may intend to use against the client;
  - g. Copies of, or the opportunity to inspect books, papers, documents, photographs, computer data, tangible objects, buildings or places, and other material relevant to the case;
  - h. Results or reports of physical or mental examinations, and of scientific tests or experiments, and the data and documents on which they are based;
  - i. Statements and reports of experts and the data and documents on which they are based; and
  - j. Statements of co-defendants.
4. A lawyer should consider filing motions seeking to preserve evidence where it is at risk of being destroyed or altered.

## **STANDARD 4.2 – THEORY OF THE CASE**

**A lawyer should develop and continually reassess a theory of the client's case that advances the client's goals and encompasses the realities of the client's situation.**

### **Implementation:**

1. A lawyer should use the theory of the case when evaluating strategic choices throughout the course of the representation.
2. A lawyer should allow the theory of the case to focus the investigation and trial or hearing preparation, seeking out and developing facts and evidence that the theory makes material.
3. A lawyer should remain flexible enough to modify or abandon the theory if it does not serve the client.

### **Commentary:**

The theory of the case is a construct that can guide the preparation and presentation of a case. A theory of the case should explain the facts of the case in such a way that a judge or jury will understand why the client is entitled to a favorable verdict. As such, it is first and

foremost a factual narrative that presents the client’s story in straightforward common sense terms that support a favorable verdict under the law applicable to the case. It must be informed by thorough investigation and preparation so that a lawyer will know which facts a judge or jury is likely to accept as proven. It must also account for what fact finders are likely to believe based upon their own life experiences. Finally, a theory of the case must account for the jury instructions and other law applicable to the case. Although a theory of the case should be developed early in the representation of a client and be largely built upon the client’s version of events, a lawyer must be able to revisit and revise the theory, in consultation with the client, as investigation and preparation continue to develop the facts that a judge or jury are likely to accept as true at the conclusion of the trial.

## **STANDARD 5.1 – PRETRIAL MOTIONS AND NOTICES**

**A lawyer should research, prepare, file and argue appropriate pretrial motions and notices whenever there is reason to believe the client may be entitled to relief.**

### Implementation:

1. The decision to file a particular pretrial motion or notice should be made after thorough investigation and after considering the applicable law in light of the circumstances of the case.
2. Among the issues the lawyer should consider addressing in pretrial motions are:
  - a. The pretrial custody of the accused;
  - b. The competency or fitness to proceed the accused (see Standard 5.3);
  - c. The constitutionality of relevant statutes;
  - d. Potential defects in the charging process or instrument;
  - e. The sufficiency of the charging document;
  - f. The severance of charges and/or co-defendants for trial;
  - g. Change of venue;
  - h. The removal of a judicial officer from the case through requests for recusal or the filing of an affidavit of prejudice;
  - i. The discovery obligations of both the prosecution and the defense, including:

- 1) Motions for protective orders;
  - 2) *Brady v. Maryland*<sup>21</sup> motions; and
  - 3) Motions to compel discovery.
- j. Violations of federal and/or state constitutional or statutory provisions, including:
- 1) Illegal searches and/or seizures;
  - 2) Involuntary statements or confessions;
  - 3) Statements obtained in violation of the right to counsel or privilege against self-incrimination;
  - 4) Unreliable identification evidence;
  - 5) Speedy trial rights; and
  - 6) Double jeopardy protections.
- k. Requests for, and challenges to denial of, funding for access to reasonable and necessary resources and experts, such as:
- 1) Interpreters;
  - 2) Mental Health Experts;
  - 3) Investigative services; and
  - 4) Forensic services.
- l. The right to a continuance in order to adequately prepare and present a defense or to respond to prosecution motions;
- m. Matters of trial evidence that may be appropriately litigated by means of a pretrial motion *in limine*, including:
- 1) The competency or admissibility of particular witnesses, including experts and children;
  - 2) The use of prior convictions for impeachment purposes;
  - 3) The use of prior or subsequent bad acts;
  - 4) The use of reputation or other character evidence; and
  - 5) The use of evidence subject to “rape shield” protections.
- n. Notices of affirmative defenses and other required notices to present particular evidence;
- o. The dismissal of charges on the basis of a civil compromise, best interests of a youth in delinquency cases, in the furtherance of justice and the general equitable powers of the court.
3. Before deciding not to file a motion or to withdraw a motion already filed, a lawyer should carefully consider all facts in the case, applicable law, case strategy and other relevant information, including:

---

<sup>21</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

- a. The burden of proof, the potential advantages and disadvantages of having witnesses testify at pretrial hearings and to what extent a pretrial hearing reveals defense strategy to a client’s detriment;
- b. Whether a pretrial motion may be necessary to protect the client’s rights against later claims of waiver, procedural default or failure to preserve an issue for later appeal;
- c. The effect the filing of a motion may have upon the client’s speedy trial rights; and
- d. Whether other objectives, in addition to the ultimate relief requested by a motion, may be served by the filing and litigation of a particular motion.

**STANDARD 5.2 – FILING AND ARGUING PRETRIAL MOTIONS**

**A lawyer should prepare for a motion hearing just as he or she would prepare for trial, including preparing for the presentation of evidence, exhibits and witnesses.**

**Implementation:**

- 1. Motions should be timely filed, comport with the formal requirements of the court and succinctly inform the court of the authority relied upon.
- 2. When a hearing on a motion requires taking evidence, a lawyer’s preparation should include:
  - a. Investigation, discovery and research relevant to the claims advanced;
  - b. Subpoenaing all helpful evidence and witnesses;
  - c. Preparing witnesses to testify; and
  - d. Fully understanding the applicable burdens of proof, evidentiary principles and court procedures, including the costs and benefits of having the client or other witnesses testify and be subject to cross examination.
- 3. A lawyer should consider the strategy of submitting proposed findings of fact and conclusions of law to the court at the conclusion of the hearing.
- 4. After an adverse ruling, a lawyer should consider seeking interlocutory relief, if available, taking necessary steps to perfect an appeal and renewing the motion or objection during trial in order to preserve the matter for appeal.

## **STANDARD 5.3 – PRETRIAL DETERMINATION OF CLIENT’S FITNESS TO PROCEED**

**A lawyer must be able to recognize when a client may not be competent to stand trial and take appropriate action.**

### Implementation:

1. A lawyer must learn to recognize when a client’s ability to aid and assist in the proceedings may be compromised due to mental health disorders, developmental immaturity or developmental and/or intellectual disabilities.
2. A lawyer must assess whether the client’s level of functioning limits his or her ability to communicate effectively with counsel, as well as his or her ability to have a factual and rational understanding of the proceedings.
3. When a lawyer has reason to doubt the client’s competency to stand trial, the lawyer should gather information and consider filing a pretrial motion requesting a competency determination.
4. In deciding whether to request a competency determination, a lawyer must consider, among other things:
  - a. His or her obligations, under Oregon Rule of Professional Conduct 1.14, to maintain a normal attorney-client relationship, to the extent possible, with a client with diminished capacity; and
  - b. The likely consequences of a finding of incompetence and whether there are other ways to resolve the case, such as dismissal upon obtaining services for the client or referral to other agencies.
5. If the lawyer decides to proceed with a competency hearing, he or she should secure the services of a qualified expert. When the client is a youth, such an expert should be versed in the emotional, physical, cognitive and language impairments of children and adolescents; the forensic evaluation of youth; the competence standards and accepted criteria used in evaluating juvenile competence; and effective interventions or treatment for youth.

6. If a court finds an adult client incompetent to proceed, a lawyer should advocate for the least restrictive level of supervision and the least intrusive treatment available. If the client is a youth, a lawyer should seek to resolve the delinquency case by having the petition converted to a dependency petition or through a motion to dismiss in the best interests of the youth.
7. If a court finds a client is competent to proceed, a lawyer should continue to raise the matter during the course of the proceedings if the lawyer has a good faith concern about the client's continuing competency to proceed and in order to preserve the matter for appeal.

#### **STANDARD 5.4 – CONTINUING OBLIGATIONS TO FILE OR RENEW PRETRIAL MOTIONS OR NOTICES**

**During trial or subsequent proceedings, a lawyer should be prepared to raise any issue which is appropriately raised pretrial but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Counsel should also be prepared to renew a pretrial motion if new supporting information is disclosed in later proceedings.**

##### Commentary:

In many cases, the dispositive issue may concern some issue other than whether the client committed the alleged offense. Invariably, these issues should be the subject of pretrial motions, supported by thorough factual investigation and legal research. The range of such issues is broad, as illustrated by the foregoing standard. The timing of motions is a strategic consideration and a function of court rule and, in many instances, local court practice. In every case, in order to determine whether to litigate a pretrial motion, a lawyer must be knowledgeable about current developments in the defense of criminal and delinquency cases and be skilled in presenting evidence and arguments on complex legal issues.

The potential advantages of litigating pretrial motions are many. This point is perhaps best summarized by the commentary on this subject in the *National Juvenile Defense Standards*, which reads as follows:

Pre-trial motions hearings provide immediate and long-term benefits. Immediately, counsel has the opportunity to convince the judge that the case should be dismissed, or at the very least that certain evidence should

be suppressed. Counsel also has the benefit of additional discovery through the state's responses to the motion prior to trial.

In the long-term, when motions generate a hearing, counsel can gain invaluable opportunities to pin down prosecution witnesses on the record and develop transcripts that could be used to impeach the witnesses with their prior inconsistent statements. Counsel has the opportunity to strengthen his or her relationship with the client through a demonstration of counsel's willingness to fight for the client. Because in many jurisdictions the vast majority of cases are resolved through a plea agreement, pre-trial motions practice may have an enormous impact on the kind of plea offer the prosecutor is willing to consider.<sup>22</sup>

## **STANDARD 6.1 - EXPLORATION OF DISPOSITION WITHOUT TRIAL**

**A lawyer has the duty to explore with the client the possibility, advisability and consequences of reaching a negotiated disposition of charges or a disposition without trial. A lawyer has the duty to be familiar with the laws, local practices and consequences concerning dispositions without trial.**

### Implementation:

1. A lawyer should explore and consider mediation, civil compromise, diversion, Formal Accountability Agreements, having the case filed as a juvenile delinquency or dependency case, alternative dispositions including conditional postponement, motion to dismiss in the interest of justice, negotiated pleas or disposition agreements, and other non-trial dispositions.
2. A lawyer should explain to the client the strengths and weaknesses of the prosecution's case, the benefits and consequences of considering a non-trial disposition and discuss with the client any options that may be available to the client and the rights the client gives up by pursuing a non-trial disposition.
3. A lawyer should assist the client in weighing whether there are strategic advantages to be gained by taking a plea or whether the sentence or disposition results would likely be the same.

---

<sup>22</sup> National Juvenile Defender Center, *National Juvenile Defense Standards*, Sec. 4.8, at 81-82.

4. With the consent of the client, a lawyer should explore with the prosecutor and, in juvenile cases, the juvenile court counselor, when appropriate, available options to resolve the case without trial. The lawyer should obtain information about the position the prosecutor and juvenile court counselor will take as to non-plea dispositions and recommendations that will be made about sentencing or disposition. Throughout negotiation, a lawyer must zealously advocate for the expressed interests of the client, including advocating for some benefit for the client in exchange for a plea.
5. A lawyer cannot accept any negotiated settlement or agree to enter into any non-trial disposition without the client's express authorization.
6. A lawyer must keep the client fully informed of continued negotiations and convey to the client any offers made by the prosecution or recommendations by the juvenile court counselor for a negotiated settlement. The lawyer must assure that the client has adequate time to consider the plea and alternative options.
7. A lawyer should continue to take steps necessary to preserve the client's rights and advance the client's defenses even while engaging in settlement negotiations.
8. Before conducting negotiations, a lawyer should be familiar with:
  - a. The types, advantages and disadvantages, and applicable procedures and requirements of available pleas or admissions to juvenile court jurisdiction, including a plea or admission of guilty, no contest, a conditional plea or admission of guilty that reserves the right to appeal certain issues, and a plea or admission in which the client is not required to acknowledge guilt (*Alford* plea);
  - b. Whether agreements between the client and the prosecution would be binding on the court or on the prison, juvenile, parole and probation, and immigration authorities; and
  - c. The practices and policies of the particular prosecuting authorities, juvenile authorities and judge that may affect the content and likely results of any negotiated settlement.
9. A lawyer should be aware of, advise the client of, and, where appropriate, seek to mitigate the following, where relevant:
  - a. Rights that the client would waive when entering a plea or admission disposing of the case without trial;

- b. The minimum and maximum term of incarceration that may be ordered, including whether the minimum disposition would be indeterminate, possible sentencing enhancements, probation or post-confinement supervision, alternative incarceration programs and credit for pretrial detention;
- c. The likely disposition given sentencing guidelines;
- d. The minimum and maximum fines and assessments, court costs that may be ordered and the restitution that is being requested by the victim(s);
- e. Arguments to eliminate or reduce fines, assessments and court costs, challenges to liability for and the amount of restitution, the possibilities of civil action by the victim(s), and asset forfeiture, and the availability of work programs to pay restitution and perform community service;
- f. Consequences relating to previous offenses;
- g. The availability and possible conditions of protective supervision, conditional postponement, probation, parole, suspended sentence, work release, conditional leave and earned release time;
- h. The availability and possible conditions of deferred sentences, conditional discharges, alternative dispositions and diversion agreements;
- i. For non-citizen juvenile clients, the possibility of temporary and permanent immigration relief through the available legislative or administrative immigration programs and Special Immigrant Juvenile Status;
- j. For non-citizen clients, the possibility of adverse immigration consequences;
- k. For non-citizen clients, the possibility of criminal consequences of illegal re-entry following conviction and deportation;
- l. The possibility of other consequences of conviction, such as:
  - 1) Requirements for sex offender registration, relief and set-aside;
  - 2) DNA sampling, AIDS and STD testing;
  - 3) Loss of civil liberties such as voting and jury service privileges;
  - 4) Effect on driver's or professional licenses and on firearms possession;
  - 5) Loss of public benefits;
  - 6) Loss of housing, education, financial aid, career, employment, vocational or military service opportunities; and
  - 7) Risk of enhanced sentences for future convictions.
- m. The possible place and manner of confinement, placement, or commitment;
- n. The availability of pre-and post-adjudication diversion programs and treatment programs;
- o. Standard sentences for similar offenses committed by offenders with similar backgrounds; and
- p. The confidentiality of juvenile records and the availability of expungement.

10. A lawyer should identify negotiation goals with the following in mind:

- a. Concessions that the client might offer to the prosecution, including an agreement:
  - 1) Not to contest jurisdiction;
  - 2) Not to dispute the merits of some or all of the charges;
  - 3) Not to assert or litigate certain rights or issues;
  - 4) To fulfill conditions of restitution, rehabilitation, treatment or community service; and
  - 5) To provide assistance to law enforcement or juvenile authorities in investigating and prosecuting other alleged wrongful activity.
- b. Benefits to the client, including an agreement:
  - 1) That the prosecution will refile allegations in juvenile court and will not contest juvenile court jurisdiction;
  - 2) That the prosecution will not oppose release pending sentence, disposition or appeal;
  - 3) That the client may reserve the right to contest certain issues;
  - 4) To dismiss or reduce charges immediately or upon completion of certain conditions;
  - 5) That the client will not be subject to further investigation for uncharged conduct;
  - 6) That the client will receive, subject to the court's agreement, a specified set or range of sanctions;
  - 7) That the prosecution will take, or refrain from taking, a specified position with respect to sanctions, and/or that the prosecution will not present preparation of a pre-sentence report, or in determining the client's date of release from confinement; and
  - 8) That the client will receive, or that the prosecution will recommend, specific benefits concerning the place and manner of confinement, conditions of parole or probationary release and the provision of pre- or post-adjudication treatment programs.

11. A lawyer has the duty to inform the client of the full content of any tentative negotiated settlement or non-trial disposition, and to explain to the client the advantages, disadvantages, and potential consequences of the settlement or disposition.

12. A lawyer should not recommend that the client enter a dispositional plea or admission unless appropriate investigation and evaluation of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced if the case were to go forward.

## **STANDARD 6.2 – ENTRY OF DISPOSITIONAL PLEA OR ADMISSION**

**A decision to enter a plea resolving the charges, or to admit the allegations, rests solely with the client. The lawyer must not unduly influence the decision to enter a plea and must ensure that the client’s acceptance of the plea is voluntary and knowing, and reflects an intelligent understanding of the plea and the rights the client will forfeit.**

### Implementation:

1. A lawyer has the duty to explain to the client the advantages, disadvantages and consequences of resolving the case by entering a dispositional plea or by admitting the allegations.
2. A lawyer has the duty to explain to the client the nature of the hearing at which the client will enter the plea or admission and the role that the client will play in the hearing, including participating in the colloquy to determine voluntary waiver of rights and answering other questions from the court and making a statement concerning the offense. The lawyer should be familiar with the Model Colloquy for juvenile waiver of the right to trial. The lawyer should explain to the client that the court may in some cases reject the plea.
3. At the hearing, a lawyer has the duty to assist the client and to ensure that :
  - a. Any plea petition is legible and accurate and clearly sets forth terms beneficial to the client;
  - b. The court, on the record using any applicable model colloquy, inquires into whether the client’s decision is knowing, voluntary, and intelligent;
  - c. The court enters the plea or admission only after finding that the client’s decision was knowing, voluntary and intelligent; and
  - d. The judicial record is legible, clear, accurate and contains the full contents and conditions of the client’s plea or admission.

4. If during the plea hearing, the client does not understand questions being asked by the court, the lawyer must request a recess to assist the client.

### **STANDARD 7.1 – GENERAL TRIAL PREPARATION**

- A. A trial or juvenile adjudicatory hearing (hereinafter referred to as a trial) is a complex event requiring preparation, knowledge of applicable law and procedure, and skill. A defense lawyer must be prepared on the law and facts, and competently plan a challenge to the state’s case and, where appropriate, presentation of a defense case.**
- B. The decision to proceed to trial with or without a jury rests solely with the client. The lawyer should discuss the relevant strategic considerations of this decision with the client.**
- C. A lawyer should develop, in consultation with the client, an overall defense strategy for the conduct of the trial.**

#### **Implementation:**

1. A lawyer should ordinarily have the following materials available for use at trial:
  - a. Copies of all relevant documents filed in the case;
  - b. Relevant documents prepared by investigators;
  - c. Voir dire questions;
  - d. Outline or draft of opening statement;
  - e. Cross-examination plans for all possible prosecution witnesses;
  - f. Direct examination plans for all prospective defense witnesses;
  - g. Copies of defense subpoenas;
  - h. Prior statements of all prosecution witnesses (e.g., transcripts, police reports);
  - i. Prior statements of all defense witnesses;
  - j. Reports from experts;
  - k. A list of all exhibits and the witnesses through whom they will be introduced;
  - l. Originals and copies of all documentary exhibits;
  - m. Proposed jury instructions with supporting authority;
  - n. Copies of all relevant statutes and cases;
  - o. Evidence codes and relevant statutes and/or compilations of evidence rules and criminal or juvenile law most likely to be relevant to the case;
  - p. Outline or draft of closing argument; and

- q. Trial memoranda outlining any complex legal issues or factual problems the court may need to decide during the trial.
2. A lawyer should be fully informed as to the rules of evidence, the law relating to all stages of the trial process and be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial. The lawyer should analyze potential prosecution evidence for admissibility problems and develop strategies for challenging inadmissible evidence. The lawyer should be prepared to address objections to defense evidence or testimony. The lawyer should be prepared to raise affirmative defenses. The lawyer should consider requesting that witnesses be excluded from the trial.
3. A lawyer should evaluate whether expert testimony is necessary and beneficial to the client. If so, the lawyer should seek an appropriate expert witness and prepare the witness to testify, including possible areas of cross examination.
4. A lawyer should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant) and, where appropriate, the lawyer should prepare motions and memoranda for such advance rulings.
5. Throughout the trial process, a lawyer should endeavor to establish a proper record for appellate review. As part of this effort, a lawyer should request, whenever necessary, that all trial proceedings be recorded.
6. Where appropriate, a lawyer should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, a lawyer should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing.
7. A lawyer should plan with the client the most convenient system for conferring throughout the trial. Where necessary, a lawyer should seek a court order to have the client available for conferences. A lawyer should, where necessary, secure the services of a competent interpreter/translator for the client during the course of all trial proceedings.
8. Throughout preparation and trial, a lawyer should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

Commentary:

Trial preparation and execution is both an intellectual and logistical exercise. A lawyer must prepare adequately and in a timely manner so that when the trial begins, the lawyer has the necessary exhibits, witnesses, trial materials and any other items necessary during the trial. A lawyer will be performing a number of tasks over the course of trial that must be coordinated so that an adequate defense is presented. A trial judge has a great deal of discretion in managing the courtroom and an unprepared attorney is likely to jeopardize a client's defense.

When appropriate, to preserve an important legal issue or prevent inappropriate comment in opening statement, a lawyer should consider obtaining a pretrial ruling by filing a motion in limine to prevent comment on evidence that may not be ultimately admitted or to inform final analysis of the trial worthiness of a particular case or trial theory.

Expert witnesses present a unique challenge to lawyers. They are chosen for their knowledge base rather than because circumstances made them a percipient witness. The lawyer should evaluate and consider whether a particular expert is helpful to the defense case. Once selected, the expert needs to be given all appropriate information to prepare to testify. Finally, the lawyer should prepare the witness for testimony and anticipate possible lines of cross examination. This preparation can include, where appropriate, a list of questions and it is advisable to have the expert commit to answers prior to calling them as a witness. The expert has his or her own duty as a witness to follow the oath and testify truthfully and therefore the lawyer must determine what the witness will say prior to presenting the witness. If the witness is not helpful to the defense then the witness should not be called to the stand.

**STANDARD 7.2 – VOIR DIRE AND JURY SELECTION**

- A. A lawyer should be prepared to question prospective jurors and to identify individual jurors whom the defense should challenge for cause or exclude by preemptory strikes.**
  
- B. A lawyer should carefully observe the prosecutor's questioning of jurors to inform defense challenges for cause and use of preemptory challenges and to object if the prosecutor is attempting to exclude jurors for impermissible reasons.**

## Implementation:

### *Preparation:*

1. A lawyer should be familiar with the procedures by which a jury is selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.
2. A lawyer should be familiar with the local practices and the individual trial judge's procedures for selecting a jury and should be alert to any potential legal challenges to these procedures.
3. Prior to jury selection, a lawyer should seek to obtain a prospective juror list.
4. A lawyer should develop voir dire questions in advance of trial and tailor voir dire questions to the specific case. Among the purposes, voir dire questions should be designed to serve the following:
  - a. To elicit information about the attitudes of individual jurors which will provide the basis for peremptory strikes and challenges for cause;
  - b. To convey to the panel certain legal principles which are critical to the defense case;
  - c. To preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;
  - d. To present the client and the defense case in a favorable light, without prematurely disclosing information and the defense case to the prosecutor; and
  - e. To establish a relationship with the jury.
5. A lawyer should be familiar with the law concerning mandatory and discretionary voir dire inquiries so as to be able to defend any request to ask particular questions of prospective jurors.
6. A lawyer should be familiar with the law concerning challenges for cause and peremptory strikes.
7. In a group voir dire, a lawyer should avoid asking questions that may elicit responses that are likely to prejudice other prospective jurors.

8. If the voir dire questions may elicit sensitive answers, a lawyer should request that questioning be conducted outside the presence of the remaining jurors.
9. A lawyer should challenge for cause all persons about whom a legitimate argument can be made for actual prejudice or bias if it is likely to benefit the client.
10. A lawyer should be familiar with the requirements for preserving appellate review of any defense challenges for cause that have been denied.
11. Where appropriate, the lawyer should consider whether to seek expert assistance in the jury selection process.

Commentary:

Highlighting the importance of jury selection, some commentators maintain that trials are won or lost during jury selection. It is also among the most challenging stages of a jury trial, requiring knowledge, training and skill to accomplish successfully. It is the occasion, of course, for a lawyer to seek to remove potential jurors from the trial panel who may be biased against the client or who may not be favorably disposed to the defense case. And it is well recognized that a lawyer has a right to ascertain if a juror is prejudiced against the client, even if that requires broader latitude in time and scope by the judge than originally allowed.<sup>23</sup> But jury selection is also an opportunity for a lawyer to establish a relationship with jurors, to convey legal principles essential to the defense and to place the client and the defense case in a favorable light. To do so successfully, however, requires a thorough understanding of the law applicable to jury selection, a thoughtful and sensitive approach to interpersonal relations and a well-crafted theory of the defense. Without these components, a lawyer may very well do more harm than good during jury selection.

### **STANDARD 7.3 – OPENING STATEMENT**

**An opening statement is a lawyer’s first opportunity to present the defense case. The lawyer should be prepared to present a coherent statement of the defense theory based on evidence likely to be admitted at trial, and should raise and, if necessary, preserve for appeal any objections to the prosecutor’s opening statement.**

---

<sup>23</sup> *State v. Williams*, 123 Or. App. 546 (1993).

Best Practice:

1. Prior to delivering an opening statement, a lawyer should ask that the witnesses be excluded from the courtroom, unless a strategic reason exists for not doing so.
2. A lawyer's objective in making an opening statement may include the following:
  - a. Provide an overview of the defense case emphasizing the defense theme and theory of the case;
  - b. Identify the weaknesses of the prosecution's case;
  - c. Emphasize the prosecution's burden of proof;
  - d. Summarize the testimony of witnesses and the role of each witness in relationship to the entire case;
  - e. Describe the exhibits which will be introduced and the role of each exhibit in relationship to the entire case;
  - f. Clarify the jurors' responsibilities;
  - g. State the ultimate inferences which the lawyer wishes the jury to draw; and
  - h. Humanize the client.
3. A lawyer should listen attentively during the state's opening statement in order to raise objections and note potential promises of proof made by the state that could be used in summation.
4. A lawyer should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement in the defense summation.
5. Whenever the prosecutor oversteps the bounds of a proper opening statement, a lawyer should consider objecting, requesting a mistrial or seeking cautionary instructions, unless tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:
  - a. The significance of the prosecutor's error;
  - b. The possibility that an objection might enhance the significance of the information in the jury's mind;
  - c. Whether there are any rulings made by the judge against objecting during the other attorney's opening argument.

6. A lawyer should consider giving an opening statement during a court trial if either the law or facts are sufficiently complex to justify it. In all cases, a lawyer should evaluate if in the particular circumstances giving an opening would help or hurt the client's case. If the consideration is neutral, then the lawyer should give an opening.

Commentary:

The opening statement is the lawyer's opportunity to set forth the defense theory and preview the case for the jury. Judges will vary on their view of the permissible scope of an opening statement. In general, the purpose and rule of opening is for each side to preview their case and offer a summary of any evidence that they have a good faith belief will be admitted at trial. For this reason, a lawyer should consider whether evidence available to the state, but that may have significant prejudice and may be inadmissible, should be challenged prior to opening statements. (See 5.1 on pretrial motions) In the alternative, a lawyer should consider seeking a ruling that the prosecutor be precluded from discussing particular evidence that may or may not be admitted at trial.

Historically, opening statements could be strictly limited to a sterile and bland recitation of what witnesses might say. Objections on argumentative grounds were common and lawyers were restricted from making any conclusions. This has evolved and opening statements in the modern case may include discussions of the law or suggest conclusions that the jury could make. Further, by stipulation or with court permission opening statements can include the use of exhibits that are pre-admitted. Finally, in many cases, effective use of computer graphics and slides may enhance the opening statement, including actual pieces of evidence such as recorded phone calls or videos. When these presentations are used by the state, the lawyer for the defendant should ask to preview it and challenge material that may not be received in evidence.

## **STANDARD 7.4 – CONFRONTING THE PROSECUTION'S CASE**

**The essence of the defense in most cases is confronting the prosecution's case. The lawyer should develop a theme and theory of the case that directs the manner of conducting this confrontation. Whether it is refuting, discrediting or diminishing the state's case, the theme and theory should determine the lawyer's course of action.**

Implementation:

1. A lawyer should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.

2. A lawyer should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.
3. In preparing for cross-examination, a lawyer should be familiar with the applicable law and procedures concerning cross-examination and impeachment of witnesses. In order to develop material for impeachment, or to discover documents subject to disclosure, a lawyer should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.
4. In preparing for cross-examination, a lawyer should:
  - a. Consider the need to integrate cross-examination, the theory of the defense and closing argument;
  - b. Consider whether cross-examination of each individual witness is likely to generate helpful information;
  - c. Anticipate those witnesses the prosecutor might call in its case-in-chief or in rebuttal;
  - d. Consider a cross-examination plan for each of the anticipated witnesses;
  - e. Consider an impeachment plan for any witnesses who may be impeachable;
  - f. Be alert to inconsistencies in a witness testimony;
  - g. Be alert to possible variations in witness testimony;
  - h. Review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
  - i. If available, review investigation reports of interviews and other information developed about the witnesses;
  - j. Review relevant statutes and police procedural manuals and regulations for possible use in cross-examining police witnesses;
  - k. Be alert to issues relating to witness credibility, including bias and motive for testifying.
5. A lawyer should be aware of the applicable law concerning competency of witnesses and admission of expert testimony in order to raise appropriate objections.
6. Before beginning cross-examination, a lawyer should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If the lawyer does not receive prior statements of prosecution witnesses until they have completed direct examination, the lawyer should request, at a minimum, adequate time to review these documents before commencing cross-examination.

7. At the close of the prosecution’s case, and out of the presence of the jury, a lawyer should move for a judgment of acquittal on each count charged. The lawyer should request, when necessary, that the court immediately rule on the motion in order for the lawyer may make an informed decision about whether to present a defense case.

Commentary:

The lawyer should be mindful of how cross-examination may affect the case and whether particular questions might “open the door” to otherwise inadmissible evidence. For example, where the defense attorney questioned the adequacy and thoroughness of the investigating officer’s interview of defendant—an interview that was cut short by the defendant’s invocation of the right to counsel—the prosecutor was allowed to respond by informing the jury that the detective was unable to conduct a more thorough inquiry because of that invocation.<sup>24</sup>

Cross-examination should be conducted purposefully to cast doubt on the state’s evidence or discredit a state’s witness and in all cases should be consistent with the defense theory of the case. Simply reiterating a witness’s direct examination is at best tedious and at worst strengthens the prosecution’s case in the mind of the trier of fact.

In preparing any topic or questions for cross examination, a lawyer should prepare the legal basis for asking the question and anticipate objections to admissibility. If the court prohibits questioning on a particular topic, a lawyer should make an appropriate record to preserve the error through an offer of proof.

**STANDARD 7.5 – PRESENTING THE DEFENSE CASE**

**A lawyer should be prepared to present evidence at trial where it will advance a defense theory of the case that best serves the interest of the client.**

Implementation:

1. A lawyer should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, a lawyer should consider whether the client’s interests are best served by not putting on a defense case and instead rely on the prosecution’s

---

<sup>24</sup> *State v. Guritz*, 134 Or. App. 262 (1995).

failure to meet its constitutional burden of proving each element beyond a reasonable doubt.

2. A lawyer should discuss with the client all of the considerations relevant to the client's decision whether or not to testify.
3. A lawyer should be aware of the elements of any affirmative defense and know whether the client bears a burden of persuasion or a burden of production.
4. In preparing for presentation of a defense case, a lawyer should:
  - a. Develop a plan for direct examination of each potential defense witness and assure each witness's attendance by subpoena if necessary;
  - b. Determine the implications that the order of witnesses may have on the defense case;
  - c. Consider the possible use of character witnesses;
  - d. Consider the need for expert witnesses; and
  - e. Consider whether to present a defense based on mental disease, defect, diminished capacity or partial responsibility and provide notice of intent to present such evidence and consult with the client about the implications of an insanity defense.
5. In developing and presenting the defense case, a lawyer should consider the implications it may have for a rebuttal by the prosecutor.
6. A lawyer should prepare all witnesses for direct and possible cross-examination. Where appropriate, a lawyer should also advise witnesses of suitable courtroom dress and demeanor.
7. A lawyer should conduct redirect examination as appropriate.
8. At the close of the defense case, the lawyer should renew the motion for judgment of acquittal on each charged count.
9. A lawyer should be prepared to object to an improper state's rebuttal case and offer surrebuttal witnesses if allowed.

Commentary:

The Oregon Rules of Professional Conduct properly affirm the constitutional requirement that the client decides whether to testify or not. The lawyer must consult with the client concerning the risks and benefits of testifying. Whether to present other defense evidence, however, is a strategic and tactical decision to be made by the lawyer in consultation with the client. A lawyer should carefully consider the most effective defense presentation that advances the client's cause or whether the client is best served by not presenting evidence.

**STANDARD 7.6 – CLOSING ARGUMENT**

**A lawyer should be prepared to deliver a closing summation that presents the trier of fact with compelling reasons to render a verdict for the client based upon the evidence presented at trial and the law applicable to the case.**

Implementation:

1. A lawyer should be familiar with the substantive limits on both prosecution and defense summation.
2. A lawyer should be familiar with local rules and the individual judge's practice concerning time limits and objections during closing argument as well as provisions for rebuttal argument by the prosecution.
3. A lawyer should prepare the outlines of the closing argument prior to the trial and refine the argument at the end of trial by reviewing the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:
  - a. Highlighting weaknesses in the prosecution's case;
  - b. Describing favorable inferences to be drawn from the evidence;
  - c. What the possible effects of the defense arguments are on the prosecutor's rebuttal argument; and
  - d. Incorporating into the argument:
    - 1) Helpful testimony from direct and cross-examinations;
    - 2) Verbatim instructions drawn from the jury charge; and
    - 3) Responses to anticipated prosecution arguments.

4. Whenever the prosecutor exceeds the scope of permissible argument, the lawyer should object, request a mistrial or seek cautionary instructions unless tactical considerations suggest otherwise.
5. In a delinquency case a lawyer should, where appropriate, ask the court, even if sufficient evidence is found to support jurisdiction, not to exercise jurisdiction and move to dismiss the petition (or defer finding jurisdiction until after the dispositional hearing) on the ground that jurisdiction is not in the best interests of the youth or society.

Commentary:

Because summation is an argument, parties will be given broad latitude in drawing inferences and suggesting conclusions. The closing should be tailored to the audience, where legal doctrines may better be emphasized in arguments to a judge, while jurors may be more receptive to arguments focused on the facts. Even in bench trials, it is good practice to prepare jury instructions and use them in preparing the closing argument.

The most likely areas for improper argument by the prosecution are discussion of facts not in evidence and unconstitutional comments on the defendant's right not to testify and attempts to impermissibly shift a burden of proof to the defense. A lawyer should be alert to such improper arguments and raise appropriate objections when they occur.

**STANDARD 7.7 – JURY INSTRUCTIONS**

**A lawyer should ensure that instructions to the jury correctly state the law and seek special instructions that provide support for the defense theory of the case.**

Implementation:

1. A lawyer should be familiar with the local rules and individual judges' practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.
2. Where appropriate, a lawyer should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. When possible, a lawyer should provide case law in support of the proposed instructions.

3. A lawyer should object to and argue against improper instructions proposed by the court or prosecution.
4. If the court refuses to adopt instructions requested by the lawyer, or gives instructions over the lawyer's objection, the lawyer should take all steps necessary to preserve the record for appeal.
5. During delivery of the charge, the lawyer should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client and, if necessary, request additional or curative instructions.
6. If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, a lawyer should request that the judge state the proposed charge to the lawyer before it is delivered to the jury and take all steps necessary to preserve a record of objection to improper instructions.

Commentary:

Preservation of jury instruction error can be critical to a defense based on the misapplication of the law. Therefore, a lawyer should carefully review all proposed jury instructions, including uniform jury instructions and others proposed by the court or prosecution, to ensure that they accurately state the applicable law. However, if a jury instruction error is not objected to properly, a client may be deemed to have waived any objection.

**STANDARD 8.1 – OBLIGATIONS OF COUNSEL CONCERNING SENTENCING OR DISPOSITION**

**A lawyer must work with the client to develop a theory of sentencing or disposition and an individualized sentencing or disposition plan that is consistent with the client's desired outcome. The lawyer must present this plan in court and zealously advocate on behalf of the client for such an outcome.**

Implementation:

1. In every criminal or delinquency case, a lawyer should:

- a. Be knowledgeable about the applicable law governing the length and conditions of any applicable sentence or disposition, the pertinent sentencing or dispositional procedures, and inform the client at the commencement of the case of the potential sentence(s) or disposition for the alleged offense(s);
- b. Be aware of the client's relevant history and circumstances, including prior military service, physical and mental health needs, educational needs and be sensitive to the client's sexual orientation or gender identity to the extent this history or circumstance impacts sentencing or the disposition plan.
- c. Understand and advise the client concerning the availability of deferred sentences, conditional discharges, early termination of probation, informal dispositions, alternative dispositions including conditional postponement and diversion agreements (including servicemember status);
- d. Understand and explain to the client the consequences and conditions that are likely to be imposed as probation requirements or requirements of other dispositions and the potential collateral consequences of any sentence or disposition in a case, including the effect of a conviction or adjudication on a sentence for any subsequent crime;
- e. Be knowledgeable about treatment or other programs, out-of-home placement possibilities for juveniles, including: group homes, foster care, residential treatment programs or mental health treatment facilities, that may be required as part of disposition or that are available as an alternative to incarceration or out of home placement for youth, that could reduce the length of a client's time in custody or in out of home placement;
- f. Be knowledgeable about the requirements of placements that receive Title IV-E of the Social Security Act funding through contracts with the Juvenile Departments or the Department of Human Services and be able to request "no reasonable efforts" findings from the juvenile court when it would benefit the client;
- g. Develop a plan in conjunction with the client, supported where appropriate by a written memorandum addressing pertinent legal and factual considerations, that seeks the least restrictive and burdensome sentence or disposition, which can reasonably be obtained based upon the facts and circumstances of the case and that is acceptable to the client;
- h. Where appropriate, obtain assessments or evaluations that support the client's plan;

- i. Investigate and prepare to present to a prosecutor, when engaged in plea negotiations or to the court at sentencing or disposition, available mitigating evidence and other favorable information that might benefit the client at sentencing or disposition;
  - j. Ensure that the court does not consider inaccurate information or immaterial information harmful to the client in determining the sentence or disposition to be imposed;
  - k. Be aware of and prepare to address, express or implicit bias that impacts sentencing or disposition; and
  - l. Review the accuracy of any temporary or final sentencing or disposition order or judgments of the court and move the court to correct any errors that disadvantage the client.
2. In understanding the sentence or disposition applicable to a client's case, a lawyer should:
  - a. Be familiar with the law and any applicable administrative rules governing the length of sentence or disposition, including the Oregon Sentencing Guidelines as well as laws that establish specific sentences for certain offenses or for repeat offenders and be familiar with juvenile code and case law language that supports a less restrictive disposition that best meets the expressed needs of the youth;
  - b. Be knowledgeable about potential court-imposed financial obligations, including fines, fees and restitution, and, where appropriate, challenge the imposition of such obligations when not supported by the facts or law;
  - c. Be familiar with the operation of indeterminate dispositions and the law governing credit for pretrial detention, earned time credit, time limits on post-trial and post disposition juvenile detention and out-of-home placement, eligibility for correctional programs and furloughs, and eligibility for and length of post-prison supervision or parole from juvenile dispositions;
  - d. As warranted by the circumstances of a case, consult with experts concerning the collateral consequence of a conviction and sentence on a client's immigration status or other collateral consequences of concern to the client, e.g. civil disabilities, sex-offender registration, disqualification for types of employment, consequences for clients involved in the child welfare system, DNA and HIV testing, military opportunities, availability of public assistance, school loans and housing, and enhanced sentences for future convictions;

- e. Be familiar with statutes and relevant cases from state and federal appellate courts governing legal issues pertinent to sentencing or disposition such as the circumstances in which consecutive or concurrent sentences may be imposed or when offenses should merge for the purpose of conviction and sentencing;
  - f. Establish whether the client's conduct occurred before any changes to sentencing or dispositional provisions that increase the penalty or punishment to determine whether application of those provisions is contrary to statute or *ex post facto* prohibitions;
  - g. In cases where prior convictions are alleged as the basis for the imposition of enhanced repeat offender sentencing, determine whether the prior convictions qualify as predicate offenses or are otherwise subject to challenge as constitutionally or statutorily infirm;
  - h. Determine whether any mandatory sentence would violate the state constitutional requirement that the penalty be proportioned to the offense; and
  - i. Advance other available legal arguments that support the least restrictive and burdensome sentence.
3. In understanding the applicable sentencing and dispositional hearing procedures, a lawyer should:
- a. Determine the effect that plea negotiations may have on the sentencing discretion of the court;
  - b. Determine whether factors that might serve to enhance a particular sentence must be pleaded in a charging instrument and/or proven to a jury beyond a reasonable doubt;
  - c. Consult with the client concerning the strategic or tactical advantages of resolving factual sentencing matters before a jury, a judge or by stipulation;
  - d. Understand the availability of other evidentiary hearings to challenge inaccurate or misleading information that might harm the client, to present evidence favorable to the client, and ascertain the applicable rules of evidence and burdens of proof at such a hearing;
  - e. Determine whether an official presentence report will be prepared for the court and, if so, take steps to ensure that mitigating evidence and other favorable information is included in the report, that inaccurate or misleading information harmful to the client is deleted from it. Determine whether the client should participate in an interview with the report writer, advising the client concerning the interview and accompanying the client during any such interview;

- f. Determine whether the prosecution intends to submit a sentencing or dispositional memorandum, how to obtain such a document prior to sentencing or disposition and what steps should be followed to correct inaccurate or misleading statements of fact or law; and
  - g. Undertake other available avenues to present legal and factual information to a court or jury that might benefit the client and challenge information harmful to the client.
- 4. In advocating for the least restrictive or burdensome sentence or disposition for a client, a lawyer should:
  - a. Inform the client of the applicable sentencing or dispositional requirements, options and alternatives, including liability for restitution and other court-ordered financial obligations and the methods of collection;
  - b. Maintain regular contact with the client before the sentencing or dispositional hearing and keep the client informed of the steps being taken in preparation for sentencing or disposition, work with the client to develop a theory for the sentencing or disposition phase of the case;
  - c. Obtain from the client and others information such as the client's background and personal history, prior criminal record, employment history and skills, current or prior military service, education and current school issues, medical history and condition, mental health issues and mental health treatment history, current and historical substance abuse history, and treatment, what, if any, relationship there is between the client's crime(s) and the client's medical, mental health or substance abuse issues, and the client's financial status and sources through which the information can be corroborated;
  - d. Determine with the client whether to obtain a psychiatric, psychological, educational, neurological or other evaluation for sentencing or dispositional purposes;
  - e. If the client is being evaluated or assessed, whether by the state or at the lawyer's request, provide the evaluator in advance with background information about the client and request that the evaluator address the client's emotional, educational and other needs as well as alternative dispositions that will best meet those needs and society's needs for protection;
  - f. Prepare the client for any evaluations or interviews conducted for sentencing or disposition purposes;
  - g. Be familiar with and, where appropriate, challenge the validity and/or reliability of any risk assessment tools;

- h. Investigate any disputed information related to sentencing or disposition, including restitution claims;
- i. Inform the client of the client's right to address the court at sentencing or disposition and, if the client chooses to do so, prepare the client to personally address the court, including advice of the possible consequences that admission of guilt may have on an appeal, retrial or trial on other matters;
- j. Ensure the client has adequate time prior to sentencing to examine any presentence or dispositional report, or other documents and evidence that will be submitted to the court at sentencing or disposition;
- k. Prepare a written disposition plan that the lawyer and the client agree will achieve the client's goals in a delinquency case and, in a criminal case, prepare a written sentencing memorandum where appropriate to address complex factual or legal issues concerning the sentence;
- l. Be prepared to present documents, affidavits, letters and other information, including witnesses, that support a sentence or disposition favorable to the client;
- m. As supported by the facts and circumstances of the case and client, challenge any conditions of probation or post-prison supervision that are not reasonably related to the crime of conviction, the protection of the public or the reformation of the client;
- n. In a delinquency case, be prepared to present evidence on the reasonableness of Oregon Youth Authority, Juvenile Department or Department of Human Services efforts that could have been made concerning the disposition and, when supported by the evidence, request a "no reasonable efforts" finding by the court;
- o. In a delinquency case, after the court has found jurisdiction, move the court, when supported by the facts, to not exercise jurisdiction and dismiss the petition, amend the petition or find jurisdiction on fewer than all charges, on the ground that jurisdiction is not in the best interests of the youth or society;
- p. When the court has the authority to do so, request specific orders or recommendations from the court concerning the place of confinement, parole eligibility, mental health treatment or other treatment services, and permission for the client to surrender directly to the place of confinement;
- q. Be familiar with the obligations of the court and district attorney regarding statutory or constitutional victims' rights and, where appropriate, ensure that the record reflects compliance with those obligations;
- r. Take any other steps that are necessary to advocate fully for the sentence or disposition requested by the client and to protect the interests of the client; and

- s. Advise the client about the obligations and duration of sentence or disposition conditions imposed by the court, and the consequence of failure to comply with orders of the court. In a delinquency case, where appropriate, counsel should confer with the client's parents regarding the disposition process to obtain their support for the client's proposed disposition.

Commentary:

In the vast majority of criminal and delinquency cases, there will be a sentencing or disposition hearing and it will be the most significant event in the case. An indispensable first step, in being a good advocate at this stage of a case, is education so that the lawyer has a good working knowledge and access to resources on what is often an ever-changing array of available sentencing and dispositional options. A lawyer should plan for this stage of the case at or near the beginning of representation. That planning will ordinarily require an in-depth interview of the client, and if appropriate, the client's parent or custodian, legal research concerning the applicable terms and conditions of sentencing or dispositional options, discussions with the client about his or her preferred option and a realistic portrayal of the various possibilities, and an investigation into factual matters, such as evidence of aggravating or mitigating factors, that may affect the outcome.

Sentencing and dispositional considerations have long been matters that should take place in the context of an overall plan for achieving the client's stated objectives for the case that works in concert with the handling of plea negotiations and the preparation and presentation of the case at trial. Several developments or trends, some pulling in opposite directions, make a coordinated case approach especially imperative.

First, in criminal cases, the potential role of juries in sentencing hearings weighs in favor of a thoughtful approach to the conduct of a trial if the same jury is reasonably likely to later consider some sentencing matters. Meanwhile, the continued viability of "mandatory minimum" laws in Oregon, which place considerably control over case outcomes in the hands of prosecutors, weighs in favor of an early and vigorous investigation of both the underlying allegations and any available mitigation evidence in order for the lawyer to put the client in the best possible position for plea negotiations with the prosecutor.

In juvenile delinquency cases, the court has broad discretion and will receive reports from the Juvenile Court Counselor and the Department of Human Services caseworker or Oregon Youth Authority parole officer if the Department of Human Services or the Oregon Youth Authority are involved. These reports can be cookie cutter and often view the delinquent

from a social worker perspective that can lead to overreaching into the lives of the client and the client's family. Counsel for the youth should advocate for a client-driven disposition plan that is individualized and tailored to the offense and not overly expansive. A written client driven disposition plan is the only effective way of countering the written plans of government agents. A written disposition plan should always be requested as part of any evaluation. In complex cases, the assistance of a qualified social worker can be obtained to help develop the client-driven disposition plan.

The proliferation and significance of collateral consequences of both criminal and delinquency adjudications also require an informed, vigorous and coordinated approach to sentencing and disposition. It is now better understood that the non-penal consequences of a conviction or adjudication, such a deportation or the loss of employment, housing, public assistance or opportunities for service in the military, may be of greater significance to a client than the time he or she spends in custody or out of the home. Some of these consequences may be triggered by the offense of conviction or adjudication, while others may be triggered by the duration or conditions of sentencing or disposition. The lawyer is now obligated to understand these consequences and conduct the defense in order to avoid or mitigate their impact.

Since the last revision of these standards, there is increased interest by courts and community corrections officials in "smart sentencing," with an emphasis on evidence-based practices that are known to be effective in reducing recidivism. Even without major legislative reforms that embrace this new focus, there are opportunities for clients to benefit from research about what sentencing or dispositional elements work best to protect the public. Lawyers handling criminal and delinquency cases, therefore, should be knowledgeable about the research and its possible application in their cases. To the extent that implementation of evidence based practices also relies upon the use of risk assessment tools, counsel should be aware of the tools used in reports considered by the court at sentencing or disposition and be prepared to challenge the validity and reliability of them, both facially and as applied to a client, where appropriate.

Because sentencing and disposition are subject to frequent legislative attention and vigorous litigation in the trial and appellate courts, lawyers representing clients in both criminal and delinquency cases must stay current with the latest developments in the law and be prepared to undertake litigation on issues such as the retroactive application of changes in punishment, the validity of prior convictions that trigger sentence enhancements, the merger of convictions and the proportionality of punishment.

Finally, lawyers representing youth should take special care to confer with clients in developmentally appropriate language about disposition planning. Although a lawyer must make clear to the client and the client’s parents that the youth controls decisions concerning disposition options, to the extent appropriate and with the permission of the youth, a lawyer should explain the disposition process to parents and enlist their support of the youth’s choices. The plan submitted to the court by the lawyer, which ordinarily should be in writing, should address the youth’s strengths and particular medical, mental health, educational or other needs, and the use of available resources in the home, the community or elsewhere through which the client is most likely to succeed.

### **STANDARD 9.1 – CONSEQUENCES OF PLEA ON APPEAL**

**In addition to direct and collateral consequences, a lawyer should be familiar with, and advise the client of, the consequences of a plea of guilty, an admission to juvenile court jurisdiction or a plea of no contest on the client’s ability to successfully challenge the conviction, juvenile adjudication, sentence or disposition in an appellate proceedings.**

#### **Implementation:**

1. A lawyer should be familiar with the effects of a guilty plea, admission to juvenile court jurisdiction or a no contest plea on the various forms of appeal.
2. During discussions with the client regarding a possible admission, plea of guilty or no contest, a lawyer must inform the client of the consequences of such a plea on any potential appeals.
3. A lawyer should be familiar with the procedural requirements of the various types of pleas, including the conditional guilty plea, that affect the possibility of appeal.

#### **Commentary:**

A plea of guilty or no contest severely limits the scope of a client’s direct appeal. A defendant who has pleaded guilty or no contest must identify a “colorable claim of error” simply in order to file a notice of appeal.<sup>25</sup> Even if the client satisfies that procedural hurdle, in cases in which the client pled guilty or pled no contest, the Court of Appeals is limited by

---

<sup>25</sup> ORS 138.050 (2001).

statute to reviewing only the sentence imposed by the court.<sup>26</sup> Although ORS 138.050 does not limit appeals in juvenile cases, and thus there is no requirement that “a colorable claim of error” be identified, as a practical matter the client’s admission to facts constituting jurisdiction greatly limits the scope of appeal.

## **STANDARD 9.2 – PRESERVATION OF ISSUES FOR APPELLATE REVIEW**

**A lawyer should be familiar with the requirements for preserving issues for appellate review. A lawyer should discuss the various forms of appellate review with the client and apprise the client of which issues have been preserved for review.**

### Implementation:

1. A lawyer must know the requirements for preserving issues for review on direct appeal and in federal habeas corpus proceedings.
2. A lawyer should review with the client those issues that have been preserved for appellate review and the prospects for a successful appeal.

### Commentary:

A trial lawyer faces the often-challenging task of zealously advocating for the best result for her client at trial while simultaneously preserving legal issues for later challenge on appeal in the event of conviction or adjudication. Some issues require only an objection from the lawyer sufficient to alert the court to the issue and the client’s position in order to preserve the issue for appellate review.<sup>27</sup>

---

<sup>26</sup> ORS 138.050 (2001). See, *State v. Anderson*, 113 Or. App. 416, 419, 833 P2d 321 (1992) (“[A] disposition is legally defective and, therefore, exceeds the maximum allowable by law if it is not imposed consistently with the statutory requirements.”)

<sup>27</sup> *State v. Wyatt*, 331 Or. 335, 15 P3d 22 (2000).

However, other types of issues require additional steps to be taken. For example, if the trial court excludes evidence over the objection of the lawyer, the lawyer often must make an offer of proof to the court detailing what the evidence would have been so that appellate courts can determine the merits of the legal issue and the harm of the exclusion.<sup>28</sup>

Another example of a more complex preservation requirement involves arguments for or against proposed jury instructions. ORCP 59H, which applies to criminal trials through ORS 136.330(2), requires a party to state its objections to the giving of an instruction (or the failure to give an instruction) “with particularity” and to except after jury instructions have been delivered.

A lawyer’s most important goal at trial is to obtain a favorable ruling for her client. Should that effort fail, the lawyer must insure that she has met the specific requirements for preserving the issue for appellate review should the client decide to appeal the conviction, adjudication, sentence or disposition.

As a subset of the duty to keep the client informed, a lawyer should discuss with the client the various forms of appeal, including the right to a de novo rehearing by a judge of a juvenile adjudication by a referee and the specific issues presented in the client’s case that could be pursued on appeal. The lawyer should advise the juvenile client that the time to file an appeal of an adjudication starts running from the time of the adjudication, not the disposition, and if necessary a separate appeal of the disposition can be filed.<sup>29</sup>

### **STANDARD 9.3 -UNDERTAKING AN APPEAL**

**A lawyer must be knowledgeable about the various types of appeals and their application to the client’s case and should impart that information to the client. A lawyer should inquire whether a client wishes to pursue an appeal. When requested by the client, a lawyer should assure that a notice of appeal is filed and that the client receives information about obtaining appellate counsel.**

---

<sup>28</sup> OEC 103(1)(b)(“Error may not be predicated upon a ruling which \* \* \* excludes evidence unless a substantial right of a party is affected” and “the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.”); *State v. Bowen*, 340 Or. 487, 500, 135 P3d 272 (2006) (“[A]n offer of proof ordinarily is required to preserve error when a trial court excludes testimony.”); see also *State v. Wirfs*, 250 Or. App. 269, 274, 281 P3d 616 (2012) (defendant not required to make an offer of proof “because the trial court and the prosecutor were aware of the substance of the testimony that defendant would elicit.”).

<sup>29</sup> *State ex rel Juv Dep. V. J.H.-O.*, 223 Or. App. 412 (2008).

### Implementation:

1. Throughout the trial proceedings, but especially upon conviction, adjudication, sentencing and disposition, a lawyer should discuss with the client the various forms of appellate review and how they might benefit the client.
2. If the client chooses to pursue a re-hearing of a juvenile referee's order or an appeal, a lawyer should take appropriate steps to preserve the client's rights, including requesting a re-hearing, filing notice of appeal or referring the case to an appellate attorney or public defender organization to have the notice of appeal filed.
3. When the client pursues an appeal, a lawyer should cooperate in providing information to the appellate lawyer concerning the proceedings in the trial court. A trial lawyer must provide the appellate lawyer with all records from the trial case, the court's final judgment and any other relevant or requested information.
4. If a lawyer is representing a client who is financially eligible for appointed counsel, the lawyer shall determine whether the client wishes to pursue an appeal and, if so, transmit to the Office of Public Defense Services the information necessary to perfect an appeal, pursuant to ORS 137.020(6).
5. If the client decides to appeal, a lawyer should inform the client of the possibility of obtaining a stay pending appeal and file a motion in the trial court if the client wishes to pursue a stay.

### Commentary:

If the client has been convicted despite the best efforts of a lawyer, a lawyer must discuss the various methods of appealing the conviction or adjudication and resulting sentence or disposition that are available to the client, including rehearing, direct appeal, post-conviction relief and a petition for federal habeas corpus. Each of those forms of appeal has unique applications and requirements and the client should be informed of the potential benefits and disadvantages of all types of appeal. In particular, a lawyer should review filing deadlines and requirements to insure the client does not lose the opportunity to pursue an appeal.

A lawyer is constitutionally mandated to confer with the client about the right to appeal.<sup>30</sup> A lawyer should explain both the meaning and consequences of the court's decision and provide the client with the lawyer's professional judgment regarding whether there are meritorious grounds for appeal and the probable consequences of an appeal, both good and bad.

There may be circumstances in which a lawyer should file a notice of appeal on behalf of the client to preserve the client's right to appeal in the face of a looming deadline, despite the fact that the lawyer will not eventually represent the client on appeal. The preferred course of action is to refer the case to the attorney or organization that will represent the client on appeal in time to allow that lawyer or entity to timely file notice of appeal. However, the primary concern is that the client's right to appeal is preserved.

Communication between lawyers who represent the client at the various stages of a criminal or delinquency case (trial, direct appeal, post-conviction relief, etc.) is critical to the client's success. That is particularly true of communication between a client's trial lawyer and the lawyer helping the client file a petition for post-conviction or post-adjudication relief.

## **STANDARD 9.4 – POST SENTENCING AND DISPOSITION PROCEDURES**

**A lawyer should be familiar with procedures that are available to the client after disposition. A lawyer should explain those procedures to the client, discern the client's interests and choices and be prepared to zealously advocate for the client.**

### Implementation:

1. Upon entry of judgment, a lawyer should immediately review the judgment to ensure that it reflects the oral pronouncement of the sentence or disposition and is otherwise free of legal or factual error. In a delinquency case, a lawyer should insure that the judgment includes the disposition probation plan, including any actions to be taken by parents, guardians or custodians.

---

<sup>30</sup> *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 120 S. Ct. 1029, 145 L. ed. 2d 985 (2000) (“We instead hold that counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.”)

2. The lawyer must be knowledgeable concerning the application and procedural requirements of a motion for new trial or motion to correct the judgment.
3. The lawyer representing a youth in delinquency proceedings should be versed in relevant case law, statutes, court rules and administrative procedures regarding the enforcement of disposition orders, as well as the methods of filing motions for post-disposition and post-adjudicatory relief, for excusal or relief from sex offender registration requirements, and/or to review, reopen, modify or set aside adjudicative and dispositional orders. For youth whose circumstances have changed; youth whose health, safety, and welfare is at risk; or youth not receiving services as directed by the court, a lawyer should file motions for early discharge or dismissal of probation or commitment, early release from detention, or modification of the court order. Where commitment is indeterminate and youth correctional authorities have discretion over whether and when to release a youth from secure custody, when the period of incarceration becomes excessive, the lawyer should advocate to terminate or limit the term of commitment, if desired by the youth.

Commentary:

In general, when the written judgment conflicts with the court's oral pronouncement of sentence at trial, the written judgment controls.<sup>31</sup> It is therefore imperative that the written judgment accurately reflects the favorable aspects of the sentence imposed by the court at the sentencing hearing.

Under ORCP 64 and ORS 136.535, a trial court may grant a motion for new trial if certain conditions are met, including irregularities in the proceedings, juror misconduct, or newly discovered evidence that could not have been discovered and produced at trial. Similarly, the trial court has the authority to correct an erroneous term in the judgment under ORS 138.083, even if the case is on appeal. The juvenile court may modify or set aside a jurisdictional order.<sup>32</sup> The lawyer should be knowledgeable about the availability and procedural requirements of these motions.

A lawyer should be familiar with the authority of a trial court to stay execution of the sentence, or part of a sentence, pending appeal and seek such relief where appropriate.

---

<sup>31</sup> See *State v. Swain/Goldsmith*, 267 Or. 527, 530, 517 P2d 684 (1974); *State v. French*, 208 Or. App. 652, 655, 145 P3d 305, 307 (2006); *State v. Mossman*, 75 Or. App. 385, 388, 706 P2d 203 (1985).

<sup>32</sup> ORS 419C.610 (2001).

## **STANDARD 9.5- MAINTAIN REGULAR CONTACT WITH YOUTH FOLLOWING DISPOSITION**

- A. A lawyer for a youth in delinquency proceedings should stay in contact with the youth following disposition and continue representation while the youth remains under court or agency jurisdiction.**
- B. A lawyer should inform a youth of procedures available for requesting a discretionary review of, or reduction in, the sentence or disposition imposed by the trial court, including any time limitations that apply to such a request.**

### **Implementation:**

1. The lawyer should reassure a youth that the lawyer will continue to advocate on the youth's behalf regarding post-disposition hearings, including probation reviews and probation or parole violation hearings, challenges to conditions of confinement and other legal issues, especially when the youth is incarcerated. The lawyer should also provide advocacy to get the client's record expunged or to obtain relief from sex offender registration.
2. Lawyers for youth convicted as adults but who were under 18 years of age at the time of the offense should be familiar with and inform the client of the "second look" provisions of ORS 420A.203 and ORS 420A.206.

### **Commentary:**

Post-disposition access to counsel is critical for youth under the continuing jurisdiction of the court or a state agency. Issues such as significant waiting lists for residential facilities, the failure to provide services ordered by the court, conditions of confinement and enforcement of disposition requirements require the legal acumen and advocacy of counsel.

In addition, a lawyer should check in periodically with the youth and routinely ensure that the facility or agency is adhering to the court's directives and that the youth's needs are met and the client's health, welfare and safety are protected.

Special attention is required to insure that secure facilities are providing educational, medical and psychological services.

If the youth is committed to a state agency, a lawyer should maintain regular contact with the caseworker, juvenile court counselor, youth correctional facility staff or juvenile parole officer, advocate for the youth as necessary and ask to be provided copies of all agency reports documenting the youth's progress. A lawyer should participate in case review meetings and administrative hearings. When appropriate, the lawyer should request court review to protect the client's right to treatment.

The lawyer may be the youth's only point of contact within the community when the youth is placed in a residential or correctional facility. The lawyer should advocate for adequate contact between the youth and his or her family and home visits when appropriate, if desired by the youth.

Oregon State Bar

# Report of the Task Force on Standards of Representation in Juvenile Dependency Cases

June \_\_, 2014

# Foreword

The original version of the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases (hereafter, the performance standards) was approved by the Board of Governors on September 25, 1996. Significant changes to the original performance standards were adopted in 2006, and an additional set of standards pertaining to representation in post-conviction standards were adopted in 2009.

As noted in the earlier revision, in order for the performance standards to continue to serve as valuable tools for practitioners and the public, they must be current and accurate in their reference to federal and state laws and they must incorporate evolving best practices.

The Foreword to the original performance standards noted that “[t]he object of these [g]uidelines is to alert the attorney to possible courses of action that may be necessary, advisable, or appropriate, and thereby to assist the attorney in deciding upon the particular actions that must be taken in a case to ensure that the client receives the best representation possible.” This continues to be the case, as does the following, which was noted in both the Foreword in the 2006 revision and the Foreword to the 2009 post-conviction standards:

“These guidelines, as such, are not rules or requirements of practice and are not intended, nor should they be used, to establish a legal standard of care. Some of the guidelines incorporate existing standards, such as the Oregon Rules of Professional Conduct, however which are mandatory. Questions as to whether a particular decision or course of action meets a legal standard of care must be answered in light of all the circumstances presented.”

We hope that the revised Performance Standards, like the originals, will serve as a valuable tool both to the new lawyer or the lawyer who does not have significant experience in criminal and juvenile cases, and to the experienced lawyer who may look to them in each new case as a reminder of the components of competent, diligent, high quality legal representation.



Tom Kranovich  
Oregon State Bar President

# Report of the Task Force on Standards of Representation in Juvenile Dependency Cases

## Summary and Background

In September of 1996, the Oregon State Bar Board of Governors approved the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases. In May of 2006, the Board accepted revisions to the 1996 standards. In 2012, at the direction of the OSB Board of Governors, two separate workgroups began meeting to work on significant revisions to the standards in criminal, delinquency and dependency cases. One group focused on juvenile dependency standards and the other on adult criminal and juvenile delinquency standards.

The task force created to address Juvenile Dependency standards included members from academia as well as from both private practice and public defender offices. Task force members were Julie McFarlane, Supervising Attorney, Youth, Rights & Justice; Shannon Storey, Office of Public Defense Services; Joseph Hagedorn, Metro Public Defender; Leslie Harris, University of Oregon Law School; Tahra Sinks, private practice in Salem; LeAnn Easton, Dorsay & Easton LLP; and Joanne Southey, Department of Justice Civil Enforcement Division.

The following pages include new standards produced by the juvenile dependency task force which are recommended to replace what is currently published on the OSB website as the third specific standard “Specific Standards for Representation in Juvenile Dependency Cases”. These changes, when combined with the revisions recently made to the second specific standard (Criminal and Juvenile Delinquency) may make the “general standards” in Section 1 duplicative, as the material covered broadly in the that document is now included in more details both in the Criminal and Juvenile sections.

The goal of this task force was to create a revised set of standards that was both easy for the practitioner to read and understand and also provide relevant detail and explanations as necessary. As with the criminal standards, this task force sought to include, in addition to the rules and implementation sections, commentary to both explain the rationale behind the individual standards and to provide relevant real world examples when possible. Thus each section of the standards includes the “black letter” standard itself, one or more “Actions” to

guide the practitioner in achieving the standard and then Commentary to more fully explain the Actions and the Standard.<sup>1</sup>

It became very clear to members of the task force throughout this process that customs and practices in juvenile dependency cases vary widely from county to county in Oregon. While some of these differences may be more stylistic than substantive, some may have a significant impact on the rights of children and parents. One of the goals in writing the action and commentary sections of the standards was identify for attorneys best practices that may differ from the custom in their jurisdiction. While this knowledge may not always result in a change in local court practice, reference to the standards may be persuasive to a lawyer who is attempting to convince a court to deviate from its traditional practice.

One criticism of the previous version of the juvenile standards was that some sections were essentially long checklists without much explanation as to why items on the list were important. Additionally, because of the desire to make sure every contingency was covered, checklists often become impractically long, which made them less useful for the reader. The task force felt that it was preferable to replace these sections with a more through explanation of the material.

However, the workgroup did feel that there was some value in checklists in that they can provide inexperienced practitioners with a visual aid to help them to avoid forgetting important tasks or issues. For this reason, much of the information that was previously included in the checklists contained in the standards has been moved to an appendix at the end of the new juvenile standards section.

Another very important change made in this version of the juvenile standards was bifurcating the juvenile standards into a section for lawyers representing children and a section for lawyers representing parents. While there is considerable overlap between these two sections, and while this choice does make the overall standards much longer, it was felt that this created a more useful product for practitioners. When standards for lawyers of parents and children are combined, it becomes critical to frequently interrupt sections with discussions of exceptions or special cases that are applicable to only some of the readers. By separating these into two different parallel sections, each section can be more streamlined and more focused on the needs of the reader. While some sections may have very similar structures, and may in fact repeat the exact same language, other sections are extremely different.

For example in forming and maintaining the lawyer-client relationship, lawyers for children are confronted with the reality that their clients may not yet have a fully developed understanding of their situation or of the nature of the proceeding. Lawyers for children must carefully consider their client's mental development and their decision-making capacity.

---

<sup>1</sup> The Juvenile Dependency Task Force preferred the term "Action" to the term "Implementation" that is use in the criminal standards and in the previous version of the juvenile standards. However, this decision is largely stylistic, and the "Implementation" and "Action" items listed in each document serve the same purpose.

Lawyers for parents, on the other hand, have a more straightforward attorney-client relationship with fewer complications and pitfalls based on their client's capacity.

Both sections, as well as the appendices, are included in the report below. However, when publishing this material online, it may be advisable to break the sections up into separate documents for ease of reading or printing.

Throughout the process of creating these revised standards, the task force has sought input from practitioners and judges and has incorporated suggestions when appropriate.

The Obligations of the Lawyer for Children begins on page 4.

The Obligations of the Lawyer for Parents begins on page 44.

The appendixes begin on page 85.

# THE OBLIGATIONS OF THE LAWYER FOR CHILDREN IN CHILD PROTECTION PROCEEDINGS WITH ACTION ITEMS AND COMMENTARY

## STANDARD 1 - ROLE OF LAWYER FOR THE CHILD

- A. The role of the lawyer for the child is to ensure that the client is afforded due process and other rights and that the client's interests are protected. For a child with full decision-making capacity, the lawyer must maintain a normal lawyer-client relationship with the child, including taking direction from the child on matters normally within the client's control.**

Action:

Consistent with Rule 1.14 of the ORCP, the child's lawyer should determine whether the child has sufficient maturity to understand and form a lawyer-client relationship and whether the child is capable of making reasoned judgments and engaging in meaningful communication.

Action:

The lawyer must explain the nature of all legal and administrative proceedings to the extent possible, and, given the client's age and ability, determine the client's position and goals. The child's lawyer also acts as a counselor and advisor. This involves explaining the likelihood of achieving the client's goals and, where appropriate, identifying alternatives for the client's consideration. In addition, the lawyer for the child should explain the risks, if any, inherent in the client's position. Once the child has settled on positions and goals, the lawyer must vigorously advocate for them.

Action:

The child's lawyer should not confuse inability to express a preference with unwillingness to express a preference. If an otherwise competent child chooses not to express a preference on a particular matter, the child's lawyer should determine if the child wishes the lawyer to take no position in the proceeding or if the child wishes the lawyer or someone else to make the decision for him or her. In either case, the lawyer is bound to follow the client's direction.

Action:

The lawyer may not request the appointment of a Court Appointed Special Advocate (CASA) or other advocate for the child's best interests where the child is competent to make decisions.

Commentary:

When a child client has the capacity to instruct the lawyer, the lawyer-client relationship is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty and communication and the duty to provide independent advice.

The ability of a child client to express a preference constitutes a threshold requirement for determining ability to instruct the lawyer. When the lawyer can discern the client's preference through investigation rather than eliciting the child's own verbally articulated position the lawyer must advocate for that preference.

When a child client is capable of instructing the lawyer, decisions that are ultimately the client's to make include whether to:

- 1) Contest, waive trial on petition, negotiate changes in or testify about the allegations in the petition;
- 2) Stipulate to evidence that is sufficient to form a basis for jurisdiction and commitment to the custody of DHS;
- 3) Accept a conditional postponement or dismissal; or
- 4) Agree to specific services or placements.

As with any client, the child's lawyer may counsel against the pursuit of a particular position sought by the child. Without unduly influencing the child, the lawyer should advise the child by providing options and information to assist the child in making decisions. The lawyer should explain the practical effects of taking various positions, the likelihood that a court will accept particular arguments and the impact of such decisions on the child, other family members, and future legal proceedings. The child's lawyer should recognize that the child may be more susceptible to intimidation and manipulation than some adult clients. Therefore, the child's lawyer should ensure that the decision the child ultimately makes reflects his or her actual position.

- B. For a child client with diminished capacity, the child's lawyer should maintain a normal lawyer-client relationship with the child as far as reasonably possible and take direction from the child as the child develops capacity. A child may have the capacity to make some decisions but not others.**

### Commentary:

The question of diminished capacity should not arise unless the lawyer has some reason to believe that the client does not have the ability to make an adequately considered decision. A child's age is not determinative of diminished capacity. The commentary to the ABA Model Rule of Professional Responsibility upon which ORCP 1.14 is based recognizes that there exist "intermediate degrees of competence" and that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody."

The assessment of a child's capacity must be based upon objective criteria, not the lawyer's personal philosophy or opinion. The assessment should be grounded in insights from child development science and should focus on the child's decision-making process rather than the child's choices themselves. Lawyers should be careful not to conclude that the child suffers diminished capacity from a client's insistence upon a course of action that the lawyer considers unwise or at variance with lawyer's view. For example, the decision of a thirteen-year-old to return home to a marginally fit parent may not be in the child's best interests, but the child may well be competent to make that decision.

In determining whether a child has diminished capacity, counsel may consider the following factors:

- 1) The child's ability to communicate a preference;
- 2) Whether the child can articulate reasons for the preference;
- 3) The decision making process used by the child to arrive at the decision (e.g., is it logical, is it consistent with previous positions taken by the child, does the child appear to be influenced by others, etc.); and
- 4) Whether the child appears to understand the consequences of the decision.<sup>2</sup>

A child may have the ability to make certain decisions, but not others. For example, a child with diminished capacity may be capable of deciding that he or she would like to have visits with a sibling, but not be capable of deciding whether he or she should return home or remain with relatives on a permanent basis. The lawyer should continue to assess the child's capacity as it may change over time.

---

<sup>2</sup> See, *Report of the Working Group on Determining the Child's Capacity to Make Decisions*, 64 *Fordham Law Review* 1339 (1996).

- C. When it is not reasonably possible to maintain a normal lawyer-client relationship generally or with regard to a particular issue, the child’s lawyer should conduct a thorough investigation and then determine what course of action is most consistent with protecting the child in the particular situation and represent the child in accordance with that determination. This determination should be based on objective facts and information and not the lawyer’s personal philosophy or opinion.**

Action:

Where the child client is incapable of directing the lawyer, the lawyer must thoroughly investigate the child’s circumstances, including important family relationships, the child’s strengths and needs, and other relevant information and then determine what actions will protect the child’s interests in safety and permanency.

Action:

In determining what course of action to take when the child cannot provide direction, the lawyer must take into consideration the child’s legal interests based on objective criteria as set forth in the laws applicable to the proceeding, the goal of expeditious resolution of the case and the use of the least restrictive or detrimental alternatives available.

Commentary:

If the child is able to verbalize a preference but is not capable of making an adequately considered decision, the child’s verbal expressions are an important factor to consider in determining what course of action to take. The child’s needs and interests, not the adults’ or professionals’ interests, must be the center of all advocacy. The child’s lawyer should seek out opportunities to observe and interact with the very young child client. It is also essential that lawyers for very young children have a firm working knowledge of child development and special entitlements for children under age five.

The child’s lawyer may wish to seek guidance from appropriate professionals and others with knowledge of the child, including the advice of an expert.

- D. When the lawyer reasonably believes the child has diminished capacity, is at risk of substantial physical, sexual, psychological or financial harm, and cannot adequately act in his or her own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client.**

Action:

When a child with diminished capacity is unable to protect him or herself from substantial harm, ORPC 1.14 allows the lawyer to take action to protect the client. Oregon Rule of Professional Responsibility 1.6(a) implicitly authorizes a lawyer to reveal information about the child, but only to the extent reasonably necessary to protect the child's interests.<sup>3</sup> Information relating to the representation of a child with diminished capacity is protected by Rule 1.6 and Rule 1.14 of the Oregon Rules of Professional Conduct.

Action:

The lawyer should choose the protective action that intrudes the least on the lawyer-client relationship and is as consistent as possible with the wishes and values of the child.

Action:

In extreme cases, i.e., where the child is at risk of substantial physical harm and cannot act in his or her own interest and where the child's lawyer has exhausted all other protective action remedies, the child's lawyer may request the court to appoint a best-interest advocate such as a CASA to make an independent recommendation to the court with respect to the best interests of the child.

Action:

When a child has been injured or suffers from a disability or congenital condition that results in the child having a progressive illness that will be fatal and is in an advanced stage, is in a coma or persistent vegetative state, or is suffering brain death, State ex rel. Juvenile Dept. of Multnomah County v. Smith<sup>4</sup>, provides that the lawyer for the child should consult with the parent if appropriate and consider seeking appointment of a guardian ad litem under the juvenile and probate code in a consolidated case with the authority to consent to medical care, including the provision or withdrawal of life sustaining medical treatment pursuant to ORS 127.505 et seq.

Commentary:

This standard implements paragraph (b) of ORPC 1.14, which states the generally applicable rule that when a client has diminished capacity and the lawyer believes the client is at risk of substantial harm, the lawyer may take certain steps to protect the client, such as consulting with family members or protective agencies and, if necessary,

---

<sup>3</sup> ORPC 1.14(c).

<sup>4</sup> 205 Or. App. 152, 133 P3d 924 (2006)

requesting the appointment of a guardian ad litem. In addition, the commentary to the Rule notes that if a guardian is not appointed, “the lawyer often must act as de facto guardian.”

Substantial harm includes physical, sexual, financial and psychological harm. Protective action includes consultation with family members or professionals who work with the child. Lawyers may also utilize a period of reconsideration to allow for an improvement or clarification of circumstances or to allow for an improvement in the child’s capacity.

Ordinarily, under ORPC 1.6, unless authorized to do so, a child’s lawyer may not disclose information related to representation of the child. When taking protective action pursuant to this section, the lawyer is impliedly authorized to make necessary disclosures, even when the client directs the lawyer to the contrary. However, the lawyer should make every effort to avoid disclosures if at all possible. Where disclosures are unavoidable, the lawyer must limit the disclosures as much as possible. Prior to any consultation, the lawyer should consider the impact on the client’s position and whether the individual is a party who might use the information to further his or her own interests. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client’s interests before discussing matters related to the client. If any disclosure by the lawyer will have a negative impact on the client’s case or the lawyer-client relationship, the lawyer must consider whether representation can continue and whether the lawyer-client relationship can be re-established.

Requesting the judge to appoint a CASA or other best interest advocate may undermine the relationship the lawyer has established with the child. It also potentially compromises confidential information the child may have revealed to the lawyer. The lawyer cannot ever become the best interest advocate, in part due to confidential information that the lawyer receives in the course of representation. Nothing in this section restricts a court from independently appointing a best interest advocate when it deems the appointment appropriate.

- E. The child’s lawyer should not advise the court of the lawyer’s determination of the child’s capacity, and, if asked, should reply that the lawyer’s relationship with the client is privileged.**

Commentary:

The lawyer’s assessment of a child client’s capacity to direct the case is a confidential matter that goes to the heart of the lawyer-client relationship. Even though sometimes judges want to know whether the lawyer is acting at the client’s direction or is making a substituted judgment, the lawyer should not provide this information, since

doing so fundamentally undermines the lawyer's ability to be an effective advocate for the child.

## **STANDARD 2 - RELATIONSHIP WITH THE CHILD CLIENT**

- A. The child's lawyer should insure that the child is aware that he or she has a lawyer and communicate with the child before all court appearances, case status conferences, pretrial conferences and mediations, and any important decision affecting the child's life, and following (and, when possible, before) significant transitions including, but not limited to, initial removal and changes in placement.**

Action:

The child's lawyer must meet with the child within 72 hours of counsel's appointment. During the first meeting with the child, the lawyer must explain his or her role to the client.

Action:

The child's lawyer should meet or communicate with a child client immediately after becoming informed of a change in the child's placement if not beforehand.

Action:

A child's lawyer must have contact with the client before court hearings and Citizen Review Board (CRB) reviews, in response to contact by the client, when a significant change of circumstances must be discussed with the client or when a lawyer learns of emergencies or significant events affecting the child.

Action:

A child's lawyer must communicate with the child at least quarterly. Counsel must determine whether developing and maintaining a lawyer-client relationship requires that the meetings occur in person in the child's environment or whether other forms of communication, such as a telephone or email conversation are sufficient.

Commentary:

Establishing and maintaining a relationship with the child client is the foundation of representation. It is often more difficult to develop a relationship and trust with a child client than with an adult. Meeting with the child personally and regularly allows the lawyer to develop a relationship with the client and to assess the child's circumstances. The child's position, interests, needs and wishes change over time. A lawyer for a child

cannot be fully informed of such changes without developing a relationship through frequent contacts.

In order to provide competent representation, the lawyer for a child should initially meet with the child in the child's environment to understand the child's personal context, unless the client indicates that he or she does not want the lawyer to do this. The benefits of meeting with an older child who can convey information and express his or her wishes are obvious. However, meeting with younger children, including preverbal children, is equally important. ORPC 1.14 recognizes the value of the child client's input and further recognizes that varying degrees of input from children at different developmental stages may occur. In addition, preverbal children can provide valuable information about their needs through their behavior, including their interactions with their caretakers and other children or adults.

The child's lawyer must communicate with a child client at least quarterly. The extraordinary circumstances under which counsel may have contact with a child client less than quarterly include situations where the child is "on the run" and his or her whereabouts are unknown, there is strong evidence that the child will be adversely affected by communicating with counsel or the child refuses to communicate with counsel.

**B. The child's lawyer should provide the child with contact information in writing and establish an effective system for the child to communicate with the lawyer.**

Action:

The child's lawyer should ensure the child understands how to contact the lawyer and that the lawyer wants to hear from the client on an ongoing basis. The lawyer should explain that even when the lawyer is unavailable, the child should leave a message.

Action:

The lawyer must respond to client messages in a reasonable time period.

Commentary:

It is important that the child's lawyer, from the beginning of the case, is clear with the child that the lawyer works for the child, is available for consultation and wants to communicate regularly. This will help the lawyer support the client, gather information for the case and learn of any difficulties the child is experiencing that the lawyer might help address. The lawyer should explain to the client the benefits of bringing issues to the lawyer's attention rather than letting problems persist.

Communicating with child clients and other parties by email may be the most effective means of maintaining regular contact. However, lawyers should also understand the pitfalls associated with communicating sensitive case history and material by email. Not only can email create greater misunderstanding and misinterpretation, it can also become documentary evidence in later proceedings. The lawyer should treat this form of communication as not confidential and advise the client accordingly.

**C. The child’s lawyer should communicate with the child in a developmentally and culturally appropriate manner. An interpreter should be retained when the lawyer and child are not fluent in the same language.**

Action:

The lawyer must explain to the child in a developmentally appropriate way all information that will assist the child in having maximum input in determining his or her position. Interviews should be conducted in private.

Action:

The lawyer must be aware of the child’s cultural background and how that background affects effective communication with the child.

Action:

The lawyer must explain the result of all court hearings and administrative proceedings to the client in a manner appropriate, given the child’s age, abilities, cultural background and wish to be informed.

Action:

The lawyer should ensure a qualified interpreter is involved when the lawyer and client are not fluent in the same language.

Commentary:

A child’s lawyer must be adept at giving explanations, asking developmentally and culturally appropriate questions and interpreting the child’s responses in such a manner as to obtain a clear understanding of the child’s preferences. This process can and will change based on age, cognitive ability and emotional maturity of the child. The lawyer needs to take the time to explain thoroughly and in a way that allows and encourages the child to ask questions and that ensures the child’s understanding.

In addition to communicating with the child client, the lawyer should review records and consult with appropriate professionals and others with knowledge of the child. The lawyer also may find it helpful to observe the child's interactions with foster parents, birth parents and other significant individuals. This information will help counsel to better understand the child's perspective, priorities and individual needs, and will assist the child's lawyer identifying relevant questions to pose to the child.

The lawyer should advocate for the use of an interpreter when other professionals in the case who are not fluent in the same language as the client are interviewing the client. The lawyer should become familiar with interpreter services that are available for out-of-court activities such as client conferences, provider meetings, etc.

**D. The child's lawyer should show respect to the client and act professionally with the child.**

Action:

A child's lawyer should support his or her client and be sensitive to the client's individual needs. Lawyers should remember that they may be their clients' only advocate in the system and should act accordingly.

Commentary:

Often lawyers practicing in abuse and neglect court are a close-knit group who work and sometimes socialize together. Maintaining good working relationships with other players in the child welfare system is an important part of being an effective advocate. The lawyer, however, should be vigilant against allowing the lawyer's own interests in relationships with others in the system to interfere with the lawyer's primary responsibility to the client. The lawyers should not give the impression to the client that relationships with other lawyers are more important than the representation the lawyer is providing the client. The client must feel that the lawyer believes in him or her and is actively advocating on the client's behalf.

**E. The child's lawyer should understand confidentiality laws, as well as ethical obligations, and adhere to both with respect to information obtained from or about the client.**

Action:

The lawyer must fully explain to the client the advantages and disadvantages of choosing to exercise, partially waive or waive a privilege or right to confidentiality. If the lawyer for a child determines that the child is unable to make an adequately considered decision with respect to waiver, the lawyer must act with respect to waiver in a manner consistent with and in furtherance of the client's position in the overall litigation.

Action:

Consistent with the client's interests and goals, the lawyer must seek to protect from disclosure confidential information concerning the client.

Action:

A lawyer should try to avoid publicity connected with the case that is adverse to the client's interests. A lawyer should be cognizant of the emotional nature of these cases, the confidential nature of the proceedings and the privacy needs of the client. A lawyer should protect the client's privacy interests, including asking for closed proceedings when appropriate.

- F. The child's lawyer should be alert to and avoid potential conflicts of interest, or the appearance of a conflict of interest, that would interfere with the competent representation of the client.**

Action:

A lawyer or a lawyer associated in practice, should not represent two or more clients who are parties to the same or consolidated juvenile dependency cases or closely related matters unless it is clear there is no conflict of interest between the parties as defined by the Oregon Rules of Professional Conduct (ORPC). Lawyers should also follow ORPC 1.8–1.13 relating to conflicts of interests and duties to former clients.

Commentary:

A lawyer should be especially cautious when accepting representation of more than one child. A lawyer should avoid representing multiple siblings when their interests may be adverse and should never represent siblings when it is alleged that one sibling has physically or sexually abused another sibling.

In analyzing whether a conflict of interest exists, the lawyer must consider whether pursuing one client's objectives will prevent the lawyer from pursuing another client's objectives, and whether confidentiality may be compromised. Conflicts of interest among siblings are likely if one child is allegedly a victim and the other(s) are not, if an older child is capable of directly the representation but a younger child is not, or if older children object to the permanency plan for younger children.

Child clients may not be capable of consenting to multiple representations even after full disclosure. For a child client not capable of considered judgment or unable to execute any written consent to continued representation in a case of waivable conflict of interest, the lawyer should not represent multiple parties.

**G. The child’s lawyer should advocate for actions necessary to meet the client’s educational, health and mental health needs.**

Action:

Consistent with the child's wishes, the child's lawyer should identify the child’s needs and seek appropriate services (by court order if necessary) to access entitlements, to protect the child's interests and to implement an individualized service plan. These services should be culturally competent, community-based whenever possible and provided in the least restrictive setting appropriate to the child’s needs. These services may include, but are not limited to:

- 1) Family preservation-related prevention or reunification services;
- 2) Sibling and family visitation;
- 3) Domestic violence services, including treatment;
- 4) Medical and mental health care;
- 5) Drug and alcohol treatment;
- 6) Educational services;
- 7) Recreational or social services;
- 8) Housing;
- 9) Semi-independent and independent living services for youth who are transitioning out of care and services to help them identify and link with permanent family connections; and
- 10) Adoption services.

Action:

Consistent with the child's wishes, the child's lawyer should assure that a child with special needs receives the appropriate and least restrictive services to address any physical, mental or developmental disabilities. These services may include, but should not be limited to:

- 1) Special education and related services;
- 2) Supplemental security income (SSI) to help support needed services;
- 3) In home, community based behavioral health treatment or out-patient psychiatric treatment;
- 4) Therapeutic foster or group home care; and
- 5) Residential/in-patient behavioral health treatment.

**H. The child’s lawyer should report abuse or neglect discovered through lawyer-client communication only if the child consents to the disclosure.**

Commentary:

Under ORS 419B.010, lawyers are mandatory child abuse reporters. However, a lawyer is not required to report if the information that forms the basis for the report is privileged. Further, ORS 419B.010(1), “A lawyer is not required to make a report under this section by reason of information communicated to the lawyer in the course of representing a client if disclosure of the information would be detrimental to the client.” Lawyers should consult with the lawyer advisors at the Oregon State Bar when they face a close question under these rules.

**I. The child’s lawyer should consider expanding the scope of representation.**

Action:

If a lawyer, in the course of representation of a client under the age of 18, becomes aware that the client has a possible claim for damages that the client cannot pursue because of his or her civil disability, the lawyer should consider asking the court that has jurisdiction over the child to either appoint a guardian ad litem for the child to investigate and take action on the possible claim or issue an order permitting access to juvenile court records by a practitioner who can advise the court whether to seek appointment of a guardian ad litem to pursue a possible claim.

Action:

The child’s lawyer may pursue, personally or through a referral to an appropriate specialist, issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment. Examples include:

- 1) Delinquency or status offender matters;
- 2) SSI and other public benefits;
- 3) Custody;
- 4) Paternity;
- 5) School and education issues;
- 6) Immigration issues;
- 7) Proceedings related to the securing of needed health and mental health services;  
and
- 8) Child support.

Commentary:

The child’s lawyer may request authority from the appropriate authority to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment. Such ancillary matters may include special education, school discipline hearings, mental health treatment, delinquency or criminal

issues, status offender matters, paternity, probate, immigration matters, medical care coverage, SSI eligibility, youth transitioning out of care issues, postsecondary education opportunity qualification and tort actions for injury.

The child's lawyer does not have an ethical duty to represent the child in these collateral matters where the terms of the lawyer's employment limit duties to the dependency case. However, the lawyer may have a duty to take limited steps to protect the child's rights, ordinarily by notifying the child's legal custodian about the possible claim unless the alleged tortfeasor is the legal custodian. In the latter case, ordinarily the lawyer adequately protects the child by notifying the court about the potential claim. Whether this solution will work depends on whether a lawyer capable of assessing the potential tort claim is available to be appointed by the court. In Multnomah County, at the request of the juvenile court judges, the Oregon Trial Lawyers Association has created a panel that accepts referrals under these circumstances. In other counties, a juvenile court judge might well expect the child's lawyer to recommend someone to whom the case could be referred. In this situation, the child's lawyer should research the other lawyer's reputation and communicate clearly to the court and to the child that he or she is turning the work over to the receiving lawyer and is not vouching for the receiving lawyer's work or monitoring his progress in pursuing the claim. For more information, see [Oregon Child Advocacy Project, When a Child May Have a Tort Claim: What's a Child's Court-Appointed Attorney to Do? \(2010\)](#).

### **STANDARD 3 - TRAINING REQUIREMENTS FOR COMPETENT REPRESENTATION OF CHILDREN**

- A. A lawyer must provide competent representation to a child client. Competent representation requires the legal knowledge, skill, training, experience, thoroughness and preparation reasonably necessary for the representation. A lawyer should only accept an appointment or retainer if the lawyer is able to provide quality representation and diligent advocacy for the client.**

Action:

A lawyer representing a child in a dependency case should obtain and maintain proficiency in applicable substantive and procedural law and stay current with changes in constitutional, statutory and evidentiary law and local or statewide court rules.

Action:

A lawyer representing a child in a dependency case should have adequate time and resources to competently represent the client, including maintaining a reasonable caseload and having access to sufficient support services.

- B. Before accepting an appointment or retainer on a child dependency or termination of parental rights case, the lawyer should gain experience by observing and serving as co-counsel in dependency and termination of parental rights cases. The lawyer accepting appointment or retainers to represent children in dependency and termination of parental rights cases should participate in at least 16 hours of continuing legal education (CLE) related to juvenile law each year.**

Action:

A lawyer representing a child in a dependency case must have served as counsel or co-counsel in at least two dependency cases adjudicated before a judge or have observed at least five dependency cases adjudicated before a judge.

Action:

A lawyer representing a parent in a termination-of-parental-rights cases must have served as counsel or co-counsel in or observed dependency cases as described above and have served as counsel or co-counsel in at least two termination of parental rights trials; or have observed or reviewed the transcripts of at least two termination of parental rights trials.

Commentary:

As in all areas of law, it is essential that lawyers learn the substantive law as well as local practice. Lawyers should be familiar with the Qualification Standards for Court-Appointed Counsel, Office of Public Defense Services, Standard 4(7). Lawyers should consider the contractually-mandated training requirements as a floor rather than a ceiling and actively pursue additional training opportunities. Newer lawyers are encouraged to work with mentors for the first three months and, at a minimum, should observe or co-counsel each type of dependency hearing from shelter care through review of permanent plan before accepting appointments.

- C. A child's lawyer should acquire working knowledge of all relevant state and federal laws, regulations, policies and rules.**

Action:

A child's lawyer must read and understand all state laws, policies and procedures regarding child abuse and neglect, including but not limited to the following:

- 1) Oregon Revised Statutes chapters 419A and 419B, Oregon Juvenile Code;
- 2) Oregon Revised Statutes chapter 418, Child Welfare Services;
- 3) Refugee Child Act, ORS 418.925–418.945;
- 4) Oregon Revised Statutes concerning paternity, guardianships and adoption;
- 5) Interstate Compact on Placement of Children, ORS 417.200-417.260 and OAR;
- 6) Uniform Child Custody Jurisdiction and Enforcement Act, ORS 109.701-109.834 and OAR;
- 7) The basic structure and functioning of DHS and the juvenile court, including court procedures, the functioning of the citizen review board (hereinafter referred to as CRB) and court-appointed special advocates (hereinafter referred to as CASA) programs; and
- 8) Indian Child Welfare Act 25 USC §1901 -1963; BIA Guidelines; and OAR.

Action:

A child’s lawyer must be thoroughly familiar with Oregon evidence law and the Oregon Rules of Professional Conduct.

Action:

A child’s lawyer must be sufficiently familiar with the areas of state and federal law listed in Appendix A so as to be able to recognize when they are relevant to a case and he or she should be prepared to research these and other applicable issues.

**D. A child’s lawyer should have a working knowledge of child development, family dynamics, placement alternatives case and permanency planning, and services for children and families in dependency cases.**

Action:

A lawyer for children should become familiar with normal growth and development in children and adolescents as well as common types of condition and impairments.

Action:

A lawyer for children should be familiar with the range of placement options in dependency cases and should visit at least two of the following:

- 1) A shelter home or facility;
- 2) A foster home;
- 3) A group home;
- 4) A residential treatment facility;
- 5) The Oregon State Hospital Child or Adolescent Psychiatric Ward; or
- 6) An outpatient treatment facility for children.

Action:

The child's lawyer must be familiar with case planning and permanency planning principles, and with child welfare and family preservation services available through Department of Human Services and available in the community and the problems they are designed to address. A child's lawyer is encouraged to seek training in the areas listed in Appendix B.

Commentary:

The parent's lawyer should know the kinds and types of services within their communities which serve parents and children. Based on the conditions and circumstances which brought the parent and their children into the dependency system, the parent's lawyer should identify the services which will help remove the barriers to reunify the parent and their child(ren). The parent's lawyer should consult with the client about such services and whether the services address the client's needs. The parent's lawyer must be aware of cultural issues within the parent's community and be prepared in appropriate circumstances, to advocate services be made available to a parent that are culturally appropriate and meet the client's unique conditions and circumstances.

**STANDARD 4 - GENERAL PRINCIPLES GOVERNING CONDUCT OF THE CASE**

- A. A child's lawyer should actively represent a child in the preparation of a case, as well as at hearings.**

Action:

A child's lawyer should develop a theory and strategy of the case to implement at hearings, including the development of factual and legal issues.

Action:

A child's lawyer should advocate for the child both in and out of court.

Action:

A child's lawyer should inform other parties and their representatives that he or she is representing the child and expects reasonable notification prior to case conferences, changes of placement and other changes of circumstances affecting the child and the child's family. When necessary, the child's lawyer should also remind parties and their representatives that the child has a lawyer and, therefore, they should not communicate with the child without the lawyer's permission.

Commentary:

Regardless of any alignment of position among the child and other parties, the child's counsel should develop his or her own theory and strategy of the case and ensure that the child has an independent voice in the proceeding. The child's counsel should not be merely a fact finder, but rather should zealously advocate a position on behalf of the child. Although the child's position may overlap with the position of one or both parents, third-party caretakers or DHS, child's counsel should be prepared to present his or her client's position independently and to participate fully in any proceedings.

**B. When consistent with the child's interest, the child's lawyer should take every appropriate step to expedite the proceedings.**

Commentary:

Delaying a case often increases the time a family is separated and can reduce the likelihood of reunification. Appearing in court often motivates parties to comply with orders and cooperate with services. When a judge actively monitors a case, services are often put in place more quickly, visitation may be increased or other requests by the parent may be granted. If a hearing is continued and the case is delayed, the parent may lose momentum in addressing the issues that led to the child's removal or the parent may lose the opportunity to prove compliance with case plan goals. Additionally, the Adoption and Safe Families Act (ASFA) timelines continue to run despite continuances.

**C. The child's lawyer should cooperate and communicate regularly with other professionals in the case.**

Action:

The child's lawyer should communicate with lawyers for the other parties, the court appointed special advocates (CASA), the caseworker, foster parents and service providers to learn about the client's progress and their views of the case, as appropriate.

Action:

The child's lawyer should respond promptly to inquiries from other parties and their representatives.

Commentary:

The child's lawyer must have all relevant information to represent a child client effectively. This requires open and ongoing communication with the other lawyers and service providers working with the child and family. When communicating with other parties, service providers and lawyers, the child's lawyer should be especially mindful of confidentiality requirements.

**D. They child's lawyer or the lawyer's agency must not contact represented parties without the consent of their lawyer.**

Commentary:

Before visiting a child who is in the physical custody of his or her parent(s), a child's lawyer must seek permission from the lawyer(s) for the parent(s). Such a visit may present particular difficulties for the child's lawyer since the parents may want to talk to the lawyer about the case. The child's lawyer should be careful not to disclose confidential information or to elicit any information from the parent. If the parent volunteers information, or if the child's lawyer observes something during the visit that is relevant to the case, the lawyer should take protective action for the child as necessary and as agreed to by the child client. The child's lawyer should also, as a matter of courtesy, tell the parent's lawyer about what was seen or disclosed.

When an agency is represented by counsel, the child's lawyer should not talk with a caseworker without the lawyer's permission. However, in many cases, the agency has not retained the Department of Justice to represent it, and in those cases the child's lawyer may talk to caseworkers without permission. If the child's lawyer is unsure whether the DOJ has been retained in a particular case, the lawyer should ask the caseworker.

In some counties, the District Attorney may appear representing the state. The DA is not counsel for the agency in these cases.

**E. The child's lawyer should engage in case planning and advocate for a permanency plan and social services which will help achieve the child's goals in the case.**

Action:

The lawyer should actively engage in case planning, including attending substantive case meetings, such as planning meetings and case reviews of plans. If the lawyer is unable to attend a meeting the lawyer should send a delegate.

Action:

If the child's goal is reunification with the parent, the child's lawyer should advocate for the parent to receive needed services. If the child's goal is not reunification, but the child's lawyer concludes that the parent will be given an opportunity to attempt reunification, the lawyer should advocate for services in support of that effort.

Action:

The child's lawyer should advocate for the child to receive any needed services in which the child is willing to participate.

Action:

After investigation and consultation with the child, the child's lawyer should advocate for the child's placement with his or her preferred care provider, if any, and in the least restrictive, culturally appropriate and most familiar setting possible.

Action:

Whenever possible, the child's lawyer should use a social worker as part of the child's team to help determine an appropriate case plan, evaluate suggested social services, and act as a liaison and advocate for the client with the service providers where appropriate.

Commentary:

When the child wishes to be reunited with the parent, the child's lawyer should advocate for services for the parent and child that will facilitate reunification. If the child does not want to return to the parent, but the child's lawyer concludes that reunification will be the initial case plan, the child's lawyer should also advocate for appropriate services to the parent, since failure to provide necessary services is likely simply to delay the case.

The lawyer should ensure that the child's plan for permanency addresses not only the permanency goal but also the child's developmental, medical, emotional, educational and independent living. Permanency includes minimizing the child's disruptions during his/her time in care and ensuring trauma-informed treatment, decision-making and transition planning.

Depending on the age and maturity of the child client, the child may have a preference placement or have an existing relationship with a relative or adult friend that can be certified as a placement for the child. The child's lawyer should advocate for the child's preferred placement and ensure the Department fully explores placements suggested by the child client.

**F. If the child's goal is reunification with the parent, the child's lawyer should advocate strongly for frequent visitation in a family-friendly setting.**

Action:

When necessary, the child's lawyer should seek court orders to compel the child welfare agency to provide frequent, unsupervised visitation if safe for the child. The lawyer may also need to take action to enforce previously entered orders.

Action:

The child's lawyer should advocate for an effective visiting plan consistent with the child's wishes. Factors to consider in visitation plans include:

- 1) Developmental age of child;
- 2) Frequency;
- 3) Length;
- 4) Location;
- 5) Child's safety;
- 6) Types of activities; and
- 7) Visit coaching - having someone at the visit who could model effective parenting skills.

Commentary:

Frequent high quality visitation is one of the best predictors of successful reunification between a parent and child. Often visits are arranged in settings that are uncomfortable and inhibiting for families. It is important that the child's lawyer seek a visitation order that will allow the best possible visitation. The lawyer should advocate that visits be unsupervised if safe for the child or at the lowest safe level of supervision, e.g. families often are more comfortable when relatives, family friends, clergy or other community members are recruited to supervise visits rather than caseworkers.

Lawyers should advocate for visits to occur in family-friendly locations, such as in the family's home, parks, libraries, restaurants, place of worship or other community venues and at the child's activities.

## **STANDARD 5 - INVESTIGATION**

- A. A child's lawyer should conduct a thorough, continuing and independent review and investigation of the case, including obtaining information, research and discovery in order to prepare the case for trial.**

**Action:**

A lawyer should not rely solely on the disclosure information provided by the DHS caseworker, the state or other parties as the investigation of the facts and circumstances underlying the case.

**Action:**

The child's lawyer should review the record of case of the child (formerly the legal file) and the supplemental confidential file and, if available, the record of the case of the child's siblings.

**Action:**

The child's lawyer should contact lawyers for the other parties and court-appointed special advocates (CASAs) for background information.

**Action:**

The child's lawyer should contact and meet with the parents/legal guardians/caretakers of the child with permission of their lawyer.

**Action:**

The lawyer should obtain necessary releases of information in order to thoroughly investigate the case.

**Action:**

The lawyer should interview individuals involved with the child.

**Action:**

The lawyer should review relevant photographs, video or audio tapes and other evidence. When necessary, the lawyer should obtain protective orders to obtain access to such evidence.

Action:

A lawyer should research and review relevant statutes and case law to identify defenses and legal arguments to support the child's case.

Commentary:

In conducting the investigation and utilizing its results to formulate a legal course of action on behalf of a child, lawyers must also utilize that information to understand the child in a larger context as a multidimensional being. The lawyer must become familiar with his or her client's world, maintain an open mind regarding his or her client's differences and ensure objective assessment of the child's circumstances, desires and needs in the context of the child's connection to family, culture and community. To achieve the child's individualized goals for the legal proceeding, within the bounds of confidentiality, the lawyer should encourage, when advantageous to the child, the involvement of family and community resources to resolve the issues the child and family face. The lawyer should be familiar with procedures to obtain funds for evaluation or assessment of the client.

Action:

The child's lawyer should work with a team that includes investigators and social workers to prepare the child's case. If necessary, the lawyer should petition the OPDS for funds.

Commentary:

If possible, the child's lawyer should work with a team that includes social workers and investigators who can meet with the child and assist in investigating the underlying issues that arise as cases proceed. If not possible, the lawyer is still responsible for gaining all pertinent case information, being mindful of not making himself a witness.

**B. The child's lawyer should review the child welfare agency case file.**

Action:

The child's lawyer should ask for and review the agency case file as early during the course of representation as possible and at regular intervals throughout the case.

Action:

After a review of the agency file, the lawyer should determine if any records or case notes of any social worker or supervisor have not been placed in the file and move to obtain those records as well either through informal or formal discovery.

Commentary:

Even if the lawyer is voluntarily given contents of the DHS file in paper or electronic format, the lawyer should also look at the actual file in the DHS office and request disclosure of all documents relating to the case from DHS, since the department may have additional items not given to the lawyer. If requests to obtain copies of the agency file are unsuccessful or slow in coming, the lawyer should pursue formal disclosure in a timely fashion. If the agency case file is inaccurate, the lawyer should seek to correct it. The lawyer must read the case file and request disclosure of documents periodically because information is continually being received by the agency.

- C. The child's lawyer should obtain all necessary documents, including copies of all pleadings and relevant notices filed by other parties, and respond to requests for documents from other parties.**

Action:

A lawyer should comply with disclosure statutes and use the same to obtain names and addresses of witnesses, witness statements, results of evaluations or other information relevant to the case. A lawyer should obtain and examine all available discoveries and other relevant information.

Commentary:

As part of the discovery phase, the lawyer should review the following kinds of documents:

- 1) Social service records, including information about services provided in the past, visitation arrangements, the plan for reunification and current and planned services;
- 2) Medical records;
- 3) School records;
- 4) Evaluations of all types;
- 5) Housing records; and
- 6) Employment records

- D. A child's lawyer should have potential witnesses, including adverse witnesses interviewed and, when appropriate, subpoenaed by an investigator or other appropriately trained person.**

Action:

Potential witnesses to be interviewed may include:

- 1) School personnel;
- 2) Neighbors;
- 3) Relatives;
- 4) Caseworkers;
- 5) Foster parents and other caretakers;
- 6) Mental health professionals;
- 7) Physicians;
- 8) Law enforcement personnel; and
- 9) The child(ren).

Commentary:

It is usually good practice to have interviews conducted by an investigator employed by the lawyer but if the lawyer conducts the interview, a third person such as a member of the lawyer's office should be present so that, if necessary, the third person can be used at trial or hearing as a witness.

Action:

When appropriate, a lawyer or another trained and qualified person should observe visitations between the parent and child.

## **STANDARD 6 - COURT PREPARATION**

- A. The child's lawyer should develop a case theory and strategy to follow at hearings and negotiations.**

Action:

Once the child's lawyer has completed the initial investigation and discovery, including interviews with the client, the lawyer should develop a strategy for representation.

Commentary:

The strategy may change throughout the case, as the child or parent makes or does not make progress, but the initial theory is important to assist the lawyer in staying focused on the client's wishes and on what is achievable. The theory of the case should inform the lawyer's preparation for hearings and arguments to the court. It should also

be used to identify what evidence is needed for hearings and the steps to move the case toward the client's ultimate goals.

**B. The child's lawyer should timely file all pleadings, motions, objections and briefs and research applicable legal issues and advance legal arguments when appropriate.**

Action:

The lawyer must file answers and responses, motions, objections and discovery requests that are appropriate for the case. The pleadings must be thorough, accurate and timely. The pleadings must be served on the lawyers or unrepresented parties.

Action:

When a case presents a complicated or new legal issue, the child's lawyer should conduct the appropriate research before appearing in court. The lawyer should be prepared to distinguish case law that appears unfavorable.

Action:

If it would advance the client's case, the child's lawyer should present a memorandum of law to the court.

Commentary:

Filing motions, pleadings and briefs benefits the client. This practice highlights important issues for the court and builds credibility for the lawyer. In addition to filing responsive papers and discovery requests, the lawyer should seek court orders when that would benefit the client, e.g., filing a motion to enforce court orders to ensure the child welfare agency is meeting its reasonable efforts obligations. When out-of-court advocacy is not successful, the lawyer should not wait to bring the issue to the court's attention. Arguments in child welfare cases are often fact-based. Nonetheless, lawyers should ground their argument in statutory, Oregon Administrative Rules (OARs) and case law. Additionally, while non-binding, law from other jurisdictions can be used to persuade a court.

At times, competent representation requires advancing legal arguments that are not yet accepted in the jurisdiction. Lawyers should preserve legal issues for appellate review by making a record, even if the argument is unlikely to prevail at trial level.

Appropriate pretrial motions include but are not limited to:

- 1) Discovery motions;
- 2) Motions challenging the constitutionality of statutes and practices;
- 3) Motions to strike, dismiss or amend the petitions;
- 4) Motions to transfer a case to another county;
- 5) Evidentiary motions and motions in limine;
- 6) Motions for additional shelter hearings;
- 7) Motions for change of venue;
- 8) Motion to consolidate; and
- 9) Motion to sever.

Note: Under ORS 28.110 when a motion challenges the constitutionality of a statute, it must be served on the Attorney General.

Action:

A lawyer should make motions to meet the client's needs pending trial.

Commentary:

Examples of such motions include:

- 1) Motion for family reunification services;
- 2) Motion for medical or mental health treatment;
- 3) Motion for change of placement;
- 4) Motion to increase parental or sibling visitation;
- 5) Motion seeking contempt for violations of court orders; and
- 6) Motion to establish, disestablish or challenge paternity pursuant to chapter 419B.

**C. The child's lawyer should promote and participate in settlement negotiations and mediation to resolve the case quickly.**

Action:

The child's lawyer should, when appropriate, participate in settlement negotiations to promptly resolve the case, keeping in mind the effect of continuances and delays on the child's goals.

Commentary:

The child's lawyer should use suitable mediation resources. The child's lawyer should consult the child in a developmentally appropriate way prior to any settlement becoming binding. The ultimate settlement agreement must be consistent with the child's wishes.

The facts to which the parties admit will frame the court's inquiry at all subsequent hearings as well as what actions the parties must take, the services provided and the ultimate outcome.

A written, enforceable agreement should be prepared whenever possible, so that all parties are clear about their rights and obligations. The child's lawyer should ensure agreements accurately reflect the understandings of the parties. The child's lawyer should request a hearing or move for contempt, if appropriate, if orders benefiting the child are not obeyed.

- D. Explain to the child, in a developmentally-appropriate manner, what is expected to happen before, during and after each hearing and facilitate the child's attendance at hearings when appropriate.**

Action:

Prior to a hearing, the child's lawyer should discuss with the child its purpose, what is likely to happen during it and whether the child will attend.

Commentary:

Children over the age of 12 must be served by summons under ORS 419B.839(c). If the child is not properly served with the summons, the child's lawyer should consider whether a motion to dismiss is appropriate. If the child will attend the hearing, the child's lawyer should meet with the child to explain what will happen at the hearing and to prepare for it.

The lawyer for a child younger than 12 years of age, and in some cases for a child older than 12, should determine, through consultation with the client and the child's therapist, caretaker or other knowledgeable person(s), how the child is likely to be affected by attending a hearing. If the child's lawyer concludes that attendance might be detrimental to the child, the lawyer should meet with the child to discuss this concern. The discussion should include how best to minimize the potential detrimental effects on the child. Whether to attend the hearing is a decision for the child provided the child is able to direct the lawyer on this issue.

Action:

When the child wishes to attend the proceedings, the child's lawyer must request that DHS, as the child's legal custodian, transport the child to the hearing.

Action:

When appropriate, the child's lawyer should ask that DHS provide support for the child to minimize adverse impacts of the hearing on the child.

Commentary:

The child's lawyer should ask DHS to provide necessary support for the child during the hearing. One example of such support is requesting that DHS have personnel accompanying the child to and from the hearing who will be able to remain with the child throughout the hearing and during any breaks.

- E. In consultation with the child, the child's lawyer should determine whether to call the child to testify. When the child will offer testimony or will be called by another party, the lawyer should prepare the child to testify.**

Action:

The child's lawyer should decide whether to call the child as a witness, although the lawyer is bound by the wishes of a child capable of considered judgment. The decision should consider the child's need or desire to testify, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, the child's developmental ability to provide direct testimony and withstand possible cross-examination, and any repercussions of testifying, including but not limited to the possible emotional and psychological effect of testifying on the child and on the possible reunification of the family.

Action:

The child's lawyer must be familiar with the current law and empirical knowledge about children's competency, memory and suggestibility and, where appropriate, attempt to establish the competency and reliability of the child.

Commentary:

There is no minimum age below which a child is automatically incompetent to testify. To testify as a witness, the child must have the capacity to observe, adequate intelligence, adequate memory, ability to communicate, an awareness of the difference between telling truth and falsehood and understand that she or he must tell the truth as

a witness. The court should make the determination of the child client's competency as a witness under the applicable rules of evidence prior to the child's testimony. If necessary, the child's lawyer should present expert testimony to establish competency or reliability or to rehabilitate any impeachment of the child on those bases.

While testifying is undoubtedly traumatic for many children, it is therapeutic and empowering for others. The child's lawyer should take all reasonable steps to reduce the likelihood of the child being traumatized from testifying. The decision about the child's testifying must be made based on the individual child client's abilities, circumstances and need for the child's testimony. If the child has a therapist, he or she should be consulted both with respect to the decision itself and assistance with preparing the child to testify.

If the child does not wish to testify or would be harmed by being forced to testify, the child's lawyer should seek a stipulation of the parties not to call the child as a witness or file a motion pursuant to ORS 419B.310 to take the testimony of the child outside the presence of the parent(s) and other parties.

Action:

The child's lawyer should prepare the child to testify and seek to minimize any harm that testifying will cause to the child.

Commentary:

Unlike a criminal proceeding or delinquency proceeding, the child can be called as a witness by any other party to the proceeding. Thus, regardless of the child's desire to testify, he or she may be called as a witness by another party to the proceeding. The child's lawyer needs to be aware of the potential that the child will be called as a witness and take steps necessary to prepare the child as a witness.

The child's lawyer's preparation of the child to testify should include attention to the child's developmental needs and abilities, as well as to accommodations which should be made by the court and other lawyers including the necessity of filing a motion pursuant to ORS 419B.310 to take the child's testimony outside the parents' presence.

The child's lawyer should familiarize the child client with the court room and process for testifying including the likelihood that the child's lawyers for the parent or state will also ask questions to reduce potential harm to the child. The lawyer should also prepare the child for the possibility that the judge may render a decision against the child's wishes which will not be the child's fault.

**F. The child’s lawyer should identify, locate and prepare all witnesses.**

Action:

The child’s lawyer, in consultation with the child to the extent developmentally appropriate, should develop a witness list well before a hearing or trial. The child’s lawyer should not assume the agency will call a witness, even if the witness is named on the agency’s witness list. The child’s lawyer should, when possible, contact the potential witnesses to determine if they can provide helpful testimony.

Action:

When appropriate, witnesses should be informed that a subpoena is on its way. The child’s lawyer should also ensure the subpoena is served. The child’s lawyer should subpoena potential agency witnesses (e.g., a previous caseworker) who have favorable information about the client.

Action:

The child’s lawyer should set aside time to fully prepare all witnesses in person before the hearing. The child’s lawyer should remind the witnesses about the court date.

Commentary:

Preparation is the key to successfully resolving a case, either in negotiation or trial. The child’s lawyer should plan as early as possible for the case and make arrangements accordingly. The child’s lawyer should carefully review the other party’s witness lists and be prepared to independently obtain witnesses and evidence in support of child’s position. Witnesses may be people with direct knowledge of the allegations against the parent, service providers working with the parent or individuals from the community who could testify generally about the family’s situation.

When appropriate, the child’s lawyer should consider working with other parties who share the child’s position when developing the child’s witness list, issuing subpoenas and preparing witnesses. Doctors, nurses, teachers, therapists and other potential witnesses have busy schedules and need advance warning about the date and time of the hearing.

The child’s lawyer should prepare their witnesses thoroughly so the witnesses feel comfortable with the process and understand the scope of their testimony. Preparation will generally include rehearsing the specific questions and answers expected on direct and anticipating the questions and answers that might arise on cross-examination. Lawyers should provide written questions for those witnesses who need them.

**G. The child’s lawyer should identify, secure, prepare and qualify expert witnesses when needed. When possible, interview opposing counsel’s experts.**

Action:

Often a case requires multiple experts with different expertise, such as medicine, mental health treatment, drug and alcohol treatment, or social work. Experts may be needed for ongoing case consultation in addition to providing testimony at trial. The lawyer should consider whether the opposing party is calling expert witnesses and determine whether the child needs to call any experts to respond to the opponent’s experts.

Action:

When opposing counsel plans to call expert witnesses, the child’s lawyer should seek to interview the witnesses in advance. Lawyers should scrupulously comply with standing orders of the juvenile court regarding contact with court-ordered evaluators.

Commentary:

By contacting opposing counsel’s expert witnesses in advance, the child’s lawyer will know what evidence will be presented against the client and whether the expert has any favorable information that might be elicited on cross-examination. The lawyer will be able to discuss the issues with the client, prepare a defense and call experts on behalf of the client, if appropriate. Conversely, if the lawyer does not talk to the expert in advance, the lawyer could be surprised by the evidence and unable to represent the client competently.

**STANDARD 7 - HEARINGS**

**A. Prepare for and attend all hearings, including pretrial conferences.**

Action:

The child’s lawyer must prepare for and attend all hearings and participate in all telephone and other conferences with the court. The child’s position may overlap with the positions of one or both parents, third-party caretakers or DHS. Nevertheless, the child’s lawyer should participate fully in every hearing and not merely defer to the other parties. The child’s lawyer should be prepared to state and explain the child’s position at each hearing.

Action:

If the court proceeds in the absence of the lawyer, the lawyer should file a motion to set aside.

Commentary:

The child's lawyer's participation in pretrial proceedings may improve case resolution for the child and failing to participate in the proceedings may harm the child's position in the case. Therefore, the child's lawyer should be actively involved in this stage. If a lawyer has a conflict with another courtroom appearance, the lawyer should notify the court and the other parties and request a short continuance. The parent's lawyer should not have another lawyer stand in to represent the client in court if the other lawyer is unfamiliar with the client or case.

Becoming a strong courtroom lawyer takes practice and attention to detail. The lawyer must be sure to learn the rules about presenting witnesses, impeaching testimony and entering evidence. The lawyer may wish to seek out training in trial skills and watch other lawyers to learn from them. Presenting and cross-examining witnesses are skills with which the child's lawyer must be comfortable.

**B. The child's lawyer should request the opportunity to make opening and closing arguments.**

Action:

The child's lawyer should make opening and closing arguments in the case to frame the issues around the child's lawyer's theory of the case and ensure the judge understands the issues from the child's perspective.

Commentary:

In many child abuse and neglect proceedings, lawyers waive the opportunity to make opening and closing arguments. However, these arguments can help shape the way the judge views the case and therefore can help the client. Argument may be especially critical, for example, in complicated cases when information from expert witnesses should be highlighted for the judge, in hearings that take place over a number of days or when there are several children and the agency is requesting different services or permanency goals for each of them.

It is important to be able to read the judge. The attorney should move along when the judge is tracking the argument and elaborate on the areas that appear to need more attention.

- C. Prepare and make all appropriate motions and evidentiary objections. Be aware of the need to make a record for appeal.**

Action:

The child's lawyer should make appropriate motions and evidentiary objections to advance the child's position during the hearing. If necessary, the child's lawyer should file memoranda of points and authorities in support of the client's position on motions and evidentiary issues. The child's lawyer should always be aware of preserving legal issues for appeal.

Commentary:

It is essential that the child's lawyers understand the applicable rules of evidence and all court rules and procedures. The lawyer must be willing and able to make appropriate motions, objections and arguments (e.g., objecting to the qualification of expert witnesses, the competence of child or other witness, or raising the issue of the child welfare agency's lack of reasonable efforts).

- D. If the child testifies, the child's lawyer should ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner.**

Commentary:

The phrasing of questions should take into consideration the law and research regarding children's testimony, memory and suggestibility. The information a child gives in interviews and during testimony is often misleading because the adults have not understood how to ask children developmentally appropriate questions and how to interpret their answers properly. The child's lawyer must become skilled at recognizing the child's developmental limitations. It may be appropriate to present expert testimony on the issue and even to have an expert present during a young child's testimony to point out any developmentally inappropriate phrasing.

- E. The child's lawyer should present and cross examine witnesses and prepare and offer exhibits.**

Action:

The parents' lawyer must be able to effectively present witnesses to advance the client's position. Witnesses must be prepared in advance and the lawyer should know what evidence will be presented through the witnesses. The lawyer must also be skilled at cross-examining opposing parties' witnesses. The lawyer must know how to offer documents, photos, physical objects, electronic records, etc. into evidence.

Action:

At each hearing, the lawyer should advocate for the client's goals, keeping in mind the case theory. This should include advocating for appropriate services and requesting that the court state its expectations of all parties on the record.

**F. The child's lawyer should ensure that findings of fact, conclusions of law and orders that benefit the child are included in the court's decision.**

Action:

Be familiar with the standard forms and ensure that they are completed correctly and that findings beneficial for the child are included.

Commentary:

By preparing proposed findings of fact and conclusions of law, the child's lawyer frames the case and ruling for the judge. This may result in orders that are more favorable to the child, preserve appellate issues and help the lawyer clarify desired outcomes before a hearing begins. The lawyer should offer to provide the judge with proposed findings and orders in electronic format. When an opposing party prepared the order, the child's lawyer should review it for accuracy before it is submitted to the judge for signature.

## **STANDARD 8 - POST HEARINGS**

**A. Review court orders to ensure accuracy and clarity and review with client.**

Action:

At the conclusion of the hearing, the child's trial lawyer should request and obtain a copy of the written order or court action sheet to ensure it reflects the court's verbal order. If the order is incorrect, *i.e.*, it does not reflect the court's verbal rulings, the lawyer should take whatever steps are necessary to correct it to the extent that the corrections are beneficial to the client.

Action:

Once the order is final, the child's lawyer should provide the client with a copy of the order, if age appropriate, and should review the order with the client to ensure the client understands it and the client's obligations under the order. If the client is unhappy with the order, the lawyer should counsel the client about any options to appeal or request a rehearing on the order, but should explain that the order is in effect unless a stay or other relief is secured.

Commentary:

The child may be angry about being involved in the child welfare system and a court order that is not consistent with the child's wishes could add stress and frustration. It is essential that the child's attorney take time, either immediately after the hearing or at a meeting soon after the court date, to discuss the hearing and the outcome with the client. The attorney should counsel the client about all options, including appeal (see Standard 9).

- B. The child's lawyer should take reasonable steps to ensure the client complies with court orders and to determine whether the case needs to be brought back to court.**

Action:

If the client is attempting to comply with the order but other parties, such as DHS, are not meeting their responsibilities, the child's attorney should approach the other party and seek assistance on behalf of the client. If necessary, the lawyer should bring the case back to court to review the order and the other party's noncompliance or take other steps to ensure that appropriate social services are available to the client.

Commentary:

The child's lawyer should play an active role in assisting the client in complying with court orders and obtaining visitation and any other social services. The lawyer should speak with the client regularly about progress and any difficulties the client is encountering. When DHS neglects or refuses to offer appropriate services, especially those ordered by the court, the child's lawyer should file motions to compel or motions for contempt.

## **STANDARD 9 - APPEALS ISSUES FOR CHILD'S LAWYER**

- A. Consider and discuss the possibility of appeal with the client.**

Action:

The child's lawyer should immediately consider and discuss with the client, preferably in person, the possibility of appeal when a court's ruling is contrary to the client's position or interests. Regardless of whether the lawyer believes an appeal is appropriate or that there are any viable issues for appeal, the lawyer should advise the client—at the conclusion of each hearing—that he or she has a right to appeal from any judgment or order resulting from a jurisdictional hearing, review hearing, permanency hearing or termination of parental rights trial. Further, if the hearing was held before a juvenile court referee, the child's lawyer should advise the client that he or she is entitled to a

rehearing before a juvenile court judge. Unless a rehearing is requested within 10 days following the entry of the referee's order, the order will become a final and non-appealable order.<sup>5</sup> Whether to seek a rehearing of a referee's order or to pursue a direct appeal in the appellate courts is always the client's decision.

Commentary:

When discussing the possibility of an appeal, the child's lawyer should explain both the positive and negative effects of an appeal, including how the appeal could affect the child's goals.

**B. If the client decides to appeal, the child's lawyer should timely and thoroughly facilitate the appointment of appellate lawyer.**

Action:

The child's attorney should take all steps necessary to facilitate appointing appellate lawyer *e.g.*, appointed trial lawyer should refer the case for appeal to the Office of Public Defense Services and comply with that office's referral procedures. The trial lawyer should work with the appellate lawyer and identify to the appellate lawyer the parties to the case (for example whether there are any interveners), appropriate issues for appeal and promptly respond to all requests for additional information or documents necessary for appellate lawyer to prosecute the appeal. The child's trial lawyer should promptly comply with the court's order to return exhibits necessary for appeal.

Commentary:

Pursuant to 419A.200(4), the child's lawyer must file the notice of appeal or if court-appointed, the trial attorney may discharge his or her duty to file the notice of appeal by referring the case to the Juvenile Appellate Section of the Office of Public Defense Services (OPDS) using the on-line referral form and complying with OPDS procedures.

To comply with OPDS procedures, trial lawyer referring a case to OPDS for appeal must satisfy the following conditions:

- 1) Electronically complete and submit the referral form to OPDS at least five (5) days prior to the due date for the notice of appeal. (if the referral is within fewer than 5 business days of the notice of appeal due date, trial lawyer remains responsible for filing the notice of appeal and should contact OPDS for assistance locating counsel on appeal.); and

---

<sup>5</sup> ORS 419A.150(4).

- 2) Fax (503.378.2163) or email ([juvenile@opds.state.or.us](mailto:juvenile@opds.state.or.us)) to OPDS a copy of the judgment being appealed.

If OPDS must refer a case to non-OPDS counsel due to a conflict or workload issues, the following procedures apply:

- 1) OPDS will prepare a draft notice of appeal and related documents in the trial lawyer's name;
- 2) OPDS will email the draft documents to the trial lawyer for review and approval—but not for filing. If counsel notes a defect in the form of the documents, counsel should notify OPDS immediately by email at [juvenile@opds.state.or.us](mailto:juvenile@opds.state.or.us) or by telephone at 503.378.6236;
- 3) If the trial lawyer does not contact OPDS within two business days of document transmission, OPDS will assume that counsel has reviewed and approved the documents; and
- 4) An OPDS attorney will sign the notice of appeal and related documents in the trial lawyer's name, file the notice of appeal and motion to appoint appellate lawyer with the Court of Appeals, serve the parties and initiate transcript production. OPDS will also forward a copy of the documents to the client with a cover letter that includes the name and contact information of the appellate lawyer appointed to represent the client on appeal.

## **STANDARD 10 - APPEALS**

### **A. The child's trial lawyer should timely file the notice of appeal.**

#### Action:

The lawyer filing the notice of appeal must comply with statutory and rule requirements in filing the notice of appeal.

#### Commentary:

A proper notice of appeal is a jurisdictional requirement.<sup>6</sup> Consequently, the notice must satisfy statutory requirements in order to prosecute the appeal.<sup>7</sup>

ORS 419A.200(5) permits the appellate lawyer to move the court for leave to file a late notice of appeal after the statutory 30-day time limit (up to 90 days after entry of judgment). A motion to file a notice of appeal after the 30-day period, to be successful,

---

<sup>6</sup> ORS 19.270.

<sup>7</sup> See ORS 19.250 (contents of notice of appeal), ORS 19.255 (time for filing notice) and ORS 419A.200(3) (juvenile appeals); see also Oregon Rules of Appellate Procedure ORAP 2.05 (contents of notice of appeal), ORAP 2.10 (separate notices of appeal) and ORAP 2.22 (appeals in juvenile cases).

must demonstrate (1) that the failure to file a timely notice of appeal was not personally attributable to the parent, *and* (2) “a colorable claim of error” exists in the proceeding from which the appeal is taken.<sup>8</sup>

## **B. The child’s appellate lawyer should communicate with the client**

### Action:

The appellate lawyer should consult with the child client in an age appropriate fashion to confirm that the client wishes to pursue the appeal and to advise the child client about the appellate process and timelines. If the client is of diminished capacity, and it is not reasonably possible to obtain direction from the child client, the appellate lawyer should determine what the child would decide if the child were capable of making an adequately considered decision. Appellate lawyers should not be bound by the determinations of the client’s position and goals made by the child’s lawyer at trial and should independently determine the client’s position and goals on appeal.

### Commentary:

The child’s appellate lawyer should explain to the child client the difference between representation for appeal and the ongoing representation in the dependency case. Because the dependency case will almost always be ongoing during the appeal, the appellate lawyer and the child’s lawyer should consult and collaborate as necessary to advance the client’s interests in both cases. Although the child’s appellate lawyer may wish to obtain information from the child’s lawyer or other parties to the case below when determining the position of a child client with diminished capacity, the appellate lawyer has the duty to make a separate determination of the child’s position on appeal in such situations.

## **C. Prosecuting or defending the appeal – Issue selection and briefing**

### Action:

The child’s appellate lawyer should review the trial court record and any opposing briefs, identify and research issues, and prepare and timely file and serve the brief on behalf of the client. The brief should reflect relevant case law and present the best legal arguments available under Oregon and federal law to advance the client’s position. Novel legal arguments that might develop favorable law in support of the client’s position should also be advanced if available. The appellate lawyer should send the child client who is able to read and the trial lawyer a copy of the filed brief.

---

<sup>8</sup> See *State ex rel Dept. of Human Services v. Rardin*, 338 Or. 399, 408, 110 P3d 580 (2005). (A “colorable claim of error” in this context means “a claim that a party reasonably may assert under current law and that is plausible given the facts and the current law (or a reasonable extension or modification of current law.”)).

Commentary:

The court-appointed appellate lawyer has considerable authority over the manner in which an appeal is presented. It is the appellate attorney's responsibility to exercise his or her professional judgment to raise issues that, in the attorney's judgment, will provide the best chance of success on appeal—even when the client disagrees with the attorney's judgment.<sup>9</sup>

**D. Prosecuting or defending the appeal – Oral Argument.**

Action:

The child's appellate lawyer should determine whether to request the oral argument. The client should be informed of the lawyer's decision and if the oral argument has been requested, the lawyer should inform the client of when the oral argument will take place. If appropriate, the appellate lawyer should make arrangements for the client to attend the oral argument.

Commentary:

The child's appellate lawyer should consider whether the oral argument might advance the client's goals in the appeal and if the oral argument is desirable make a timely request for oral argument.<sup>10</sup>

**E. Communicate the results of the appeal and its implications to the client.**

Action:

The child's appellate lawyer should communicate the result of the appeal and its implications in an age appropriate fashion to the child client. If the client is able to read, a copy of the appellate decision should be provided to the child client. The appellate lawyer should also communicate the result of the appeal to the trial lawyer and provide a copy of the appellate decision as well as any needed consultation. The appellate lawyer should consider whether to petition for review in the Oregon Supreme Court and advise the child client about such a petition. Whether to petition for review is ultimately the client's decision unless the child client is of diminished capacity. When the child client is of diminished capacity, and it is not reasonably possible to obtain direction from the child client, the appellate lawyer should determine what the child would decide if the child were capable of making an adequately considered decision and proceed according to that determination.

---

<sup>9</sup> See *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed2d 987 (1983).

<sup>10</sup> ORAP 6.05.

# THE OBLIGATIONS OF THE LAWYER FOR PARENTS IN CHILD PROTECTIVE PROCEEDINGS WITH ACTION ITEMS AND COMMENTARY

## STANDARD 1 - ROLE OF THE LAWYER FOR PARENTS

- A. The parent’s lawyer must maintain a normal lawyer-client relationship with the parent, including advocating for the parent’s goals and empowering the parent to direct the representation and make informed decisions.**

### Action:

Lawyers representing parents must understand the parent’s goals and pursue them vigorously. The lawyer should explain that the lawyer’s job is to represent the parent’s interests and regularly inquire as to the parent’s goals, including ultimate case goals and interim goals. The lawyer should explain all legal aspects of the case including the advantages and disadvantages of different options. At the same time, the lawyer should be careful not to usurp the parent’s authority to decide the case goals.

### Commentary:

Since many parents distrust the child welfare system, the parent’s lawyer must take care to distinguish him or herself from others in the system so the parent can see that the lawyer serves the parent’s interests. The lawyer should be mindful that parents often feel disempowered in child welfare proceedings and should take steps to make the parent feel comfortable expressing goals and wishes without fear of judgment. The lawyer should clearly explain the legal issues as well as expectations of the court and the agency, and potential consequences of the parent failing to meet those expectations. The lawyer has the responsibility to provide expertise and to make strategic decisions about the best ways to achieve the parent’s goals, but the parent is in charge of deciding the case goals and the lawyer must act accordingly.

- B. When representing parents with diminished capacity because of minority, mental impairment or for some other reason, the lawyer should as far as reasonably possible, maintain a normal lawyer/ client relationship with the parent. A parent may have the capacity to make some decisions but not others.**

Action:

The parent's lawyer must be aware of the parent's mental health status and be prepared to assess whether the parent can assist with the case.

Commentary:

Lawyers representing parents must be able to determine whether a parent's mental status (including mental illness and mental intellectual disability or developmental delay) interferes with the parent's ability to make decisions about the case. The lawyer should be familiar with any mental health diagnosis and treatment that a parent has had in the past or is presently undergoing (including any medications for such conditions). The lawyer should get consent from the parent to review mental health records and to speak with former and current mental health providers. The lawyer should explain to the parent that the information is necessary to understand the parent's capacity to work with the lawyer.

- C. When it is not reasonably possible to maintain a normal lawyer-client relationship generally or with regard to a particular issue, the parent's lawyer should conduct a thorough investigation and then determine what course of action is most consistent with protecting the parent's interests in the particular situation and represent the parent in accordance with that determination. This determination should be based on objective facts and information and not the lawyer's personal philosophy or opinion.**
- D. When the parent's lawyer reasonably believes that the parent has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken, and cannot adequately act in the parent's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the parent.**

Action:

The lawyer should choose the protective action that intrudes the least on the lawyer-client relationship and is as consistent as possible with the wishes and values of the client.

Action:

In extreme cases, i.e. where the client is at risk of substantial physical harm and cannot act in his or her own interest and where the client's lawyer has exhausted all other protective action remedies, the client's lawyer may request the court to appoint a Guardian Ad Litem.

Commentary:

When a client with diminished capacity is unable to protect him or herself from substantial harm, ORPC 1.14 allows the lawyer to take action to protect the client. Oregon Rules of Professional Responsibility 1.6(a) implicitly authorizes a lawyer to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.<sup>11</sup> Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 and Rule 1.14 of the Oregon Rules of Professional Conduct.

It is generally accepted that it is error for a court to proceed without appointment of a Guardian Ad Litem (GAL) for a party when facts strongly suggest the party has diminished capacity and is unable to meaningfully the lawyer. Similarly, it is a violation of due process to fail to appoint a GAL for a parent with diminished capacity in a termination-of parental-rights proceeding. However, a parent's lawyer must maintain as regular a lawyer-parent relationship as possible and adjust representation to accommodate a parent's limited capacity.<sup>12</sup> This is not inconsistent with Oregon RPC 1.14. It states that when a client has diminished capacity and the lawyer believes the client is at risk of substantial harm, the lawyer may take certain steps to protect the client. Such steps may include consulting with family members or protective agencies or, if necessary, requesting the appointment of a guardian ad litem.

Information relating to the representation of a parent with diminished capacity is protected by Rule 1.6. When taking protective action, the lawyer is implicitly authorized under Rule 1.6(a) to reveal information about the parent, but only to the extent reasonably necessary to protect the parent's interests. Consequently, and as a general proposition, lawyers for parents should not invade a typical parent's rights beyond the extent to which it reasonably appears necessary for the lawyer to do so. In other words, lawyers should request GALs for their parents only when a parent consistently demonstrates a lack of capacity to act in his or her own interests and it is unlikely that the parent will be able to attain the requisite mental capacity to assist in the proceedings in a reasonable time.

According to a 9<sup>th</sup> circuit case from 1986, counsel for other parties to the proceeding may be obligated to advise the court of the parent's incompetence.<sup>13</sup> If it appears

---

<sup>11</sup> ORCP 1.14(c)

<sup>12</sup> Oregon State Bar Formal Opinion No. 2005-159.

<sup>13</sup> United States v. 30.64 Acres, 795 F2d 796 (9<sup>th</sup> Cir 1986).

“during the course of proceedings that a party may be suffering from a condition that materially affects his ability to represent himself (if pro se), to consult with his lawyer with a reasonable degree of rational understanding... or otherwise to understand the nature of the proceedings... that information should be brought to the attention of the court promptly.”<sup>14</sup>

When a GAL is appointed for a parent, the GAL must consult with the parent’s lawyer.<sup>15</sup> The GAL also has the statutory authority to control the litigation and provide direction to the parent’s lawyer on decisions that would ordinarily be made by the parent in the proceeding.<sup>16</sup> The parent’s lawyer is required to follow such directions provided by the GAL, but must inquire at every critical stage of the proceedings as to whether the parent’s competence has changed.<sup>17</sup> If appropriate, the lawyer must request removal of the GAL.

## **STANDARD 2 - RELATIONSHIP WITH THE PARENT CLIENT**

### **A. The parent’s lawyer must meet and communicate regularly with the parent.**

#### Action:

A lawyer should make an initial contact with the parent within 24 hours and, when feasible, conduct an initial interview within 72 hours.

#### Action:

A lawyer should have contact with parents before court hearings and CRB (Citizen Review Board) reviews, in response to contact by the parent, when a significant change of circumstances must be discussed with the parent or when a lawyer is apprised of emergencies or significant events impacting the child.

#### Action:

The lawyer should ensure a qualified interpreter is involved when the lawyer and client are not fluent in the same language.

#### Commentary:

The lawyer should be available for in-person meetings or telephone calls to answer the client’s questions and address the client’s concerns. The lawyer and parent client

---

<sup>14</sup> Id. at 806.

<sup>15</sup> ORS 419B.234(3)(a).

<sup>16</sup> ORS 419B.234(3)(d).

<sup>17</sup> ORS 419B.234(5).

should work together to identify and review short and long-term goals, particularly as circumstances change during the case.

**B. The parent’s lawyer should provide the parent with contact information in writing and establish a message system that allows regular lawyer-parent contact.**

Action:

The parent’s lawyer should ensure the parent understands how to contact the lawyer and that ongoing contact is integral to effective representation of the client. The lawyer should explain that even when the lawyer is unavailable, the parent should leave a message.

Action:

The lawyer must respond to parent’s messages in a reasonable time period.

Commentary:

Gaining the parent’s trust and establishing ongoing communication are two essential aspects of representing the parent. The parent may feel angry and believe that all of the lawyers in the system work with the child welfare agency and against that parent. It is important that the parent’s lawyer, from the beginning of the case, is clear with the parent that the lawyer works for the parent, is available for consultation and wants to communicate regularly. This will help the lawyer support the parent, gather information for the case and learn of any difficulties the parent is experiencing that the lawyer might help address. The lawyer should explain to the parent the benefits of bringing issues to the lawyer’s attention rather than letting problems persist. The lawyer should also explain that the lawyer is available to intervene when the parent’s relationship with the agency or provider is not working effectively. The lawyer should be aware of the parent’s circumstances, such as whether the parent has access to a telephone, and tailor the communication system to the individual parent. For example, it may involve telephone contact, email or communication through a third party when the parent agrees to it.

Communicating with parents and other parties by email may be the most effective means of regular contact. However, lawyers should also understand the pitfalls associated with communicating sensitive case history and material by email. Not only can email create greater misunderstanding and misinterpretation, it can also become documentary evidence in later proceedings. The lawyer should treat this form of communication as not confidential and advise the client accordingly.

- C. The lawyer should counsel the parent about all legal matters related to the case, including specific allegations against the parent, the conditions for return, the parent’s rights in the pending proceeding, any orders entered against the parent and the potential consequences of failing to obey court orders or meet Court approved conditions for return.**

Action:

The lawyer should clearly explain the allegations made against the parent, what is likely to happen before, during and after trial and each hearing.

Action:

The lawyer should explain what steps the parent can take to increase the likelihood of reuniting with the child. Specifically, the lawyer should discuss in detail the Court-approved conditions for return.

Action:

The lawyer should explain any settlement options and determine whether the parent wants the lawyer to pursue such options.

Action:

The parent’s lawyer should provide or insure that the parent is provided with copies of all petitions, court orders, service plans and other relevant case documents, including reports regarding the child except when expressly prohibited by law, rule, or court order.

Action:

If the parent has difficulty reading, the lawyer should read the documents to the parent. In all cases, the lawyer should be available to discuss and explain the documents to the parent.

Commentary:

The parent’s lawyer’s job extends beyond the courtroom. The lawyer should be a counselor as well as litigator. The lawyer should be available to talk with the parent to prepare for hearings and to provide advice and information about ongoing concerns. Open lines of communication between lawyers and clients help ensure parents get answers to questions and lawyers get the information and documents they need.

The lawyer should review: the parent client's rights; the role and responsibilities of the lawyer; the role of each player in the system; alternatives and options available to the parent, including referrals to available resources in the community to resolve domestic relations issues; the consequences of selecting one option over another in light of applicable timelines, including the impact of the timelines established by the ASFA; the impact of concurrent case planning required under the AFSA on the case and the parent's participation in such planning; and the consequences of the parent client failing to appear in particular proceedings.

The lawyer should help the parent client access information about the child's developmental and other needs by speaking to service providers and reviewing the child's records. The parent client needs to understand these issues to make appropriate decisions for the child's care.

The parent's lawyer and the parent client should identify barriers to the parent engaging in services such as employment, transportation, financial issues, inability to read and language differences. The lawyer should work with the parent, caseworker and service provider to remove the barriers and advocate with the child welfare agency and court for appropriate accommodations.

A lawyer should give the parent client time to ask questions and consider the alternatives. A lawyer should obtain information from the parent about: the parent's prior contacts with the agency; the parent's knowledge about the allegations of the petition; the accuracy of information provided by the state supporting the petition; alternative or amended allegations that should be sought as part of the negotiations with the parties; services provided before removal or intervention (i.e. In-Home Safety and Reunification Services "ISRS" ); reasons for removal or intervention; services the parent feels would have avoided the need for removal; alternatives to removal, including relative placements, in-home services, or removal a person who allegedly endangers the child from the parent's and child's home; current efforts to reunify the family; family history, including paternity issues, if any, and identity of prior caretakers of the child; services needed by the child, parents or guardians; the parent's concerns about placement; the parent's long and short-term goals; and current visitation and the parent's desires concerning visitation.

The lawyer must be aware of any allegations of domestic violence in the case and not share confidential information about an alleged or potential victim's location.

A parent's lawyer should read the provisions of local court rules, state and federal law governing confidentiality of records and documents in juvenile court proceedings and understand which records and documents are deemed confidential under

applicable law. The parent's lawyer must appreciate the existing conflict or tension that exists about what documents and records that the parent's lawyer can give to the parent client and which they cannot. He or she must understand that this is an evolving area of the law and regularly review the statutes and case law in this area.

**D. The parent's lawyer should work with the parent client to develop a case timeline and calendar system.**

Action:

At the beginning of a case, the parent's lawyer should develop a timeline that reflects projected deadlines and important dates and a calendar system to remember the dates. The timeline should specify what actions the lawyer and parent will need to take and dates by which they will be completed. The lawyer and the parent should know when important dates will occur and should be focused on accomplishing the objectives in the case plan in a timely way. The lawyer should provide the parent with a timeline, outlining known and prospective court dates, service appointments, deadlines and critical points of lawyer and parent contact. The lawyer should record federal and state law deadlines in the case timeline.

Commentary:

Parents should be encouraged to create a system for keeping track of important dates and deadlines related to the case. This helps parents stay focused on accomplishing the service plan goals and meeting court-imposed deadlines.

**E. A parent's lawyer must show respect and act professionally with the client.**

Action:

A parent's lawyer should support the parent and be sensitive to the parent's individual needs. The lawyer should be vigilant against allowing the lawyer's own interests in relationships with others in the system to interfere with the lawyer's primary responsibility to the parent

Commentary:

Often lawyers practicing in abuse and neglect court are a close-knit group who work and sometimes socialize together. Maintaining good working relationships with other players in the child welfare system is an important part of being an effective advocate. The lawyer should not give the impression to the parent that relationships with other lawyers are more important than the representation the lawyer is providing the parent.

The parent must feel that the lawyer believes in him or her and is actively advocating on the parent's behalf. A parent's lawyer should remember that they may be the client's only advocate in the system.

**F. A parent's lawyer must understand confidentiality laws, as well as ethical obligations, and adhere to both with respect to information obtained from or about the client.**

Action:

A parent's lawyer must understand the laws and rules governing confidentiality. Consistent with the parent's interests and goals, the lawyer must seek to protect from disclosure confidential information concerning the parent.

Commentary:

Confidential information contained in a parent's substance abuse treatment records, domestic violence treatment records, mental health records and medical records is often at issue in abuse and neglect cases. Improper disclosure of confidential information may adversely affect the parent's chances of achieving his or her goals. For this reason, it is crucial for the lawyer to advise the parent promptly as to the advantages and disadvantages of releasing confidential information, and for the lawyer to take all necessary steps necessary to protect the parent's privileges and rights to confidentiality.

**G. The parent's lawyer must be alert to and avoid potential conflicts of interest or the appearance of a conflict of interest that would interfere with the competent representation of the parent.**

Action:

The parent's lawyer must not represent both parents if their interests differ. The lawyer should not represent both parents when there is even a potential for conflicts of interest. In situations involving allegations of domestic violence, the lawyer should never represent both parents.

Commentary:

In most cases, lawyers should not represent both parents in an abuse or neglect case. Even in cases in which there is no apparent conflict at the beginning of the case, conflicts may arise as the case proceeds. If this occurs, the lawyer will likely be required to withdraw from representing both parents. This could be difficult for the parents and delay the case. Other examples of potential conflicts of interest that the lawyer should avoid include representing multiple fathers in the same case or representing a different

party in a separate case where the same individual is a party to or has interests in the current case.

In analyzing whether a conflict of interest exists, the lawyer must consider whether : “(1) the representation of one parent will be directly adverse to another parent; (2) there is a significant risk that the representation of one or more parents will be materially limited by the lawyer’s responsibilities to another parent, a former parent or a third person or by a personal interest of the lawyer; or (3) the lawyer is related to another lawyer, as a parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.”<sup>18</sup>

**H. The parent’s lawyer must act in a culturally competent manner and with regard to the socioeconomic position of the parent throughout all aspects of representation.**

Action:

The parent’s lawyer should learn about and understand the parent’s background, determine how that has an impact on the parent’s case and always show the parent respect. The lawyer must understand how cultural, linguistic and socioeconomic differences impact interaction with parents, and must interpret the parent’s words and actions accordingly.

Commentary:

Clients and other parties involved in the child welfare system are a diverse group of people. Each person comes to this system with his or her own set of values and expectations, but it is essential that each person try to learn about and understand the backgrounds of others. An individual’s race, ethnicity, gender, sexual orientation and socioeconomic position all have an impact on how the person acts and reacts in particular situations. The parent’s lawyer must be vigilant against imposing the lawyer’s values onto the parent, and should, instead, work with the parent within the context of their culture and socioeconomic position. While the court and the child welfare agency have expectations of parents concerning their treatment of their children, the parent’s lawyer must strive to explain these expectations to the parents in a sensitive way. The parent’s lawyer should also try to explain to the court and agency how the parent’s background might affect the parent’s ability to comply with court orders and agency requests.

---

<sup>18</sup> Oregon Rules of Professional Conduct, Rule 1.7(a).

**I. The parent’s lawyer should take diligent steps to locate and communicate with a missing parent and decide representation strategies based on that communication.**

Action:

The parent’s lawyer should attempt to locate and communicate with a missing parent client. If communication is established with the parent client, the lawyer should formulate positions the lawyer should take at hearings, and to understand what information the parent wishes the lawyer to share with the child welfare agency and the court.

Action:

If, after diligent steps, the lawyer is unable to communicate with the parent client, the lawyer should assess whether the parent’s interests are better served by advocating for the parent’s last clearly articulated position, or declining to state a position in further court proceedings and should act accordingly.

Action:

After a prolonged period without contact with the parent, the lawyer should consider withdrawing from representation.

Commentary:

To represent a parent adequately, the lawyer must know what the parent wishes. It is, therefore, important for parents’ lawyers to take diligent steps to locate missing parents. The lawyer should be aware that in some circumstances, it is contrary to the client’s interests to advise DHS or other parties that they have lost contact with their client. Diligent steps may include speaking with the parent’s family, the caseworker, the foster care provider and other service providers and checking OJCIN Odyssey and jail rosters. It may include sending mail to the client’s last known address as well as visiting the client’s last known address and ask anyone who lives there for information about the client’s whereabouts. Additionally, the lawyer may leave business cards with contact information with anyone who might have contact with the client as long as this does not compromise confidentiality.

If the lawyer is unable to find and communicate with the client after initial consultation, the lawyer should assess what action would best serve the parent client’s interests. This decision must be made on a case-by-case basis. In some cases, the lawyer may decide to take a position consistent with the client’s last clearly articulated position. In other cases the client’s interests may be better served by the lawyer declining to participate in the court proceedings in the absence of the client because that may better protect the client’s right to vacate orders made in the client’s absence.

A parent's lawyer should be familiar with the grounds and procedures for motions to set aside under ORS 419B.923 as well the time requirements.

**J. The parent's lawyer must be aware of the unique issues an incarcerated parent faces and provide competent representation to the incarcerated parent.**

Action:

The parent's lawyer should counsel the parent as to any effects incarceration has on the agency's obligations.

Action:

The parent's lawyer must be prepared to argue against an agency's motion to be relieved of the requirements to make reasonable efforts or active efforts if the Indian Child Welfare Act (ICWA) applies toward reunification.

Action:

The parent's lawyer may need to advocate for reasonable/active efforts to be made for the incarcerated parent and to assist the parent and the agency caseworker in accessing services. The lawyer must assist the parent client by advocating both with the agency and the jail or correctional facility for these services.

Action:

Lawyers must know Oregon's statutory and case law concerning incarceration as a basis for termination of parental rights.

Action:

The parent's lawyer should counsel the parent on the importance of maintaining regular contact with the child while incarcerated. The lawyer should assist in developing a plan for communication and visitation by obtaining necessary court orders and working with the caseworker as well as the correctional facility's social worker.

Action:

The lawyer for an incarcerated parent may need to visit the parent in the jail or prison or engage in more extensive phone or mail contact than with other clients. The lawyer should be aware of the challenges to having a confidential conversation with the parent client and must attempt to obtain a confidential setting for meetings with the client.

Action:

If the parent wants to be transported to court for a hearing, the lawyer should move the court for a transport order to do so. If the parent does not want to be present, or if having the parent present is not possible, the lawyer should explore what other means are available to have the parent participate, such as by telephone or video conference. The lawyer should obtain the necessary court order and make the necessary arrangements for the parent to participate in the hearing.

Action:

The parent's lawyer should communicate with the parent's criminal defense lawyer about issues related to self-incrimination and concerns about delaying the abuse and neglect case to strengthen the criminal case or vice versa.

Commentary:

A lawyer must be particularly diligent when representing an incarcerated parent. The lawyer should make efforts to visit an incarcerated parent at the correctional institution in which he or she is incarcerated as soon as possible after being appointed. The purpose of visiting the incarcerated parent at the correctional facility is to establish an attorney-client relationship and engage the client in case preparation. The lawyer must know why the parent client is incarcerated, the length of client's incarceration and post incarceration release requirements if applicable, particularly any potential restrictions or limitations on contact with children. If the parent is incarcerated as a result of an act against the child or another child in the family, the child welfare agency may seek an order excusing the agency from making reasonable efforts, allowing the case to be fast-tracked toward other permanency goals. If the parent opposes this step, the lawyer must oppose such a motion.

The lawyer should help the parent identify potential kinship placements and relatives who can provide care for the child while the parent is incarcerated. Lawyers must understand the implications of ASFA for an incarcerated parent who has difficulty visiting and planning for the child.

If the parent will be incarcerated for a lengthy period, and the child is not placed with the parent's relative, the lawyer should ensure that any potential placement options for the child with a relative of the parent, or other caretaker proposed by the parent, are made known to the agency and explored thoroughly.

Obtaining services such as substance abuse treatment, parenting skills or job training while in jail or prison is often difficult. The lawyer must learn about and advocate for available resources, contact the placements and attempt to get the

support of the agency and child's lawyer. Without services, it is unlikely the parent will be reunified with the child upon discharge from prison.

An incarcerated parent's contact with the child should generally, at a minimum, include cards and letters. In some instances, prisons may have technology such as videoconferencing and/or Skype that can be used for parent-child visitation. Because the time to process the required visitation paperwork varies from institution, the lawyer should begin the process of filling out and filing the forms to allow visitation between the parent client and their children. The parent's lawyer should also consult with the DHS caseworker and the parent's Department of Corrections counselor on ways to expedite approval of the parent's request for visitation.

Some prisons, such as Coffee Creek Correctional Facility in Wilsonville, Oregon, have a specialized unit for incarcerated parents and their children in a supported, child-friendly environment. If the client agrees, the lawyer should advocate for transfer of the parent to such a program as well as encouraging visits with the child through these programs.

The parent client's appearance in court frequently raises issues that require the lawyer to take action well in advance of the hearing or trial. The lawyer should find out from the parent if the parent wants to be present in court. In some prisons, inmates lose privileges if they are away from the prison, and the parent may prefer to stay at the prison rather than lose their privileges. The lawyer should explain to any parent hesitant to appear that the case will proceed without the parent's presence and discuss the potential consequences of the parent client's decision not to attend the proceeding.

**K. The parent's lawyer should take appropriate actions on collateral issues.**

Action:

The parent's lawyer should be aware of collateral issues arising during the course of representation of the client and identify such issues and, if able, counsel the client on options for advocacy on such issues. Examples include:

- 1) Pending criminal matters;
- 2) SSI and other public benefits;
- 3) Custody;
- 4) Paternity;
- 5) Immigration issues;
- 6) Child support;
- 7) Options to secure health and mental health services; and
- 8) Challenges to DHS administrative findings including denial of benefits or findings of abuse and neglect.

Commentary:

The parent's lawyer does not have an ethical duty to represent the parent client in these collateral matters where the terms of the lawyer's appointment and/or employment limit the lawyer's representation to the dependency case. A parent's lawyer must be aware of the ethical obligations to avoid providing legal advice on areas of law which they are not qualified to advise the client on. In some circumstances, the lawyer may have a duty to take limited steps to protect the parent client's rights, such as asserting the client's 5th Amendment rights to remain silent pending potential criminal prosecution.

**STANDARD 3 - TRAINING REQUIREMENTS FOR COMPETENT REPRESENTATION OF PARENT CLIENTS**

- A. A lawyer must provide competent representation to a parent client. Competent representation requires the legal knowledge, skill, training, experience, thoroughness and preparation reasonably necessary for the representation. A lawyer should only accept an appointment or retainer if the lawyer is able to provide quality representation and diligent advocacy for the client.**

Action:

A lawyer representing a parent in a dependency case should obtain and maintain proficiency in applicable substantive and procedural law and stay current with changes in constitutional, statutory and evidentiary law and local or statewide court rules.

Action:

A lawyer representing a parent in a dependency case should have adequate time and resources to competently represent the client, including maintaining a reasonable caseload and having access to sufficient support services.

- B. Before accepting an appointment or retainer as a lawyer for a parent in a child dependency or termination of parental rights case, the lawyer should gain experience by observing and serving as co-counsel in dependency and termination of parental rights cases. While accepting appointment or retainers for parents in dependency and termination of parent rights cases, the lawyer should participate in at least 16 hours of continuing legal education (CLE) related to juvenile law each year.**

Action:

A lawyer representing a parent in a dependency case must have served as counsel or co-counsel in at least two dependency cases adjudicated before a judge or have observed at least five dependency cases adjudicated before a judge.

Action:

A lawyer representing a parent in a termination-of-rights case must have served as counsel or co-counsel in or observed dependency cases as described above and have served as counsel or co-counsel in at least two termination of parental trials, or have observed or reviewed the transcripts of at least two termination of parental rights trials.

Commentary:

As in all areas of law, it is essential that lawyers learn the substantive law as well as local practice. Lawyers should be familiar with the Qualification Standards for Court Appointed Counsel, Office of Public Defense Services, Standard 4(7). Lawyers should consider the contractually-mandated training requirements as a floor rather than a ceiling, and actively pursue additional training opportunities. Newer lawyers are encouraged to work with mentors for the first three months and at a minimum should observe juvenile court hearings.

**C. A parent's lawyer should acquire working knowledge of all relevant state and federal laws, regulations, policies and rules.**

Action:

A parent's lawyer must read and understand all state laws, policies and procedures regarding child abuse and neglect, including but not limited to the following:

- 1) Oregon Revised Statutes chapters 419A and 419B, Oregon Juvenile Code;
- 2) Oregon Revised Statutes chapter 418, Child Welfare Services;
- 3) Refugee Child Act, ORS 418.925–418.945;
- 4) Oregon Revised Statutes concerning paternity, guardianships and adoption;
- 5) Interstate Compact on Placement of Children, ORS 417.200-417.260 and OAR;
- 6) Uniform Child Custody Jurisdiction and Enforcement Act, ORS 109.701-109.834 and OAR;
- 7) the basic structure and functioning of DHS and the juvenile court, including court procedures, the functioning of the citizen review board (hereinafter referred to as CRB) and court-appointed special advocates (hereinafter referred to as CASA) programs; and
- 8) Indian Child Welfare Act 25 USC §1901 -1963; BIA Guidelines; and OAR.

Action:

A parent's lawyer must be thoroughly familiar with Oregon evidence law and the Oregon Rules of Professional Conduct.

Action:

A parent's lawyer must be sufficiently familiar with the areas of state and federal law listed in Appendix A so as to be able to recognize when they are relevant to a case, and he or she should be prepared to research them when they are applicable.

- D. A parent's lawyer should have a working knowledge of placement alternatives, child development, family dynamics and parental discipline, as well as case and permanency planning, and services for children and families in dependency cases.**

Action:

The parent's lawyer must be familiar with case planning and permanency planning principles and with child welfare and family preservation services available through the Oregon Department of Human Services and available in the community and the problems they are designed to address. A parent's lawyer is encouraged to seek training in the areas listed in Appendix B.

Commentary:

The parent's lawyer should know the kinds and types of services within their communities which serve parents and children. Based on the conditions and circumstances which brought the parent and their children into the dependency system, the parent's lawyer should identify the services which will help remove the barriers to reunify the parent and their child(ren). The parent's lawyer should consult with the client about such services and whether the services address the client's needs. The parent's lawyer must be aware of cultural issues within the parent's community and be prepared in appropriate circumstances, to advocate services be made available to a parent that are culturally appropriate and meet the client's unique conditions and circumstances.

## **STANDARD 4 - GENERAL PRINCIPLES GOVERNING CONDUCT OF A CASE**

- A. A parent's lawyer should actively represent a parent in the preparation of a case, as well as at hearings.**

Action:

A parent's lawyer should develop a theory and strategy of the case to implement at hearings, including the development of factual and legal issues.

Action:

A parent's lawyer should identify family members and professionals who may already be, or who may become, a stable and long-term resource for the family.

Action:

A parent's lawyer should inform other parties and their representatives that he or she is representing a parent and expects reasonable notification prior to case conferences, changes of placement and other changes of circumstances affecting the child and the child's family.

- B. A parent's lawyer should, when consistent with the parent's interest, take every appropriate step to expedite the proceedings.**

Commentary:

Delaying a case often increases the time a family is separated and can reduce the likelihood of reunification. Appearing in court often motivates parties to comply with orders and cooperate with services. When a judge actively monitors a case, services are often put in place more quickly, visitation may be increased or other requests by the parent may be granted. If a hearing is continued and the case is delayed, the parent may lose momentum in addressing the issues that led to the child's removal or the parent may lose the opportunity to prove compliance with case plan goals. Additionally, the Adoption and Safe Families Act (ASFA) timelines continue to run despite continuances.

- C. A parent's lawyer should cooperate and communicate regularly with other professionals in the case.**

Action:

The parent's lawyer should communicate with lawyers for the other parties, the court appointed special advocates (CASA), the caseworker and service providers to learn about the client's progress and their views of the case, as appropriate.

Action:

The child's lawyer should respond promptly to inquiries from other parties and their representatives.

Commentary:

The parent's lawyer must have all relevant information to effectively represent the parent. This requires open and ongoing communication with the other lawyers and service providers working with the parent, the child and family. The parent's lawyer must be aware of local rules on this issue and seek permission to speak with represented parties when that would further the client's interests. When communicating with other parties, service providers and lawyers, the parent's lawyer should be especially mindful of confidentiality requirements.

**D. The parent's lawyer may not contact represented parties without the consent of their lawyer.**

Commentary:

Where the agency is represented by the counsel, the parent's lawyer should not talk with a caseworker without the lawyer's permission. However, in many cases, the agency has not retained the Department of Justice to represent it and in those cases the parent's lawyer may talk to caseworkers without permission. If the parent's lawyer is unsure whether the DOJ has been retained in a particular case, ask the caseworker.

In some counties, the District Attorney may appear representing the state. The DA is not counsel for the agency in these cases.

**E. The parent's lawyer should engage in case planning and advocate for social services in which the client wishes to participate.**

Action:

The parent's lawyer should advocate for the client both in and out of court.

Action:

The lawyer should counsel the client about the advantages and disadvantages of engaging in services prior to the court ordering them to engage in such services and determine whether the client is willing to engage in services. If the client is willing to engage in services, the parent's lawyer should advocate for those services.

Action:

The parent's lawyer should actively engage in case planning, including attending substantive case meetings, such as initial treatment planning meetings and case reviews of treatment plans. If the lawyer is unable to attend a meeting, the lawyer should send a delegate or advise the client not to attend.

Action:

The parent's lawyer should ensure the client asks for and receives needed services. The lawyer should not agree to services that are beyond the scope of the case. The services in which the client is engaged must be tailored to the client's needs and not merely hurdles over which the client must jump (e.g., if the client is taking parenting classes, the classes must be relevant to the underlying issue in the case).

Action:

Whenever possible, the parent's lawyer should use a social worker as part of the parent's team to help determine an appropriate case plan, evaluate social services suggested for the client and act as a liaison and advocate for the client with the service providers.

Action:

The lawyer for the parent should consider whether the child's lawyer or the CASA might be an ally on service and visitation issues. If so, the lawyer should solicit their assistance.

Action:

Pursuant to ORS 419B.389, a lawyer for a parent who believes that financial, health or other problems will prevent or delay the parent's compliance with an order of the court must inform the court of the relevant circumstances as soon as reasonable possible. If appropriate, the lawyer should also seek relief from the order under ORS 419B.923.

Commentary:

For a parent to succeed in a child welfare case, the parent should receive and cooperate with social services and maintain strong bonds with the child. It is therefore necessary that the parent's lawyer does whatever is possible to obtain appropriate services for the client and then counsel the client about participating in the services. Examples of services common to child welfare cases include: evaluations; family preservation or reunification services; medical and mental health care; drug and alcohol treatment; domestic violence prevention, intervention or treatment; parenting education; education and job training; housing; child care; and funds for public transportation so the client can attend services.

**F. The parent's lawyer should advocate strongly for frequent visitation in a family-friendly setting.**

Action:

When necessary, the parent's lawyer should seek court orders to compel the child welfare agency to provide frequent, unsupervised visitation to the client. The lawyer may also need to take action to enforce previously entered orders.

Action:

The parent's lawyer should advocate for an effective visiting plan and counsel the parent on the importance of regular contact with the child. Courts and the Department of Human Services (DHS) may need to be pushed to develop visitation plans that best fit the needs of the individual family. Factors to consider in visitation plans include:

- 1) Developmental age of child;
- 2) Frequency;
- 3) Length;
- 4) Location;
- 5) Supervision;
- 6) Types of activities; and
- 7) Visit coaching - having someone at the visit who could model effective parenting skills.

Commentary:

Frequent high quality visitation is one of the best predictors of successful reunification between a parent and child. Often visits are arranged in settings that are uncomfortable and inhibiting for families. It is important that the parent's lawyer seek a visitation order that will allow the best possible visitation. The lawyer should advocate that visits be unsupervised or at the lowest possible level of supervision, e.g. families often are more comfortable when relatives, family friends, clergy or other community members are recruited to supervise visits rather than caseworkers.

Lawyers should advocate for visits to occur in the most family-friendly locations possible, such as in the family's home, parks, libraries, restaurants, places of worship or other community venues.

A lawyer for an incarcerated parent must be aggressive in ensuring frequent, high quality visitation. In general, visits in prison are governed by the Department of Corrections directives, available on line, which tend to be far more generous than the practices (as opposed to the policies) of DHS. A lawyer may need to be personally familiar with the visitation rules and visiting rooms of a particular prison to be an effective advocate for the parent.

## **STANDARD 5 - INVESTIGATION**

- A. The parent's lawyer should conduct a thorough, continuing and independent review and investigation of the case, including obtaining information, research and discovery in order to prepare the case for trial and hearings.**

**Action:**

The parent's lawyer must thoroughly prepare each case including working with investigators and social workers to prepare the case. If necessary, the lawyer should request OPDS for funds for investigation.

**Action:**

The parent's lawyer should review the record of the case (formerly the legal file) and the supplemental confidential file (formerly the social file).

**Action:**

The parent's lawyer should contact lawyers for the other parties and any court-appointed special advocate (CASA) for background information.

**Action:**

The parent's lawyer should contact and meet with the child, with permission of the child's lawyer.

**Action:**

The lawyer should obtain necessary authorizations for the release of information.

**Action:**

The lawyer should interview individuals involved with the parent and the child.

**Action:**

The parent's lawyer should review relevant photographs, video or audio recordings, and other evidence.

**Action:**

The lawyer should attend treatment, placement and administrative hearings involving the parent and child as needed.

Action:

The parent's lawyer should determine whether obtaining independent evaluations or assessments of the client is needed for the investigation of the case.

Action:

A parent's lawyer should research and review relevant statutes and case law to identify defenses and legal arguments to support the parent's case.

Commentary:

If possible, the parent's lawyer should work with a team that includes social workers and investigators who can meet with parents and assist in investigating the underlying issues that arise as the case proceeds. If not possible, the lawyer is still responsible for gaining all pertinent case information, being mindful of not making himself or herself a witness.

A thorough investigation is an essential element of preparation. The parent's lawyer cannot rely solely on what the agency caseworker reports about the parent. Rather, the lawyer should review the agency file; meet with the parent as soon as possible and thoroughly interview the parent for information pertaining to the issues; and contact and interview any potential witnesses, including, but not limited to service providers who work with the parent and or the parent's child or family, relatives who can discuss the parent's care of the child(ren), community supports such as clergy, neighbors, child care providers, the child(ren)'s teacher or other natural supports who can clarify information relevant to the case.

**B. The parent's lawyer should counsel the parent well before each hearing, in time to use parent information for the case investigation.**

Action:

The parent's lawyer should meet with the parent regularly throughout the case. The meetings should occur well before any hearings, not at the courthouse just minutes before the case is called before the judge. The lawyer should ask the parent questions to obtain information to prepare the case and strive to create a comfortable environment so the parent can ask the lawyer questions. The lawyer should use these meetings to prepare for court as well as to counsel the parent concerning issues that arise during the course of the case. Information obtained from the parent should be used to propel the investigation. The lawyer should work collaboratively with the parent to ascertain independent sources to corroborate the parent's information.

Commentary:

Often, the parent is the best source of information for the lawyer and the lawyer should set aside time to obtain that information. Since the interview may involve disclosure of sensitive or painful information, the lawyer should explain lawyer-parent confidentiality to the parent. The lawyer may need to work hard to gain the parent's trust, but if a trusting relationship can be developed, the lawyer will be a better advocate for the parent. The investigation will be more effective if guided by the parent, as the parent generally knows firsthand what occurred in the case.

**C. The parent's lawyer should review the child welfare agency case file.**

Action:

The parent's lawyer should ask for and review the agency case file as early during the course of representation as possible and at regular intervals throughout the case.

Action:

After a review of the agency file, the lawyer should determine if any records or case notes of any social worker or supervisor have not been placed in the file and move to obtain those records as well either through informal or formal discovery.

Commentary:

Even if the lawyer is voluntarily given contents of the DHS file in paper or electronic format, the lawyer should also look at the actual file in the DHS office and request disclosure of all documents relating to the case from DHS, since the department may have additional items not given to the lawyer. If requests to obtain copies of the agency file are unsuccessful or slow in coming, the lawyer should pursue formal disclosure under the statute. If the agency case file is inaccurate, the lawyer should seek to correct it. The lawyer must read the case file and request disclosure of documents periodically because information is continually being received by the agency.

**D. The parent's lawyer must obtain all necessary documents, including copies of all pleadings and relevant notices filed by other parties and respond to requests for documents from other parties.**

Action:

A lawyer should comply with disclosure statutes and use the same to obtain names and addresses of witnesses, witness statements, results of evaluations or other information relevant to the case.

Commentary:

As part of the discovery phase, the lawyer should review the following kinds of documents:

- 1) Social service records, including information about services provided in the past, visitation arrangements, the plan for reunification and current and planned services;
- 2) Medical records;
- 3) School records;
- 4) Evaluations of all types;
- 5) Housing records ; and
- 6) Employment records.

**E. The parent’s lawyer should have potential witnesses, including adverse witnesses, interviewed by an investigator and, when appropriate, subpoenaed.**

Action:

The lawyer should have potential witnesses interviewed by an investigator. Potential witnesses may include:

- 1) School personnel;
- 2) Neighbors;
- 3) Relatives;
- 4) Caseworkers;
- 5) Foster parents and other caretakers;
- 6) Mental health professionals;
- 7) Physicians;
- 8) Law enforcement personnel; and
- 9) The child(ren).

Action:

If a lawyer conducts a witness interview, the lawyer should do so in the presence of a third person who can be available to appear as a witness at trial.

Action:

If an investigative report is written, and the parent’s lawyer intends to call the individual as a witness, the parent’s lawyer must comply with the disclosure requirements of 419 B.881.

Commentary:

It is a good practice to have interviews conducted by an investigator employed by the lawyer. If the lawyer conducts the interview, a third person, such as a member of the lawyer's office, should be present so that the third person can be used at trial to impeach the witness.

Action:

When appropriate, the parent's lawyer, or the lawyer's trained and qualified staff, should observe visitations between the parent and child.

**STANDARD 6 - COURT PREPARATION**

**A. The parent's lawyer should develop a case theory and strategy to follow at hearings and negotiations.**

Action:

Once the parent's lawyer has completed the initial investigation and discovery, including interviews with the client, the lawyer should develop a strategy for representation.

Commentary:

The strategy may change throughout the case, as the client makes or does not make progress, but the initial theory is important to assist the lawyer in staying focused on the client's wishes and on what is achievable. The theory of the case should inform the lawyer's preparation for hearings and arguments to the court. It should also be used to identify what evidence is needed for hearings and the steps to move the case toward the client's ultimate goals (e.g., requesting increased visitation, reunification services, etc.).

**B. The parent's lawyer should timely file all pleadings, motions, objections and briefs, and research applicable legal issues and advance legal arguments when appropriate.**

Action:

The parent's lawyer must file answers and responses, motions, objections and discovery requests and responsive pleadings or memoranda that are appropriate for the case. The pleadings and memoranda must be thorough, accurate and timely. The pleadings must be served on the lawyers or unrepresented parties.

Action:

When a case presents a complicated or new legal issue, the parent's lawyer should conduct the appropriate research before appearing in court. The lawyer should be prepared to distinguish case law that appears unfavorable.

Action:

If it would advance the client's case, the parent's lawyer should present a memorandum of law to the court.

Commentary:

Filing motions, pleadings and memoranda benefits the client. The lawyer who actively litigates issues highlights important issues for the court and builds credibility for the lawyer. In addition to filing responsive papers and discovery requests, the lawyer should seek court orders when that would benefit the client, e.g., filing a motion to enforce court orders to ensure the child welfare agency is meeting its reasonable/active efforts obligations. When out-of-court advocacy is not successful, the lawyer should not wait to bring the issue to the court's attention. Arguments in child welfare cases are often fact-based. Nonetheless, lawyers should ground their argument in statutes, OARs and case law. Additionally, while non-binding, law from other jurisdictions can be used to persuade a court.

At times, competent representation requires advancing legal arguments that are not yet accepted in the jurisdiction. Lawyers should preserve legal issues for appellate review by making a record even if the argument is unlikely to prevail at trial level.

Appropriate pretrial motions include but are not limited to:

- 1) Discovery motions;
- 2) Motions challenging the constitutionality of statutes and practices;
- 3) Motions to strike, dismiss or amend the petitions;
- 4) Motions to transfer a case to another county;
- 5) Evidentiary motions and motions in limine;
- 6) Motions for additional shelter hearings;
- 7) Motions for change of venue;
- 8) Motions to consolidate; and
- 9) Motions to sever.

Note: Under ORS 28.110, when a motion challenges the constitutionality of a statute, it must be served on the Attorney General.

Action:

A lawyer should make motions to meet the client's needs pending trial.

Commentary:

Examples of such motions include:

- 1) Motion for family reunification services;
- 2) Motion for medical or mental health treatment;
- 3) Motion for change of placement;
- 4) Motion to increase, parental or sibling visitation;
- 5) Motion seeking child support or waiver of obligation to pay child support;
- 6) Motion seeking contempt for violations of court orders; and
- 7) Motion to establish, disestablish or challenge paternity pursuant to chapter 419B.

**C. With the client's permission, and when appropriate, the parent's lawyer should engage in settlement negotiations and mediation to resolve the case quickly.**

Action:

The parent's lawyer should, when appropriate (e.g., after sufficient investigation determines that the petition will likely be granted), participate in settlement negotiations to promptly resolve the case, keeping in mind the effect of continuances and delays on the client's goals.

Commentary:

Negotiation and mediation often result in detailed agreement among parties about actions the participants must take. Generally, when agreements have thoroughly been discussed and negotiated, all parties, including the parents, feel as if they had a say in the decision and are more willing to adhere to a plan. Mediation can resolve a specific conflict in a case, even if it does not result in an agreement about the entire case. Negotiated agreement about facts sufficient to allow the court to enter jurisdictional findings can move a case along more swiftly.

Action:

Parent's lawyers should be trained in mediation and negotiation skills and be comfortable resolving cases outside a courtroom setting when consistent with the client's position. With the agreement of the client, the parent's lawyer should share information about services in which the parent is engaged and provide copies of

favorable reports from service providers. This information may affect settlement discussions.

Action:

The lawyer must communicate all settlement offers to the client and discuss their advantages and disadvantages with the client. Specifically, the lawyer should fully explain to the client the rights that would be waived by a decision to admit to facts sufficient to establish jurisdiction, including the impact of time-lines established by ORS 419B.470 et. seq.

Action:

The lawyer should explain to the client the conditions and limits of the settlement and the effect of the settlement, especially when admissions made to allegations could give rise to a criminal charge or finding of aggravated circumstances or extreme conduct. These admissions could affect future actions such as domestic relations proceedings, immigration proceedings, criminal proceedings or termination-of-parental rights petitions.

Action:

It is the client's decision whether to settle. The lawyer must be willing to try the case and not compromise solely to avoid the hearing.

Commentary:

While the parents may admit to facts, parents cannot stipulate to jurisdiction.<sup>19</sup> Jurisdiction is a legal conclusion for the judge to determine.

The facts to which the parent admits will frame the court's inquiry at all subsequent hearings as well as what actions the parent must take, the services provided and the ultimate outcome. Thus, the parent's lawyer must take care to ensure that the factual admissions made by the client are specific and limited to the allegations in the petition.

A written, enforceable agreement should be prepared whenever possible, so that all parties are clear about their rights and obligations. The parent's lawyer should ensure agreements accurately reflect the understandings of the parties. The parent's lawyer should request a hearing or move for contempt, if appropriate, if orders benefiting the parent are not obeyed.

---

<sup>19</sup> Dept. of Human Services v. D.D., 238 Or. App. 134, 138, 241 P3d 1177 (2010), rev den 349 Or. 602, 249 P3d 123 (2011).

**D. The parent’s lawyer should thoroughly prepare the parent client to testify.**

Action:

The parent’s lawyer should discuss and practice the questions that the lawyer will ask the parent, as well as types of questions the parent should expect opposing counsel to ask. The parent’s lawyer should help the parent think through the best way to present information, familiarize the parent with the court setting, and offer guidance on logistical issues regarding getting to court on time and appropriate court attire.

Commentary:

Testifying in one’s own case can be affirming, but it also can be intimidating without sufficient preparation. The parent’s lawyer should be attuned to the client’s comfort level about the hearing, and ability to testify accurately and persuasively. The lawyer should provide the client with a written list of questions that the lawyer will ask, if this will help the client.

Unlike in a criminal proceeding, a parent generally cannot invoke the right not to testify in a dependency case unless the client’s testimony would potentially expose the client to criminal liability.

**E. The parent’s lawyer should identify, locate and prepare all witnesses.**

Action:

The parent’s lawyer, in consultation with the parent, should develop a witness list well before a hearing. The lawyer should not assume the agency will call a witness, even if the witness is named on the agency’s witness list. The lawyer should contact the potential witnesses to determine if they can provide helpful testimony and issue a subpoena to such witnesses.

Action:

When appropriate, witnesses should be informed that a subpoena is on its way. The lawyer should also ensure the subpoena is served. The lawyer should subpoena potential agency witnesses (e.g., a previous caseworker) who have favorable information about the client.

Action:

The parent’s lawyer should set aside time to fully prepare all witnesses personally. The lawyer should remind the witnesses about the court date.

Commentary:

Witnesses may be people with direct knowledge of the allegations against the parent, service providers working with the parent or individuals from the community who could testify generally about the client's strengths.

When appropriate, the parent's lawyer should consider working with other parties who share the parent's position (such as the child's representative) when creating a witness list, issuing subpoenas and preparing witnesses. Doctors, nurses, teachers, therapists and other potential witnesses have busy schedules and need advance warning about the date and time of the hearing. The parent's lawyer should review ORS 419B.899 and 419B.902 and local supplemental rules for the proper process and time to issue subpoenas.

Witnesses are often nervous about testifying in court. Lawyers should prepare them thoroughly so they feel comfortable with the process. Preparation will generally include rehearsing the specific questions and answers expected on direct and anticipating the questions and answers that might arise on cross-examination. Lawyers should provide written questions for those witnesses who need them.

- F. The parent's lawyer should identify, secure, prepare and qualify expert witnesses when needed. When possible, the parent's lawyer should interview opposing counsel's experts.**

Action:

Often a case requires multiple experts with different expertise, such as medicine, mental health treatment, drug and alcohol treatment, or social work. Experts may be needed for ongoing case consultation in addition to providing testimony at trial. The lawyer should consider whether the opposing party is calling expert witnesses and determine whether the parent needs to call any experts on behalf of the parent to respond to the opponent's experts.

Action:

When opposing counsel plans to call expert witnesses, the parent's lawyer should seek to interview the witnesses in advance. Lawyers should scrupulously comply with standing orders of the juvenile court regarding contact with court-ordered evaluators.

Commentary:

By contacting opposing counsel's expert witnesses in advance, the parent's lawyer will know what evidence will be presented against the client and whether the expert has any favorable information that might be elicited on cross-examination. The lawyer will

be able to discuss the issues with the client, prepare a defense and call experts on behalf of the client, if appropriate. Conversely, if the lawyer does not talk to the expert in advance, the lawyer could be surprised by the evidence and unable to represent the client competently.

## **STANDARD 7 - HEARINGS**

### **A. The parent's lawyer should prepare for and attend all hearings, including pretrial conferences.**

#### **Action:**

The parent's lawyer must prepare for and attend all hearings and participate in all telephone and other conferences with the court.

#### **Action:**

If the court proceeds in the absence of the parent's lawyer, the lawyer should file a motion to set aside.

#### **Commentary:**

The lawyer must be prepared to present in court in order to adequately represent the parent. Participating in pretrial proceedings may improve case resolution for the parent. The parent's lawyer's failure to participate in the proceedings in which all other parties are represented may disadvantage the parent. Therefore, the parent's lawyer should be actively involved in this stage. If a lawyer has a conflict with another courtroom appearance, the lawyer should notify the court and the other parties and request a short continuance. The parent's lawyer should avoid having another lawyer stand in to represent the client in court if the other lawyer is unfamiliar with the client or case.

Becoming a strong courtroom lawyer takes practice and attention to detail. The lawyer must be sure to learn the rules about presenting witnesses, impeaching testimony and entering evidence. The lawyer may wish to seek out training in trial skills and watch other lawyers to learn from them. Presenting and cross-examining witnesses are skills with which the parent's lawyer must be comfortable.

### **B. The parent's lawyer should prepare and make all appropriate motions and evidentiary objections. The parent's lawyer must be aware of the need to make a record for appeal.**

Action:

The parent's lawyer should make appropriate motions and evidentiary objections to advance the client's position during the hearing. If necessary, the lawyer should file memoranda of points and authorities in support of the client's position on motions and evidentiary issues. The parent's lawyer should always be aware of preserving legal issues for appeal.

Commentary:

It is essential that parents' lawyers understand the applicable rules of evidence and all court rules and procedures. The lawyer must be willing and able to make appropriate motions, objections and arguments (e.g., objecting to the qualification of expert witnesses, the competence of child or other witnesses, or raising the issue of the child welfare agency's lack of reasonable/active efforts).

**C. The parent's lawyer must present and cross-examine witnesses, prepare and present exhibits.**

Action:

The parents' lawyer must be able to effectively present witnesses to advance the client's position. Witnesses must be prepared in advance and the lawyer should know what evidence will be presented through the witnesses. The lawyer must also be skilled at cross-examining opposing parties' witnesses. The lawyer must know how to offer documents, photos, physical objects, electronic records, etc. into evidence.

Action:

At each hearing the lawyer should advocate for the client's goals, keeping in mind the case theory. This should include advocating for appropriate services and requesting that the court state its expectations of all parties on the record.

**D. The parent's lawyer should the opportunity to make opening and closing arguments.**

Action:

The parent's lawyer should make opening and closing arguments in the case to frame the issues around the parent's lawyer's theory of the case and ensure the judge understands the issues from the parent's perspective.

Commentary:

In many child abuse and neglect proceedings, lawyers waive the opportunity to make opening and closing arguments. However, these arguments can help shape the way the judge views the case, and therefore can help the client. Argument may be especially critical, for example, in complicated cases when information from expert witnesses should be highlighted for the judge, in hearings that take place over a number of days, or when there are several children and the agency is requesting different services or permanency goals for each of them.

It is important to be able to read the judge. The attorney shall move along when the judge is tracking the argument and elaborate on the areas that appear to need more attention.

- E. The parent’s lawyer should ensure that findings of fact, conclusions of law and orders that benefit the parent are included in the court’s decision.**

Action:

The parent’s lawyer must be familiar with the standard forms and ensure that they are completed correctly and findings beneficial for your client are included.

Commentary:

By preparing proposed findings of fact and conclusions of law, the parent’s lawyer frames the case and ruling for the judge. This may result in orders that are more favorable to the parent, preserve appellate issues and help the lawyer clarify desired outcomes before a hearing begins. The lawyer should offer to provide the judge with proposed findings and orders in electronic format. When an opposing party prepares the order, the parent’s lawyer should review it for accuracy prior to it being submitted to the judge for signature.

**STANDARD 8 - POST HEARING**

- A. The parent’s lawyer should review court orders to ensure accuracy and clarity and review with client.**

Action:

At the conclusion of the hearing, the parent’s lawyer should request and obtain a copy of the written order or judgment to ensure it reflects the court’s verbal order. If the order or judgment is incorrect, *i.e.*, it does not reflect the court’s verbal rulings, the lawyer should take whatever steps are necessary to correct it to the extent that the corrections are beneficial to the client. The parent’s lawyer should provide the client

with a copy of the order or judgment and should review the order or judgment with the client to ensure the client understands it and the client's obligations under the order. If the client is unhappy with the order, the parent's lawyer should counsel the client about any options to appeal or request a rehearing on the order, but should explain that the order is in effect unless a stay or other relief is secured.

Commentary:

The parent may be angry about being involved in the child welfare system and a court order that is not in the parent's favor could add stress and frustration. It is essential that the parent's attorney take time, either immediately after the hearing or at a meeting soon after the court date, to discuss the hearing and the outcome with the client. The parent's lawyer should counsel the client about all options, including appeal (see Standard 10).

- B. The parent's lawyer should take reasonable steps to ensure the client complies with court orders and to determine whether the case needs to be brought back to court.**

Action:

If the client is attempting to comply with the order but other parties, such as DHS, are not meeting their responsibilities, the parent's lawyer should approach the other party and seek assistance on behalf of the client. If necessary, the parent's lawyer should request a hearing to review the order and the other party's noncompliance or take other steps to ensure that appropriate social services are available to the client.

Commentary:

The parent's lawyer should play an active role in assisting the client in complying with court orders and obtaining visitation and any other social services. The attorney should speak with the client regularly about progress and any difficulties the client is encountering while trying to comply with the court order or service plan. When DHS neglects or refuses to offer appropriate services, especially those ordered by the court, the lawyer should file motions to compel or motions for contempt. When DHS does not offer appropriate services, the parent's lawyer should consider making referrals to independent social service providers.

## **STANDARD 9 - MODIFYING OR VACATING AN ORDER**

- A. The parent's lawyer may move the court to modify or set aside an order if appropriate.**

Action:

If the client fails to appear at a hearing, and the court enters an adverse judgment because of the parent's non-appearance, the parent's lawyer should not ask the court to allow him or her to withdraw. Instead, the parent's lawyer should object to entry of the judgment or order and should take prompt action to contact the client. The parent's lawyer should advise the client that if he or she is dissatisfied with the court's order or judgment the lawyer may move the court to modify or vacate the order pursuant to ORS 419B.923. If the client directs the lawyer to pursue a motion to modify or vacate the judgment, the lawyer should take prompt action to do so.

Commentary:

The parent's lawyer should be aware that ORS 419B.923 requires that a motion to modify or vacate an order or judgment of the juvenile court must be filed within a "reasonable period of time." In light of that requirement, *inter alia*, it is particularly important that the parent's lawyer inform the court that he or she wishes to continue his or her appointment in the face of the parent's non-appearance. That is particularly so in cases where the juvenile court terminates a parent's parental rights based on the parent's non-appearance. Should the parent's lawyer withdraw upon a parent's non-appearance in a termination of parental rights matter, the parent is then left without counsel to offer advice about the option of filing a motion to set aside the judgment and is without counsel to properly prepare and file the motion should one be warranted. Further, when the court has allowed the lawyer to withdraw in a termination of parental rights matter, it is unlikely that court will grant a parent's request for appointment of counsel to litigate a motion under ORS 419B.923 because upon the termination of the parent's parental rights, the parent is no longer a party to the case. In sum, in most instances, the lawyer for the parent's withdrawal upon a parent's nonappearance effectively forecloses the parenting from obtaining relief under ORS 419B.923. Thus, only after the parent's lawyer has made a good faith effort to locate his or her client and has been unable to do so during the pendency of a "reasonable period of time," should the parent's lawyer seek withdrawal or acquiesce to termination of his or her appointment.

## **STANDARD 10 - APPEALS ISSUES FOR TRIAL LAWYER**

### **A. Consider and discuss the possibility of appeal with the client.**

Action:

The parent's lawyer should immediately consider and discuss with the client, preferably in person, the possibility of appeal when a court's ruling is contrary to the client's position or interests. Regardless of whether the parent's lawyer believes an appeal is appropriate or that there are any viable issues for appeal, the lawyer should advise the

client—at the conclusion of each hearing—that he or she has a right to appeal from any judgment or order resulting from a jurisdictional hearing, review hearing, permanency hearing or termination of parental rights trial. Further, if the hearing was held before a juvenile court referee, the parent’s lawyer should advise the client that he or she is entitled to a rehearing before a juvenile court judge. Unless a rehearing is requested within 10 days following the entry of the referee’s order, the order will become a final and non-appealable order.<sup>20</sup> Whether to seek a rehearing of a referee’s order or to pursue a direct appeal in the appellate courts is always the client’s decision.

Commentary:

When discussing the possibility of an appeal, the lawyer should explain both the positive and negative effects of an appeal, including how the appeal could affect the parent’s goals. For instance, the appellate court could reverse the juvenile court and vindicate the client’s belief that the juvenile court’s jurisdiction was not warranted. Further, the filing of a notice of appeal vests the appellate court with jurisdiction to stay the juvenile court’s orders while the appeal is pending.<sup>21</sup> Alternatively, an appeal could delay the case for a long time.

**B. If the client decides to appeal, the parent’s lawyer should timely and thoroughly facilitate the appointment of appellate lawyer.**

Action:

The parent’s lawyer should take all steps necessary to facilitate appointing appellate lawyer *e.g.*, the parent’s lawyer should refer the case for appeal to the Office of Public Defense Services and comply with that office’s referral procedures. The parent’s lawyer should work with the appellate lawyer and identify to the appellate lawyer the parties to the case (for example whether there are any interveners), appropriate issues for appeal and promptly respond to all requests for additional information or documents necessary for appellate lawyer to prosecute the appeal. The parent’s lawyer should promptly comply with the court’s order to return exhibits necessary for appeal.

Commentary:

Pursuant to 419A.200(4)<sup>22</sup>, the trial attorney must file the notice of appeal or if court-appointed, the trial attorney may discharge his or her duty to file the notice of

---

<sup>20</sup> ORS 419A.150(4)

<sup>21</sup> See ORS 19.360.

<sup>22</sup> ORS 419A.200(4) “The counsel in the proceeding from which the appeal is being taken shall file and serve those documents necessary to commence an appeal if the counsel is requested to do so by the party the counsel represents. If the party requesting an appeal is represented by court-appointed counsel, court appointed counsel

appeal by referring the case to the Juvenile Appellate Section of OPDS using the on-line referral form and complying with OPDS procedures.

To comply with OPDS procedures, the parent's lawyer referring a case to OPDS for appeal must satisfy the following conditions:

- 1) Electronically complete and submit the referral form to OPDS at least five (5) days prior to the due date for the notice of appeal (If the referral is within fewer than 5 business days of the notice of appeal due date, the trial lawyer remains responsible for filing the notice of appeal and should contact OPDS for assistance locating counsel on appeal.); and
- 2) Fax (503.378.2163) or email ([juvenile@opds.state.or.us](mailto:juvenile@opds.state.or.us)) to OPDS a copy of the judgment being appealed.

If OPDS must refer a case to non-OPDS counsel due to a conflict or workload issues, the following procedures apply:

- 1) OPDS will prepare a draft notice of appeal and related documents in trial lawyer's name;
- 2) OPDS will email the draft documents to trial lawyer for review and approval—but not for filing. If counsel notes a defect in the form of the documents, counsel should notify OPDS immediately by email at [juvenile@opds.state.or.us](mailto:juvenile@opds.state.or.us) or by telephone at 503.378.6236;
- 3) If the trial lawyer does not contact OPDS within two business days of the document transmission, OPDS will assume that counsel has reviewed and approved the documents; and
- 4) An OPDS attorney will sign the notice of appeal and related documents in the trial lawyer's name, file the notice of appeal and motion to appoint appellate lawyer with the Court of Appeals, serve the parties and initiate transcript production. OPDS will also forward a copy of the documents to the client with a cover letter that includes the name and contact information of the appellate lawyer appointed to represent the client on appeal.

## **STANDARD 11 - APPEALS ISSUES FOR APPELATE LAWYER**

### **A. Timely file the notice of appeal**

---

may discharge the duty to commence and appeal under this subsection by complying with policies and procedures established by the office of public defense services for appeals of juvenile court judgments.”

Action:

The parent's appellate lawyer should timely file the notice of appeal including timely serving all parties.

Commentary:

A proper notice of appeal is a jurisdictional requirement.<sup>23</sup> Consequently, the notice must satisfy statutory requirements in order to prosecute the appeal.<sup>24</sup>

ORS 419A.200(5) permits an appellate lawyer to move the court for leave to file a late notice of appeal after the statutory 30-day time limit (up to 90 days after entry of judgment). A motion to file a notice of appeal after the 30-day period, to be successful, must demonstrate that (1) the failure to file a timely notice of appeal was not personally attributable to the parent, *and* (2) "a colorable claim of error" exists in the proceeding from which the appeal is taken.<sup>25</sup>

**B. The parent's appellate lawyer should maintain communication with the client.**

Action:

If the appellate lawyer differs from the trial lawyer, the appellate lawyer should write to the client as soon as possible and confirm that he or she wishes to pursue a direct appeal and advise the client of the appellate process including relevant timelines.

Commentary:

The appellate lawyer should not be bound by the determinations of the client's position and goals as made by trial lawyer and should independently determine his or her client's position and goals on appeal.

In all cases, except appeals from a judgment, terminating a parent's parental rights the appeal from a discrete judgment and the ongoing dependency litigation will be occurring concurrently. The appellate lawyer and the trial lawyer should be thoughtful about their respective roles and relationship with the client. For example, the trial lawyer should be careful to safeguard the appeal by consulting with the appellate lawyer prior to upcoming hearings and immediately notifying the appellate lawyer

---

<sup>23</sup> ORS 19.270.

<sup>24</sup> See ORS 19.250 (contents of notice of appeal), ORS 19.255 (time for filing notice) and ORS 419A.200(3) (juvenile appeals); see also Oregon Rules of Appellate Procedure (ORAP) 2.05 (contents of notice of appeal), ORAP 2.10 (separate notices of appeal) and ORAP 2.22 (appeals in juvenile cases).

<sup>25</sup> See *State ex rel Dept. of Human Services v. Rardin*, 338 Or. 399, 408, 110 P3d 580 (2005). (A "colorable claim of error" in this context means "a claim that a party reasonably may assert under current law and that is plausible given the facts and the current law (or a reasonable extension or modification of current law.)").

should the court enter any new order or judgment to determine whether the new judgment should be referred for appeal. The appellate lawyer should consult with the trial lawyer about the issues raised in the opening brief and offer to consult about properly raising issues at upcoming hearings.

The appellate lawyer should advise the client about the limited scope of his or her representation and, should the client have concerns about their ongoing case, the appellate lawyer should refer the client to trial lawyer. Ideally, the trial lawyer and the appellate lawyer will work collaboratively and strategically to obtain the best result for the client. For example, the appellate lawyer may assist the trial lawyer in identifying issues to litigate at upcoming hearings and in properly preserving issues for a subsequent appeal in the event that the parent does not prevail at trial.

### **C. Prosecuting the appeal**

#### **a. Issue Selection and Briefing**

##### Action:

The appellate lawyer should thoroughly review the judgment to ensure that it comports with the requirements of the juvenile code.<sup>26</sup> The appellate lawyer should thoroughly review the record of the hearing that is subject to appeal and identify appropriate issues to raise on direct appeal.

##### Action:

The appellate brief should be clear, concise and comprehensive and also timely filed. The brief should reflect all relevant case law and present the best legal arguments available under Oregon and federal law for the client's position. The brief should include novel legal arguments if there is a chance of developing favorable law in support of the parent's claim. The appellate lawyer should send the client and the trial lawyer a copy of the brief when it is filed.

##### Commentary:

The court-appointed appellate lawyer has considerable authority over the manner in which an appeal is presented. It is the appellate lawyer's responsibility to exercise his or her professional judgment to raise issues that, in the attorney's

---

<sup>26</sup> See for example ORS 419B.476(5) (setting out requirements of a valid permanency judgment).

judgment, will provide the best chance of success on appeal—even when the client disagrees with the attorney’s judgment.<sup>27</sup>

**b. Oral argument**

Action:

If oral arguments are scheduled, the appellate lawyer should be prepared, organized and direct. The appellate lawyer should inform the client of whether he or she intends to present oral argument or submit the case on the briefs. If counsel intends to present oral argument, counsel should inform the client of date, time and place scheduled for oral argument. The oral argument may be waived at the discretion of the appellate lawyer in consideration of the merits of the appeal, the efficient use of resources and whether there are strategic reasons to allow the case to be submitted on the briefs.

Commentary:

As with the determination of which issues to raise on direct appeal, the appellate lawyer must exercise his or her professional judgment in determining whether to present oral argument to the appellate court.

**c. The appellate lawyer should communicate the results of the appeal and its implications to the client.**

Action:

The parent’s appellate lawyer should communicate the result of the appeal and its implications, and provide the client with a copy of the appellate decision. This appellate lawyer should promptly communicate with the trial lawyer and assist the trial lawyer with interpreting the appellate court’s decision and preparing for the next trial level event. In the event that the client does not prevail on direct appeal in the Oregon Court of Appeals, the appellate lawyer may petition for review in the Oregon Supreme Court. Whether to petition for review in the Oregon Supreme Court is ultimately the client’s decision.

---

<sup>27</sup> *See Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L Ed2d 987 (1983). *See also, Smith v. Murray*, 477 U.S. 527, 536, 106 S. Ct. 2661, 91 L Ed 2d 434 (1986) (“[T]he process of winnowing out weaken arguments or appeal and focusing on those more likely to prevail \*\*\* is the hallmark of effective appellate advocacy.”).

APPENDIX A –

ANCILLARY AREAS OF LAW WITH WHICH LAWYERS SHOULD BE SUFFICIENTLY FAMILIAR TO  
RECOGNIZE THEIR RELEVANCE TO PARTICULAR CASES

- (1) State laws and rules of civil procedure including Uniform Trial Court Rules and Supplemental Trial Court Rules;
- (2) State laws and rules of criminal procedure;
- (3) State laws and rules of administrative procedure;
- (4) State laws concerning public benefits, education and disabilities;
- (5) State laws regarding domestic violence;
- (6) State domestic relations laws, especially those regarding paternity, guardianships and adoption;
- (7) The rights a client might have as a result of being the victim of a crime;
- (8) Indian Child Welfare Act (ICWA) 25 U.S.C. §§ 1901-1963, the ICWA Regulations, 25 C.F.R. Part 23 and the Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67, 584 (Nov. 26, 1979);
- (9) Individuals with Disabilities Education Act (IDEA), P.L. 91-230;
- (10) Interstate Compact on Placement of Children (ICPC);
- (11) The Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) and the Parental Kidnapping Prevention Act;
- (12) Titles IV-B and IV-E of the Social Security Act, including the Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 620-679 and the ASFA Regulations, 45 C.F.R. Parts 1355, 1356, 1357;
- (13) Child Abuse Prevention Treatment Act (CAPTA), P.L. 108-36;
- (14) Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. 110-351;
- (15) McKinney-Vento Homeless Assistance Act, 42 U.S.C. §§ 11431-11435;
- (16) Multi-Ethnic Placement Act (MEPA), as amended by the Inter-Ethnic Adoption Provisions of 1996 (MEPA-IEP) 42 U.S.C. § 622 (b)(9) (1998), 42 U.S.C. § 671(a)(18) (1998), 42 U.S.C. § 1996b (1998);
- (17) Foster Care Independence Act of 1999 (FCIA), P.L. 106-169;
- (18) Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794 (1982);
- (19) Family Education Rights Privacy Act (FERPA), 20 U.S.C. § 1232g;
- (20) Health Insurance Portability and Accountability Act of 1996 (HIPPA), P.L., 104-192 § 264, 42 U.S.C. § 1320d-2 (in relevant part);
- (21) Public Health Act, 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2 (pertaining to confidentiality of individual information);
- (22) Immigration laws relating to child welfare and child custody;
- (23) ORS 419B.851(3), statutory implementation of the Vienna Convention on Consular Relations, April 24, 1963, Article 36, regarding service of process, and 8 C.F.R. § 236.1;

- (24) The Hague Convention of May 29, 1993 on Protection of Children and Co-operation in Respect of Intercounty Adoption;
- (25) The International Parental Kidnapping Crime Act of 1993 (IPKCA), 18 U.S.C § 1204 (1993);
- (26) The Hague Convention on the International Aspects of Child Abduction, implemented by ICARA, 42 U.S.C. § 11603 et seq.; and
- (27) The Hague Convention on the Service of Judicial and Extrajudicial Documents Abroad.

## APPENDIX B –

### ADDITIONAL AREAS IN WHICH LAWYERS SHOULD SEEK TRAINING

- (1) Stages of child development and patterns of growth as related to child abuse and neglect;
- (2) Cultural and ethnic differences as they relate to child-rearing;
- (3) Substance abuse and resources for substance abusing families;
- (4) Domestic violence, its effect on parents, children and families and appropriate resources;
- (5) Family preservation services;
- (6) Resources for diagnosis and treatment of sexual abuse, physical abuse and emotional abuse;
- (7) Resources for the treatment and recognition of non-organic failure to thrive;
- (8) Educational, mental health and other resources for special needs children, including infants and preschoolers;
- (9) The appropriateness of various types of placement;
  - (a) The efforts that should be made to ensure a smooth, timely transition between placements;
  - (b) The effect of the placement on visitation by parents, siblings and other relatives and on the services needs of the child; and
  - (c) The transracial, transcultural and language aspects of the placement.
- (10) The importance of placing siblings together when appropriate;
- (11) Risk assessment prior to reunification;
- (12) The use and appropriateness of psychotropic drugs for children;
- (13) Government benefits available in dependency cases, such as Social Security payments including non-needy relative grants; AFDC, AFDC-FC, adoption assistance programs and crime victims programs;
- (14) Transition plans and independent living programs for teens, including emancipation issues; and
- (15) Accessing private insurance for services.

APPENDIX C –

CHECKLISTS FOR SPECIFIC HEARINGS FOR ATTORNEYS FOR CHILDREN:

**A. SHELTER HEARINGS:** At the **Shelter Hearing (as well as subsequent hearing)**, the child's lawyer should:

1. Obtain copies of all discovery including but not limited to:
  - a. Shelter report;
  - b. Police report; and
  - c. Prior Child Welfare referrals.
2. Talk with child before hearing if possible:
  - a. Purpose of hearing;
  - b. Placement preference if applicable; and
  - c. Child's preferred outcome.
3. Evidentiary Hearing:
  - a. Jurisdiction sufficient of the petition;
  - b. Appropriateness of venue;
  - c. Adequacy of notice provided to parties and Indian child's tribe if applicable:
    - 1) Determine applicability of the Indian Child Welfare Act or the Uniform Child Custody Jurisdictional Enforcement Act; and
    - 2) Transfer of the case to tribal court if appropriate.
  - d. Determine if paternity established;
  - e. Child's position on return to home without danger of suffering physical injury or emotional harm;
  - f. Has the agency made reasonable efforts (active efforts if ICWA) to prevent the need for removal;
  - g. Have diligent efforts been made to place with family;
  - h. Legal standard:
    - 1) Least restrictive and most family-like placement;
    - 2) Parent can parent at a minimally adequate level; and
    - 3) Removal (or continuation in the home) not in the best interest or welfare of the child.
  - i. Is continuation of the child in the home contrary to the child's expressed desires or whether it is in the best interest of welfare of the child to be removed from home; and
  - j. Child should remain in current school unless it is in the best interest of the child.
4. The lawyer should request any temporary orders that the client directs, including but not limited to:
  - a. Temporary restraining orders, including orders expelling an allegedly abusive parent from the home;

- b. Orders governing future conduct of the parties including not discussing allegations with child, etc.;
  - c. Orders for any services agreed-on before adjudication;
  - d. Visitation orders that are reasonable and flexible and take into consideration the child's age and activities and counseling schedules and available transportation and that specify the terms and conditions of visitation:
    - 1) OAR 419B.337(3). Under this provision, the juvenile court may, at the minimum, order that DHS provide a certain number of visits weekly and that the visits be supervised or unsupervised; and
    - 2) Lack of resources on behalf of the agency is not enough to limit visits OAR 413-070-0870(1); see also OAR 413-070-0860(1)(d)(B)(ii); OAR 413-070-0860(2)(f)(B). Visits must meet the best interest of the child.
  - e. Orders for child support if appropriate;
  - f. Order for DHS-CW to investigate relatives and friends of the family as potential placements or to place sibling groups together; and
  - g. Orders for DHS to provide appropriate treatment for the child.
5. Review the Order with the child client or child's care provider if child with diminished capacity:
    - a. Orders by referee's can be reviewed by a sitting judge; and
    - b. Right (and process) to appeal.
  6. Review the Consequences of not abiding by the Order.

**B. JURISDICTION/ADJUDICATION HEARING:** The lawyer should be fully prepared by:

1. Review and prepare materials (including fact and legal argument) available at the trial, including all pleadings, discovery and investigate reports, as well as, relevant statutes, case law and the evidence code;
2. A draft outline of:
  - a. Opening and closing statements;
  - b. Direct and cross examination plans for all witnesses based on allegations in petition; and
  - c. Findings of fact and conclusions of law to be requested at the conclusion of the hearing.
3. The child's lawyer should ensure that the child is informed of and understand the nature, obligations and consequences of the decision, and the need for the child or the child with diminished capacity's care provider to cooperate with the trial court's orders. A child's lawyer should also explain the child's rights and possibilities of post-trial motions to reconsider, set aside, modify or review the jurisdictional finding, as well as the right to appeal. The child's lawyer should explain to the child, or the care provider of a child with diminished capacity, the consequences of violating the trial court's order and the continuing jurisdiction of the court; and

4. After the jurisdictional hearing or adjudication, the child's lawyer should:
  - a. Carefully review the judgment and advise the child about potential issues for appeal;
  - b. Advise the child in writing of the timelines for filing a notice of appeal and the child lawyer's ability to represent the client on appeal; and
  - c. Assist the child in locating a lawyer to handle the appeal if the lawyer is unable to undertake such representation and take whatever steps are necessary to preserve the client's right to appeal the judgment.

If the trial lawyer is court appointed they shall timely refer the case to OPDS pursuant to OPDS procedures.

**C. DISPOSITION HEARINGS:** Explain the nature of the hearing to the child, the issues involved and alternatives available to the Court:

1. When court has found sufficient evidence to support jurisdiction - the lawyer should still, when appropriate, ask the court to not exercise jurisdiction and move to dismiss the petition on the ground that jurisdiction is not in the best interests of the child because the child and family do not require supervision, treatment or placement;
2. A lawyer should advocate the least restrictive disposition possible that can be supported and is consistent with the child's needs and desires;
3. Respond to inaccurate or unfavorable information presented by other parties;
4. Ensure that all reasonably available and mitigating factors and favorable information is presented to the court; and
5. When appropriate the lawyer should:
  - a. Request the Court to order the department to provide services and set concrete conditions of return of the child to the parent;
  - b. Be prepared to present evidence on whether the reasonableness or unreasonableness of the agency's efforts and alternative efforts were active or reasonable;
  - c. Request a no reasonable/no active efforts finding;
  - d. Request an order specifying what future services will make the changes in the family needed to correct the problems necessitating intervention and constituting "reasonable efforts" by the agency;
  - e. Request orders for services or agreements that include (but are not limited to):
    - 1) Family Preservation Services;
    - 2) Medical and mental health care;
    - 3) Drug and alcohol treatment;
    - 4) Parenting education;
    - 5) Housing;
    - 6) Recreational or social services;
    - 7) Domestic violence counseling;
    - 8) Anger-management counseling;

- 9) Independent living services;
  - 10) Sex-offender treatment; and
  - 11) Other individual services.
- f. The lawyer should assure the order includes a description of actions to be taken by parents to correct the identified problems as well as a timetable for accomplishing the changes required;
  - g. The lawyer should request specific visitation orders addressing visitation between child and parent, between siblings and between the child and other significant persons in the child's life;
  - h. The child's lawyer should, when appropriate, request an educational advocate (surrogate) for the child. When appropriate the child's lawyer should seek child support orders;
  - i. The child's lawyer should seek to ensure continued representation of the child at all future hearings and reviews - set a next date; and
  - j. The lawyer should assure that the child is informed of and understands the nature, obligations and consequences of the dispositional decision, and the need for the child to cooperate with the dispositional orders. The lawyer should also explain the child's rights and possibilities of post-trial motions to reconsider, set aside, modify or review the disposition, as well as the right to appeal. The lawyer should explain the consequences of violating the dispositional order and continuing jurisdiction of the court.

**D. REVIEW HEARINGS AND CITIZEN REVIEW BOARD REVIEWS:** The child's lawyer has a critical role at review hearings and CRB review because at the hearing the court or CRB panel reviews the child's conditions and circumstances, evaluates the parties progress toward achieving the case plan, assesses the adequacy of the services offered to the family and child, and considers whether jurisdiction should continue. The child's lawyer should be fully prepared to represent the child at all reviews and CRB's.

- 1. A child is entitled to request reviews to review issues in the case as issues arise that cannot be resolved without court intervention. The child's lawyer should seek a review to court intervention if necessary to resolve a dispute over such matters as visitation, placement or services;
- 2. Whether a review is periodic or at the request of one of the parties, the child's lawyer should conduct appropriate investigation to prepare for the review which may include:
  - a. Reviewing the agency file and the report prepared for the review and obtaining all relevant discovery;
  - b. Interviewing the child prior to the hearings and obtain supplemental reports and information for child prior to the hearings;
  - c. Interviewing the caseworker to determine his or her assessment of the case, the case plan, the child's placement and progress, and the parent's cooperation and progress;

- d. Contacting other agencies and professionals who are providing services to the child or parents and seeking appropriate documentation to verify the progress;
  - e. Interviewing other potential witnesses, which may include relatives, neighbors, school personnel and foster parents; and
  - f. Subpoenaing needed witnesses and records.
3. At all review hearings and CRB reviews, the child's lawyer should be prepared to present information supporting the child's position and whether the parties are taking the necessary steps to achieve the chosen plan in a timely fashion. The child's lawyer should consider submitting a written report on behalf of the child. The child's lawyer should address:
- a. Whether there is a basis for jurisdiction to continue;
  - b. Whether there is a need for continued placement of the child;
  - c. Reasons the child can or cannot presently be protected for the identified problems in the home even if services are provided;
  - d. Whether the agency is making reasonable or active efforts to rehabilitate and reunify the family or to achieve another permanent plan;
  - e. Why services have not been successful to date;
  - f. Whether the court-approved plan for the child meets the child's expressed desires or for a child with diminished capacity, is the best plan for the child;
  - g. Whether the case plan or service agreement needs to be clarified or modified;
  - h. The child's position on the development of the concurrent case plan;
  - i. The appropriateness of the child's placement;
  - j. Whether previous court orders regarding visitation, services and other case related issues should be modified; and
  - k. Whether jurisdiction should continue.
4. At all review hearings and CRB reviews, the child's lawyer should request specific findings and orders that advance the child's position.

**E. PERMANENT PLANNING HEARINGS:** Because this is the hearing where the court determines what the permanent plan for the child should be, including return to parent, adoption, guardianship or other planned permanent living arrangements, the child's lawyer should take particular care in preparing for a permanency hearing and ensure that she is well acquainted with the case history and case files involving the family. The child's lawyer should be prepared to present evidence and zealously advocate the child's position about the permanent plan.

- 1. The child's lawyer should consult with the other parties prior to the permanent planning hearing to determine whether the parties are in agreement on the proposed permanent plan;

2. If the hearing will be a contested permanent plan hearing, the child's lawyer should be prepared to call witnesses and advocate the child's position during the hearing:
  - a. The child's lawyer should request sufficient court time to adequately present the client's position, including live witness testimony; and
  - b. The child's lawyer should consider submitting a written permanency memorandum in support of the client's position.
3. At the permanency hearing, the lawyer should be prepared to present evidence on what the permanent plan for the child should be, including whether to continue toward a plan of family reunification, a motion to dismiss or implementation of a concurrent plan;
4. At a permanency hearing, the lawyer should request specific findings and orders that advance the child's position, including but not limited to a specific extension of time for reunification if appropriate and the specific services and progress required during that time; and
5. The child's lawyer should carefully review the court order from the permanency hearing with the child including if appropriate, the option to seek review of the order including appellate review of any final orders.

**F. TERMINATION OF PARENTAL RIGHTS HEARINGS:** Termination of parental rights is a drastic and permanent deprivation of the fundamental right of family membership which can permanently sever the legal relationship of a child from his parents as well as other members of his or her extended family. It has been said that only the death penalty is a more severe intrusion into personal liberty. Thus, the child's lawyer should be zealous and meticulous in investigating and preparing for termination of parental rights trial.

1. In preparation for a termination trial, the child's lawyer should:
  - a. Thoroughly review the entire record of the case, carefully analyzing court orders and CRB findings and recommendations;
  - b. Completely investigate the case, paying particular attention to issues unique to termination, such as the adoptability of the child and whether termination of parental rights is in the child's best interest, including:
    - 1) The child's relationship with his or her parents;
    - 2) The importance of the maintaining a relationship with the child's siblings and other relatives;
    - 3) The child's ability to bond to an adoptive resource; and
    - 4) Preserving the child's cultural heritage.
  - c. Prepare a detailed chronology of the case to use in case presentation and in developing a theory and strategy for the case;
  - d. Research termination statutes and case law, with particular attention to constitutional issues, and prepare trial memorandum if necessary;

- e. Obtain and review records to be submitted to the court and prepare objections or responses to objections to these documents;
  - f. Subpoena and carefully prepare witnesses;
  - g. If the child will be called as a witness, carefully prepare the child to testify at the termination trial;
  - h. Evaluate evidentiary issues and file motions in limine as appropriate and lay proper evidentiary foundations as needed during trial;
  - i. Be aware of the heightened standard of proof in termination cases - clear and convincing evidence for most cases, and beyond a reasonable doubt in cases covered by the Indian Child Welfare Act;
  - j. Evaluate and be prepared if necessary to move to recuse or disqualify the trial judge; and
  - k. Be aware of alternatives to termination of parental rights, including but not limited to guardianship and open adoption to achieve permanency for the child and if appropriate advocate the child's preferred permanency option.
2. The child's lawyer should meet with the child to discuss the termination petition and determine the child's position on termination of parental rights; and
3. In preparation for and during the termination trial, the child's lawyer should be:
  - a. Prepared to submit a trial memorandum in support of child's position;
  - b. Prepared to offer or agree to stipulations regarding the evidence;
  - c. Prepared to offer and stipulate to facts;
  - d. Prepared to examine witnesses both on direct and cross-examination;
  - e. Prepared to lay the proper evidentiary foundations;
  - f. Prepared to make opening and closing statements; and
  - g. Create an adequate record of the case and preserve any issues appropriate for appeal.

## APPENDIX D –

### CHECKLIST FOR SPECIFIC HEARINGS FOR LAWYERS FOR PARENTS:

#### A. SHELTER HEARINGS:

1. Discovery: Obtain copies of all relevant documents:
  - a. Shelter report;
  - b. Police report; and
  - c. Prior Child Welfare referrals.
2. Client interview: Take time to talk to the client (before court), caution the client about self-incrimination, inquire about other available relatives, or safety service providers, and ask for a recess or a continuance if necessary;
3. If appropriate, assert the client's Fifth Amendment and other constitutional rights;
4. Assist the client in exercising his or her right to an evidentiary hearing to require the department to demonstrate to the court that the child can be returned home without further danger of suffering physical injury or emotional harm, endangering or harming others, or not remaining within the reach of the court process before adjudication;
5. When appropriate, present facts regarding:
  - a. Jurisdictional sufficiency of the petition;
  - b. Appropriateness of venue;
  - c. Adequacy of notice provided to parties, and tribes if applicable, particularly if they are not present;
  - d. The necessity of shelter care;
  - e. Why continuation of the child in the home would be contrary to the child's welfare or why it is not in the best interest or welfare of the child to be removed;
  - f. Whether reasonable or active efforts were made to prevent removal;
  - g. Whether diligent efforts have been made to place with family;
  - h. Do not move the child's school unless it is in the best interest of the child;
  - i. Whether reasonable and available services can prevent or eliminate the need to separate the family;
  - j. Whether the placement proposed by DHS-CW is the least disruptive and most family-like setting that meets the needs of the child;
  - k. The possibility of placement with appropriate non-custodial parents and relatives - again diligent efforts requirement;
  - l. A place for return of the child prior to the jurisdictional hearing;
  - m. If the child remains in shelter care, arrangements for visits and alternatives to shelter care to be explored such as relative placement, intensive in-home services, and medication; and

- n. Applicability of the Indian Child Welfare Act, appropriate parties and tribes to receive notice, expert testimony of ICWA cases.
6. The lawyer should: propose return to parents or placement that is the least restrictive;
  7. The lawyer should request any temporary orders that the client directs, including:
    - a. Temporary restraining orders, including orders expelling an allegedly abusive parent from the home;
    - b. Orders governing future conduct of the parties (so that they are on notice...), i.e., remaining clean and sober while the child is present, etc.;
    - c. Orders for any services agreed-on before adjudication;
    - d. Visitation orders that are reasonable and flexible and take into consideration the parties' work and counseling schedules and available transportation and that specify the terms and conditions of visitation. Take note of OAR 419B.337(3). Under this provision, the juvenile court may, at a minimum, order that DHS provide a certain number of visits weekly and that the visits be supervised or unsupervised. Further lack of resources on behalf of the agency is not enough to limit visits OAR 413-070-0870(1); see also OAR 413-070-0860(1)(d)(B)(ii); OAR 413-070-0860(2)(f)(B). Visits must meet the best interest of the child;
    - e. Orders for child support if appropriate. Be prepared to rebut the presumption - argue inability to pay and treatment costs etc. are more valuable to the child etc. See ORS 25.245, ORS 25.280;
    - f. Order for DHS-CW to investigate relatives and friends of the family as potential placements, or to place sibling groups together; and
    - g. Orders for the agency to provide appropriate treatment for the child.
  8. The lawyer should consult with the client about transfer of the case to tribal court and take appropriate action as directed by the client;
  9. Review order, rehearing, appeal or habeas. The lawyer should inform the client of the possibility of a review of the referee's or court's order at the shelter care hearing and the possibility of pursuing a writ of habeas corpus; and
  10. Review the safety plan and the consequences for not following it. If the Court sets conditions of the child's placement, the lawyer should explain to the client and any third party the conditions and potential consequences of violating those conditions. The lawyer should seek review of shelter care decisions as appropriate and advise clients or any third parties of changes in conditions for pretrial placement that would be likely to get the court to agree with the client's plan.

**B. JURISDICTION/ADJUDICATION HEARING:**

1. Have all relevant materials (including fact and legal argument) available at the trial, including all pleadings, discovery, and investigate reports, as well as, relevant statutes, case law and the evidence code;

2. Have a draft outline of:
  - a. Opening and closing statements;
  - b. Direct and cross examination plans for all witnesses;
    - 1) Prepare the client to testify; and
    - 2) If there is potential for criminal liability, the lawyer should advise the client whether to answer specific questions or assert the client's Fifth Amendment right not to answer specific questions;
  - c. If the State makes an amendment to the petition make sure there is sufficient notice/time to defend. Request continuance if necessary; and
  - d. Findings of fact and conclusions of law to be requested at the conclusion of the hearing.
3. The lawyer should ensure that the client is informed of and understands the nature, obligations, and consequences of the decision, and the need for the client to cooperate with the trial court's orders. A lawyer should also explain the client's rights and possibilities of post-trial motions to reconsider, set aside, modify, or review the jurisdictional finding, as well as the right to appeal. The lawyer should explain the consequences of violating the trial court's order and the continuing jurisdiction of the court;
4. After the jurisdictional hearing or adjudication, the lawyer should:
  - a. Carefully review the judgment and advise the client about potential issues for appeal;
  - b. Advise the client in writing of the timelines for filing a notice of appeal and the lawyer's ability to represent the client on appeal; and
  - c. Assist the client in locating a lawyer to handle the appeal if the lawyer is unable to undertake such representation and take whatever steps are necessary to preserve the client's right to appeal the judgment. If the trial lawyer is court appointed they shall timely refer the case to OPDS pursuant to OPDS procedures.
5. If a child is found within the jurisdiction of a court following a parent's failure to appear and the lawyer has been relieved as counsel, the lawyer should promptly notify the client of the entry of the judgment and advise them of the steps necessary to set aside the judgment based on excusable neglect. If the lawyer is court-appointed and the client wishes to request that the judgment be set aside, the lawyer should immediately contact the court to request re-appointment and thereafter promptly file the necessary pleadings on behalf of the client.

**C. DISPOSITION HEARINGS:** At the hearing, the parent's lawyer should be prepared to present a disposition plan on behalf of the client, as well as to respond to inaccurate or unfavorable information presented by other parties, ensuring that all reasonably available and mitigating factors and favorable information is presented to the court and obtaining all appropriate order to protect the client's rights and interests. The lawyer shall be prepared to:

1. Explain to the client the nature of the hearing, the issues involved and the alternatives open to the court;
2. Investigate all sources of evidence that will be presented at the hearing and interview material witnesses. The lawyer also has an independent duty to investigate the client's circumstances, including such factors as previous history, family relations, economic conditions, and any other information relevant to disposition;
3. When court has found sufficient evidence to support jurisdiction - the lawyer should still, when appropriate, ask the court to not exercise jurisdiction and move to dismiss the petition on the ground that jurisdiction is not in the best interests of the child because the child and family do not require supervision, treatment, or placement;
4. A lawyer should advocate the least restrictive disposition possible that can be supported and is consistent with the client's needs and desires; and
5. At the hearing, a lawyer should, when appropriate should:
  - a. Request the Court to order the department to provide services and set concrete conditions of return of the child/ren to the parent;
  - b. Be prepared to present evidence on whether the reasonableness or unreasonableness of the agency's efforts and alternative efforts were active or reasonable;
  - c. Request a no reasonable/no active efforts finding;
  - d. Request an order specifying what future services will make the changes in the family needed to correct the problems necessitating intervention and constituting reasonable/active efforts by the agency;
  - e. Request orders for services or agreements that include (but are not limited to):
    - 1) Family preservation services;
    - 2) Medical and mental health care;
    - 3) Drug and alcohol treatment;
    - 4) Parenting education;
    - 5) Housing;
    - 6) Recreational or social services;
    - 7) Domestic violence counseling;
    - 8) Anger-management counseling;
    - 9) Independent living services;
    - 10) Sex-offender treatment; and
    - 11) Other individual services.
  - f. The lawyer should assure the order includes a description of actions to be taken by parents to correct the identified problems as well as a timetable for accomplishing the changes required;
  - g. The lawyer should request specific visitation orders covering visitation between child and parent, between siblings, and between the child and other significant persons;

- h. The lawyer should, when appropriate, request that the court appoint counsel, a court-appointed special advocate (CASA) or an educational advocate (surrogate parent) for the child. When appropriate the lawyer should seek child support orders;
- i. The lawyer should seek to ensure continued representation of the client at all future hearings and reviews; and
- j. The lawyer should assure that the client is informed of and understands the nature, obligations, and consequences of the dispositional decision, and the need for the client to cooperate with the dispositional orders. The lawyer should also explain the client's rights and possibilities of post-trial motions to reconsider, set aside, modify, or review the disposition, as well as the right to appeal. The lawyer should explain the consequences of violating the dispositional order and continuing jurisdiction of the court.

(Note: Rules of evidence do not apply at disposition hearings. See ORS 419B.325)

**D. REVIEW HEARINGS AND CITIZEN REVIEW BOARD REVIEWS:** The lawyer's role is critical at review and CRB review because at the hearing the court or CRB panel reviews the child's conditions and circumstances, evaluates the parties progress toward achieving the case plan, assesses the adequacy of the services offered to the family, and considers whether jurisdiction should continue. The lawyer should be fully prepared to represent the client at all reviews and CRB's.

Clients are also entitled to request reviews in the case as they arise. The lawyer should seek a review to request return of the child when any event happens that may significantly affect the need for continued placement. The lawyer should also request a review when court intervention is necessary to resolve a dispute over such matters as visitation, placement, or services.

1. Whether a review is periodic or at the request of one of the parties, the lawyer should conduct appropriate investigation to prepare for the review which may include:
  - a. Reviewing agency files and the report prepared for the review and obtaining all relevant discovery;
  - b. Interviewing the client prior to the hearings and obtain supplemental reports and information for client prior to the hearing;
  - c. Interviewing the caseworker to determine his or her assessment of the case, the case plan, the child's placement and progress, and the parent's cooperation and progress;
  - d. Contacting other agencies and professionals who are providing services to the child or parents and seeking appropriate documentation to verify the progress by the client;

- e. Interviewing other potential witnesses, which may include relatives, neighbors, school personnel, and foster parents; and
  - f. Subpoenaing needed witnesses and records.
2. At all review hearings and CRB reviews, the lawyer should be prepared to present information supporting the client's position and whether the parties are taking the necessary steps to achieve the chosen plan in a timely fashion. The lawyer should consider submitting a written report on behalf of the client. The lawyer should specifically address:
    - a. Whether there is a basis for jurisdiction to continue;
    - b. Whether there is a need for continued placement of the child;
    - c. Reasons the child can or cannot presently be protected for the identified problems in the home even if services are provided;
    - d. Whether the agency is making reasonable or active efforts to rehabilitate and reunify the family or to achieve another permanent plan;
    - e. Why services have not been successful to date;
    - f. Whether the court-approved plan for the child remains the best plan;
    - g. Whether the case plan or service agreement needs to be clarified or modified;
    - h. The client's position on the development of the concurrent case plan;
    - i. The appropriateness of the child's placement;
    - j. Whether previous court orders regarding visitation, services, and other case related issues should be modified; and
    - k. Whether jurisdiction should continue.
  3. At all review hearings and CRB reviews, the lawyer should request specific findings and orders that advance the client's case; and
  4. At all review hearings and CRB reviews, the lawyer should ensure that parents receive a clear and authoritative statement of the court's expectations, the statutory time-lines, the possibility of return of the child if sufficient progress is made, and the risk of implementation of the concurrent case plan. The lawyer should ask the court to schedule a subsequent hearing (unless wardship terminated).

**E. PERMANENT PLANNING HEARINGS:** This is the hearing where the court determines what the permanent plan for the child should be, including return to parent, adoption, guardianship, or other planned permanent living arrangements. The lawyer should take particular care in preparing for a permanency hearing and ensure that the lawyer is well acquainted with the case history and case files. The lawyer should be prepared to present favorable evidence and zealously advocate the client's position about the permanent plan.

It is the Department's burden to prove its efforts were reasonable and despite those efforts progress on behalf of the parents has not been sufficient, measured against the pled and proven basis for jurisdiction.

1. The lawyer should consider requesting that the court schedule a permanency hearing in furtherance of the client's goals;
2. The lawyer should conduct an investigation as described above. In addition the lawyer should be prepared to address what the long-term plan for the child should be, including:
  - a. A specific date on which the child is to be returned home;
  - b. A date on which the child will be placed in an alternative permanent placement;
  - c. Whether the child will remain in substitute care on a permanent or long term basis; and
  - d. Whether substitute care will be extended for a specific time, with a continued goal of family reunification.
3. At the permanency hearing, the lawyer should be prepared to present evidence on what the permanent plan for the child should be, including whether to continue toward a plan of family reunification, a motion to dismiss or implementation of a concurrent plan. The lawyer should request sufficient court time to adequately present the client's position, including live witness testimony. The lawyer should consider submitting a written permanency memorandum in support of the client's position;
4. At a permanency hearing, the lawyer should request specific findings and orders that advance the client's position, including but not limited to a specific extension of time for reunification is appropriate and the specific services and progress required during that time; and
5. The lawyer should carefully review the court order from the permanency hearing with the client and discuss a client's option to review, including appellate review of any final orders.

**F. TERMINATION OF PARENTAL RIGHTS HEARINGS** is a drastic and permanent deprivation of the fundamental right of family membership. As such, the lawyer should be zealous and meticulous in investigating and preparing for termination of parental rights hearings.

1. For zealous and meticulous advocacy, the lawyer should:
  - a. Thoroughly review the entire record of the case, carefully analyzing court orders and CRB findings and recommendations and review the case with the client;
  - b. Completely investigate the case, paying particular attention to issues unique to termination, such as the adoptability of the child and whether termination of parental rights is in the child's best interest, including:
    - 1) The child's relationship with his or her parents;
    - 2) The importance of the maintaining a relationship with the child's siblings and other relatives;

- 3) The child's ability to bond to an adoptive resource; and
  - 4) Preserving the child's cultural heritage.
- c. Prepare a detailed chronology of the case to use in case presentation and in developing a theory and strategy for the case;
  - d. Research termination statutes and case law, with particular attention to constitutional issues, and prepare trial memorandum if necessary;
  - e. Obtain and review records to be submitted to the court and prepare objections or responses to objections to these documents;
  - f. Subpoena and carefully prepare witnesses;
  - g. Carefully prepare the client to testify at the termination trial and advise the client of the consequences of failing to appear at a mandatory court appearance in termination proceeding;
  - h. Evaluate evidentiary issues and file motions in limine as appropriate and lay proper evidentiary foundations as needed during the trial;
  - i. Be aware of the heightened standard of proof in termination cases - clear and convincing evidence for most cases, and beyond a reasonable doubt in cases covered by the Indian Child Welfare Act;
  - j. Be prepared to present evidence of or address the agency's failure to adequately assist parents;
  - k. Evaluate and be prepared if necessary to move to recuse or disqualify the trial judge; and
  - l. Be aware of alternatives to termination of parental rights, including but not limited to guardianship and open adoption to achieve permanency for the child.
2. The lawyer should meet with the client to discuss the termination petition and the consequences of an involuntary judgment of termination of parental rights. The lawyer should also discuss alternatives to trial with the client, including voluntary relinquishments of parental rights, open adoption agreements, post-adoption contact agreements, guardianship, other planned permanent living agreements, conditional relinquishments and continuance of the trial. If the client wishes to pursue an alternative to trial, the lawyer should advocate for the client's position;
  3. When a parent fails to appear at a mandatory termination proceeding the lawyer should consider the following options:
    - a. To seek a continuance in order to allow the client to appear; and
    - b. To request withdrawal as lawyer of record for the absent parent.
  4. In preparation for and during the termination trial, the lawyer should be:
    - a. Prepared to submit a trial memorandum in support of client's position;
    - b. Prepared to offer or agree to stipulations regarding the evidence;
    - c. Prepared to offer and stipulate to facts;
    - d. Prepared to examine witnesses both on direct and cross-examination;
    - e. Prepared to lay the proper evidentiary foundations;
    - f. Prepared to make opening and closing statements; and

- g. Create an adequate record of the case and preserve any issues appropriate for appeal.

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** June 27, 2014  
**From:** Travis Prestwich, Public Affairs Committee Chair  
**Re:** Judiciary Committee Task Force Reports (SB 798, SB 799, and SB 812)

---

### Issue

Consider whether to adopt the task force reports requested by the Senate Judiciary Committee Task Forces in 2013,

- SB 798 – Alternate Jurors in Criminal Cases,
- SB 799 – Motions for Change of Attorney, and
- SB 812 – Motions for Change of Judge,

and submit them to the Committee during fall Legislative Days.

### Options

Adopt the reports for SB 798 (Alternate Jurors in Criminal Cases), SB 799 (Motions for Change of Attorney), and SB 812 (Motions for Change of Judge) and submit them to the Senate Judiciary Committee.

Adopt the reports for SB 798 (Alternate Jurors in Criminal Cases), SB 799 (Motions for Change of Attorney), and SB 812 (Motions for Change of Judge) with changes and submit them to the Senate Judiciary Committee.

Decline to accept the reports for SB 798 (Alternate Jurors in Criminal Cases), SB 799 (Motions for Change of Attorney), and SB 812 (Motions for Change of Judge).

### Discussion

At the end of the 2013 Legislative Session, Senator Floyd Prozanski requested that the Oregon State Bar create task forces to address three legislative concepts. All three bills, SB 798 (Alternate Jurors in Criminal Cases), SB 799 (Motions for Change of Attorney), and SB 812 (Motions for Change of Judge), received hearings during the session, however none of them received sufficient support to pass both chambers.

In response, the bar created and staffed three task forces, bringing together bill sponsors and interested stakeholders to review the proposed concepts, work towards developing compromise language, and provide a report and recommendations to the Senate Judiciary Committee for the Fall Legislative Days.

### **SB 798 - Alternate Jurors in Criminal Cases**

During the 2013 legislative session, the legislature considered SB 798. The bill would have modified ORS Chapter 136 to expand the permissible use of alternate jurors in criminal cases. The task force included judges, representatives for both prosecutors and criminal defense attorneys, and representatives of the Oregon State Bar.

Under current law, the court is generally required to dismiss all alternate jurors when the case is submitted to the jury, meaning that if a juror becomes incapacitated during deliberations, there will no longer be an alternate available. In such a situation, the court will generally be forced to declare a mistrial and the case will have to be retried.

After discussion, the task force agreed that allowing alternate jurors to be used after deliberations have begun is a positive change. The proposal has the potential to make the courts more efficient by eliminating the need for some cases to be retried and with the concession that parties must agree to the alternates.

This proposed change was in part modeled after recent changes to the Oregon Rules of Civil Procedure. Those changes went into effect on January 1, 2014 and allow the use of alternate jurors after deliberations begin in civil cases. Because the ORCP does not apply to criminal cases, separate legislation is required in order to make analogous changes.

### **SB 799 – Motions for Change of Attorney**

During the 2013 legislative session, the legislature considered SB 799. The bill would have modified ORS 9.380, which addresses changes in representation during judicial proceedings. The task force included judges, both criminal and civil litigators, family law practitioners, and representatives of the Oregon Judicial Department, the Professional Liability Fund, and the Oregon State Bar.

ORS 9.380(1) allows for two different procedures for attorney withdrawal and substitution in an action or proceeding. An attorney may withdraw or the attorney-client relationship terminated if the attorney consents prior to a judgment or final determination or at any time by order of court for good and sufficient cause. For the second option, either the client or the attorney must make a request to the court.

The task force recommends two parallel processes to address the concerns raised by SB 799. It should be noted that the task force would like to work with legislative counsel to determine whether the statutory language should be removed completely or whether the language should direct the reader to the Uniform Trial Court Rules (UTCRC).

First, draft legislation should be submitted to either repeal ORS 9.380 and 9.390 in their entirety or to replace them with a very brief statute that simply refers the reader to the UTCR.

Secondly, the bar would be willing to work with the UTCR Committee to draft new language to be added to the Uniform Trial Court Rules.

### **SB 812 – Motions for Change of Judge**

During the 2013 legislative session, the legislature considered SB 812. The bill would have modified the process to disqualify a judge due to a party's belief that they cannot have a fair or impartial trial or hearing before the judge in question (ORS 14.260). Currently, parties are permitted to make two motions supported by affidavit to disqualify a judge. The proposed language in SB 812 would limit a party to only making one motion to disqualify if the case was in a judicial district with three or fewer circuit court judges.

The task force included judges, both criminal and civil litigators, family law practitioners, and representatives of the Oregon Judicial Department, the Professional Liability Fund, and the Oregon State Bar.

The original bill was introduced to address concerns of judges in rural counties and applied only to smaller judicial districts. There appeared to be concern that in some districts the ability to make to motions was being used aggressively and was not only driving up costs to bring in judges from other counties but also allowed "judge shopping."

Three concerns were raised by the task force members:

- After a review of neighboring states, it appears that Oregon is the only state that allows two affidavits.
- Several members of the task force voiced concerns that having different laws apply to different districts based on the size of the district does not meet fairness and equity standards and that any solution should be statewide and not apply only to rural judicial districts.
- Many members of the task force thought that the current system worked well and that the problem appeared to be localized rather than a statewide problem.

The task force members did appear to have some interest in Arizona's rule addressing "Notice of Change in Judge," however the task force was ultimately unable to develop any final recommendations regarding whether a bill should be drafted for the 2015 session, and if so, what the content of that bill would be.

Oregon State Bar

# Senate Bill 798 Task Force

## Alternate Jurors in Criminal Cases

**June 27, 2014**

# Report of the SB 798 Task Force

April 2014

## Origin of the task force

During the 2013 legislative session, the legislature considered SB 798. The bill would have modified ORS Chapter 136 to expand the permissible use of alternate jurors in criminal cases. The Senate Judiciary Committee held a hearing on this bill on April 8, 2013, but after hearing from both sides decided not to move the bill out of committee. Instead the chair of the committee asked the Oregon State Bar to convene a task force to look into this issue in more detail, and report back with a recommendation. The task force included judges, representatives for both prosecutors and criminal defense attorneys, and representatives of the Oregon State Bar.

## Purpose Senate Bill 798

Senate Bill 798, and the -2 amendments to that bill which were submitted at the April 8, 2013 hearing, were intended to allow judges to use an alternate juror to replace a juror who dies or becomes unable to continue even after jury deliberations have begun.

Under current law, the court is generally required to dismiss all alternate jurors when the case is submitted to the jury, meaning that if a juror becomes incapacitated during deliberations, there will no longer be an alternate available. In such a situation, the court will generally be forced to declare a mistrial and the case will have to be retried, or the parties may agree to continue deliberations with fewer jurors.

Proponents of SB 798 felt that, absent the parties agreeing to a smaller jury, declaring a mistrial was a waste of judicial resources, and that judges should be permitted to make use of alternates to avoid having to repeat what could be a weeks-long jury trial.

This proposed change was in part modeled after recent changes to the Oregon Rules of Civil Procedure. Those changes went into effect on January 1, 2014 and allow the use of alternate jurors after deliberations begin in civil cases. Because the ORCP does not apply to criminal cases, separate legislation is required in order to make analogous changes.

## Concerns and Discussion Points

The task force spent considerable time discussing how courts currently handle situations where a juror is unable to continue after deliberations have begun. Existing statutes do not provide any clear guidance on how to proceed and local court practices differ.

On occasion, parties will agree to continue with fewer jurors, but this practice appears to be extremely rare. One reason is that a defendant who is convicted by less than a full jury may have a colorable post-conviction relief claim, even if parties agreed at the time. Another complication is that Oregon permits non-unanimous felony convictions, but the law does not specify how many jurors would need to vote to convict when less than 12 participate in the decision. For these reasons, and since defendants will often fare better in a second trial than a first, proceeding with fewer jurors is rare.

There was also some belief among task force members that courts may have on occasion decided to keep alternate jurors around after deliberations begun so they would continue to be available if needed. It was not known if such a juror has ever participated in a decision, but since the statute appears to explicitly prohibit this practice, a conviction based on the deliberations of such an alternate would appear to be highly suspect.

The task force members agreed that current law provides no satisfactory way for deliberations to continue when a juror dies or becomes incapacitated.

The major concern expressed regarding the original proposal came from attorneys who feared their clients could be prejudiced by the use of an alternate juror inserted after deliberations have begun. Some members felt that such a juror might feel pressure to go along with the prevailing view of jurors who had participated in the full deliberations, and that it would be difficult to get the jury to truly begin deliberations anew.

Under the original proposal, the decision to use alternate jurors would have been made by the judge. While presumably the judge would take the parties' opinions into account in making this decision, the parties had no formal ability to prevent a judge from inserting an alternate if they felt that to do so would be detrimental to their client.

After extensive discussion, the members of the task force agreed to propose an amended bill that would require the consent of the parties before a judge made use of alternate jurors.

This decision was not unanimously agreed to be a preferable approach to the original bill. Some members of the task force believed that as a policy matter, it was preferable to leave the decision to the sole discretion of the judge, because the parties' objections could be based not on whether they believed they would actually be prejudiced by the situation, but rather based on the verdict they anticipated. However, members of the task force did generally agree that a bill that permitted the use of alternates upon agreement of the parties was preferable to the status quo.

Some concerns were raised with this approach during discussions. One concern was that defendants might only rarely agree to the use of alternate jurors, since refusing and forcing a mistrial could serve as an opportunity to delay a conviction. Other task force members argued that there were many reasons the defense might agree to the substitution, and that it should not be assumed that it is always in the defendant's interest to retry cases. Many defendants do not want to go through a trial a second time, and an attorney who feels that the case is going well might advise the client to proceed with the alternate.

One important issue on which the task force did not reach a consensus regarded the timing of when parties must agree to permit the use of alternate jurors after deliberations begin.

One task force member strongly argued that the court should be required to get consent at the time of jury selection, because after the trial begins the parties' decisions will be clouded by how they believe the trial has been going, and whether a mistrial would be favorable to their client.

Other task force members have argued that while it is fine for the judge to seek consent at the time of jury selection, it should not be required too early because attorneys may be unwilling to provide it at that time. Arguably, a lawyer can't be certain at the time of jury selection whether it would be prejudicial to their case to allow substitution during deliberations, as many factors weigh into that calculation, including the amount of time a jury had been deliberating before the need for substitution arose. For this reason some task force members argued that the judge should be able to seek this consent at any time.

Therefore the two alternate recommendations on this point are:

- Permit the judge to seek, at the time of jury selection, the consent of the parties to make use of alternate jurors after deliberations begin if a juror is unable to continue, or
- Permit the judge to seek consent of the parties at any time to make use of alternate jurors after deliberations begin if a juror is unable to continue.

## **Proposed -2 amendments**

Prior to the hearing on SB 798 before the Senate Judiciary Committee, a set of amendments, SB 798-2, were drafted and distributed. These amendments included two changes to the Introduced version of the bill. The first was an explicit clarification to ORS 136.280, that the court may retain the alternates (which is not permitted under current law), and that those alternates may not attend or participate in deliberations. The original bill did not address the issue of whether alternates should sit in on deliberations.

These changes were agreed to by the task force at an early stage, since they represented the proponents' original intentions, and made the statute more clear.

The other change proposed in -2 amendments was a change to ORS 136.260, that would eliminate the distinction between preemptory challenges used against alternates and ones used against the original jury panel. These changes would give judges additional flexibility to structure the selection of alternates in the way that they deem best. For example, some judges have expressed concerns that when a juror knows they are an alternate, rather than an original juror, they may pay less attention during the proceedings. These changes would permit judges to select a larger jury pool, and not reveal to the jurors who among them are alternates until deliberations begin.

The task force did not discuss this part of the proposal in great detail, as it was not the source of concern with the original bill. However, task force members expressed no objections to this proposed change. This part of the proposal is only indirectly related to the rest of the bill, and could be included or removed from any future legislation without impacting the rest of the bill. However, it was the general understanding of the task force that the -2 amendments should be thought of as the proponents' proposal, and that they should form the basis for discussion.

## **Task Force Recommendations**

After discussion, the task force agreed that allowing alternate jurors to be used after deliberations have begun is a positive change. The proposal has the potential to make the courts more efficient by eliminating the need for some cases to be retried, and with the concession that parties must agree to the alternates.

The majority of the task force<sup>1</sup> recommends that SB 798 be redrafted, as modified by the -2 amendments to that bill (dated 3/28/2013), and with the additional amendments below requiring that both parties must agree to the use of an alternate juror after deliberations have begun.

On page one of the -2 amendments, after line 18 insert:

**(b) Both parties have consented to the substitution of the alternate juror, either at the time of the substitution, or at some earlier point during the proceedings; and**

On page one of the amendments, on line 19 strike (b) and insert (c).

On page two of the -2 amendments, on line 11, strike "as described in" and insert "in accordance with".

This bill should be proposed to the Senate Judiciary Committee for introduction with other Oregon State Bar legislation.

---

<sup>1</sup> One task force member disagreed with this recommendation, and proposes that consent to the substitution be required at the time of jury selection.

Oregon State Bar

# Senate Bill 799 Task Force

## Motions for Change of Attorney

**June 27, 2014**

# Report of the SB 799 Task Force

April 2014

## Origin of the task force

During the 2013 legislative session, the legislature considered SB 799. The bill would have modified ORS 9.380, which addresses changes in representation during judicial proceedings. The Senate Judiciary Committee held a hearing on this bill on April 8, 2013, but, after hearing from advocates on both sides, decided not to move the bill. Instead the chair of the committee asked the Oregon State Bar to convene a task force to look into this issue in more detail, and report back with a recommendation.

The task force included judges, both criminal and civil litigators, family law practitioners, and representatives of the Oregon Judicial Department, the Professional Liability Fund, and the Oregon State Bar.

## Purpose Senate Bill 799

By its terms, ORS 9.380(1) appears to allow two different procedures for changing the attorney in an action or proceedings:

9.380. (1) The attorney in an action or proceeding may be changed, or the relationship of attorney and client terminated, as follows:

- (a) Before judgment or final determination, upon the consent of the attorney filed with the clerk or entered in the appropriate record of the court; or
- (b) at any time, upon the order of the court, based on the application of the client or the attorney, for good and sufficient cause.

SB 799 would have modified ORS 9.380 to eliminate section (1)(a) regarding attorneys withdrawing “upon consent of the attorney.” Some proponents asserted that the phrase “the attorney” that is used in subsection (1)(a) is intended to refer to a new attorney being substituted into a case, and not to the attorney seeking to withdraw. Some task force members disagreed with this analysis, and believed that the existing statute allows the withdrawing attorney to essentially “consent to” their own withdrawal. It does not appear that this wording has ever been analyzed at the appellate level, so the task force was not able to come to a conclusion as to the intent of this language.

Different courts around Oregon appear to have interpreted these provisions differently; some allowing attorneys to withdraw by notice and some requiring a motion approved by the court.

According to proponents of this concept, the main purpose was to better enable judges to manage their docket by minimizing the number of cases where an attorney withdraws on the eve of a trial or other important hearing, thus requiring the case to be rescheduled. This can be especially problematic for the courts when done at the last minute because it may be too late to insert another matter into the schedule and slowing down the overall court docket. Given that most courts are understaffed, and that many matters wait months to get before a judge, anything that further slows down the process places an additional burden on all court users.

## **Concerns and Discussion Points**

There were a number of concerns raised by SB 799 in its original form. The Oregon State Bar, expressed its concerns in comments provided to the Senate Judiciary Committee, specifically:

*A significant amount of judicial resources will need to be expended if judges are to review and approve every attorney withdrawal from an open case. While making these motions may be only moderately time consuming for lawyers, judges will need to dedicate time to each motion if the process is to have any real effect. This bill appears to slow the process down and increase the court's already considerable workload.*

These concerns were also echoed by task force members, who noted that while each individual motion might take a very minimal amount of time to resolve, the large number of withdrawals processed each year could cumulatively become significant.

The task force also discussed whether requiring judicial approval for all withdrawals and substitutions was necessary to achieve proponents' objectives. Many task force members agreed that the court's interest in managing its docket increased the closer a case got to trial or an important evidentiary hearing, and that it would be reasonable to provide the court greater authority closer to those important dates.

## **Statute vs. Court Rule**

Another important discussion point within the task force was the extent to which it made sense for these rules to be contained in statute.

In general, attorneys are trained to look for procedural rules in the Uniform Trial Court Rules, the Oregon Rules of Civil Procedure, and other similar locations. Procedural requirements regarding an attorney's representation of a client are generally not found in statutes.

Furthermore, statutes are more cumbersome to change when problems arise or circumstances change, so in general, procedural rules are best kept outside of the ORS.

This understanding led most work group members to conclude that the substance of any new rule should not be placed into the statute, but should be contained in a new section of the Uniform Trial Court Rules. Work group members disagreed however as to whether ORS 9.380 and 9.390 should be repealed in their entirety.

Some members believed that it would be best to eliminate much of the content of those statutes, but leave in language that would direct readers to the UTCR. For example, amending ORS 9.380 to simply read: "The attorney in an action or proceeding may be changed, or the relationship of attorney and client terminated, **only in accordance with the Uniform Trial Court Rules.**" (*New language in bold.*)

Other task force members disagreed and suggested that lawyers were already accustomed to looking for procedural rules in the UTCR and directing them was not necessary. Furthermore, the court already has constitutional authority to manage the lawyer-client relationship and does not need additional statutory authority to do so.

This question was not resolved by the task force, and should be explored further with Legislative Counsel as possible legislation is developed.

## **Recommended Solutions**

### Substitution

Task force members agreed that in cases where a new attorney is substituting into a case, and where that substitution will not impact trial schedules or otherwise require rescheduling important events, the lawyers should be permitted to simply notify the court of the change in representation. It was agreed that the best way to achieve this result is to identify a specific number of days before which the substitution can be achieved simply by notice, but to require a motion after the deadline, or an acknowledgment by the new attorney that a no change in the schedule will not be required.

There was some disagreement as to the exact number of days that should serve as the dividing line. In general, judges preferred the number to be as high as practical and attorneys preferred that the number of days be smaller. For the purpose of advancing the discussion and moving the proposal forward, the task force members recommended 56 days (8 weeks).

### Withdrawal

Further, the task force recommended that attorneys be allowed to withdraw by notice in civil cases 56 days in advance of trial or evidentiary hearings, but that a motion be required closer than 56 days. In the case of withdrawal the attorney should also be required to notify the client

of all scheduled court dates. There was some discussion of using different numbers of days for substitutions v. withdrawals, but it was felt that this could cause confusion.

The task force recommends the same rule for withdrawal in criminal cases, except that in the case of court appointed attorneys, the withdrawal can only be achieved by an order of the court. The rationale in this case is that the lawyer-client relationship was essentially created by the court, and therefore the court should oversee its termination.

## **Draft proposal**

The task force recommends that the Oregon State Bar work with the Judiciary Committee to engage in two parallel processes to address the concerns raised by SB 799.

First, draft legislation should be drafted to either repeal ORS 9.380 and 9.390 in their entirety, or to replace them with a very brief statute that simply refers the reader to the UTCR. For discussion purposes the current proposal envisions a complete repeal.

Secondly, the bar is happy to work with the UTCR Committee to draft new language to be added to the Uniform Trial Court Rules. The task force's recommended language is attached to this report. That language should include the issues described above, as well as the content of the existing ORS 9.390.

## **Draft UTCR Changes**

UTCR 3.140 should be amended, and a new UCTR 3.145 be created as follows:

### **3.140 ATTORNEY-OF-RECORD**

- (1) The attorney who files the initial appearance for a party, or who personally appears for a party at arraignment on an offense, is deemed to be that party's attorney-of-record for the action or proceeding, unless at that time the attorney files a notice stating that the attorney is making a limited or special appearance only.
- (2) When an attorney is employed for the purpose of appearing as attorney-of-record for a party in an already pending action or proceeding in which there is not attorney-of-record for the attorney's client, the attorney must promptly notify the court of the representation, either in open court or by filing a notice or other pleading, which shall serve as the party's intent to appear in the action or proceeding. The attorney shall be deemed to be that party's attorney-of-record for the action or proceeding unless at that time the attorney advises the court that the attorney is making a limited or special appearance only.

- (3) When an attorney-of-record is changed, or the attorney-of-record's relationship with the client is terminated for the proceeding, written notice of the change or termination shall be given to the adverse party.

### 3.145 SUBSTITUTION AND WITHDRAWAL OF THE ATTORNEY-ON-RECORD

- (1) Before judgment or other final determination in an action or proceeding -

- (A) Substitution of attorney-on-record:

- (1) When there are more than 56 days before the date of any trial or evidentiary hearing requiring oral testimony, an attorney may substitute as the attorney-on-record for a party by filing a notice.
- (2) When there are 56 or fewer days before the date of any trial or evidentiary hearing requiring oral testimony, an attorney may substitute as the attorney-on-record for a party by filing a notice, which notice shall acknowledge that as of the date of the notice the substitution will not require a change to any existing trial or evidentiary hearing date.
- (3) When there are 56 or fewer days before the date of any trial or evidentiary hearing, an attorney who seeks to substitute as the attorney-on-record for a party and the substitution is contingent upon the resetting of any existing trial or evidentiary hearing date, the substitution requires an order of the court.

- (B) Withdrawal of the attorney-on-record:

- (1) In a civil case -
  - (a) When there are more than 56 days before the date of any then-scheduled trial or evidentiary hearing requiring oral testimony, an attorney-of-record may withdraw from the action or proceeding by filing a notice, which notice shall acknowledge that the withdrawing attorney-of-record has notified the party of all then scheduled court dates and has complied with all other requirements of the ORCP, the UTCR and the SLR.
  - (b) When there are 56 or fewer days before the date of any trial or evidentiary hearing, an attorney-of-record may withdraw from a case only by an order by the court.

(2) In a criminal case -

- (a) If the attorney-of-record is court appointed, the attorney-of-record may withdraw only by an order of the court.
- (b) If the attorney-of-record is not court appointed and there are more than 56 days before any trial or evidentiary hearing, the attorney-of-record may withdraw by filing a notice, which notice shall acknowledge that the withdrawing attorney-of-record has notified the party of all then scheduled court dates and has complied with all other requirements of the ORCP, the UTCR and the SLR.
- (c) If the attorney-of-record is not court appointed and there are 56 or fewer days before the date of any trial or evidentiary hearing, an attorney-of-record may withdraw from a case only by an order by the court.

(2) After judgment or other final determination in an action or proceeding, an attorney-of-record not previously discharged by the court may withdraw as the attorney-of-record in the action or proceeding by filing a notice of termination, which notice shall acknowledge that all services required of the attorney by the agreement between the attorney and the client have been provided. The attorney-of-record filing the notice under this subsection shall list all co-counsel who have appeared in the case to who are also withdrawn by the notice.

(3) An attorney appearing in an action or proceeding other than as the attorney-of-record may withdraw at any time by filing a notice.

(4) Other than a notice filed pursuant to Subsection (3) of this Rule, a notice or motion under this Rule must contain, if known, the name, mailing address, email address, and voice and fax telephone numbers of the new attorney-of-record, if a substitution is being made, or of the party, if not substitution is being made, as well as the date of any scheduled trial or evidentiary hearing. Protected confidential information need not be disclosed, in accord with the applicable standard of confidentiality. Every notice or motion under this rule must be served on every party to the action or proceeding and the party represented by the attorney filing the notice or motion. A motion under this Rule shall be decided by the Presiding Judge or the Presiding Judges designee.

Oregon State Bar

# Senate Bill 812 Task Force

## Motions for Change of Judge

**June 27, 2014**

# Report of the SB 812 Task Force

April 2014

## Origin of the task force

During the 2013 legislative session, the legislature considered SB 812. Under the proposed language, in judicial districts with three or fewer circuit court judges, a party may not make more than one motion to disqualify a judge due to a party's belief that they cannot have a fair or impartial trial or hearing before the judge in question. Currently, parties are permitted to make two such motions.

Senate Bill 812 passed the Senate, and was heard in the House Judiciary Committee on May 8, 2013, but was never passed out of the House committee. After the legislative session ended, the chair of the Senate Judiciary Committee requested the Oregon State Bar convene a task force to look into this issue in more detail and report back with recommendations.

The task force included judges, both criminal and civil litigators, family law practitioners, and representatives of the Oregon Judicial Department, the Professional Liability Fund, and the Oregon State Bar.

## Purpose Senate Bill 812

SB 812 was supported by judges from a number of judicial districts, and was promoted as a mechanism to address two independent problems.

First, in small judicial districts, permitting parties to make two motions to change judges can have a significant financial impact on court operations. When a district only has two or three judges to begin with, disqualifying two makes it extremely likely that the district will have to bring in a judge from another jurisdiction. This imposes a financial burden on the Oregon Judicial Department, who has to pay the extra expenses of bringing in a judge from some distance away to hear the case. In large districts this is less likely to be an issue, because the pool of judges is large enough that it is only rarely necessary to bring someone in from another county.

The second problem is the problem of "judge shopping." In a very small district, when a party makes a motion to disqualify a judge, the lawyer can have a very good idea of which judge is likely to be selected as the replacement. In theory, in a three judge district a party could

essentially select which of the three judges they prefer by disqualifying the other two if they are drawn first. In larger counties, while parties may still use motions for a change in judge to eliminate a judge from whom they believe they may get a disfavorable ruling, the party will have little ability to predict which judge will be selected in their place. Proponents assert that this difference results in motions for a change of judge more frequently being used for “judge shopping” in smaller districts.

SB 812 was proposed to address these issues by limiting parties in districts with three or fewer judges to a single motion for a change of judge instead of the two allowed under current law.

### **Value of a single statewide rule**

The task force dedicated significant time to discussing whether it was appropriate to have different procedural rules in different counties. The proponents of SB 812 did not specifically oppose limiting motions for a change in judge in larger counties, but simply felt that it would be less objectionable to limit the legislation to those counties where they felt the current system was most problematic.

Some members of the task force felt that it was a questionable policy to have different rules in different counties. In a practical sense, having multiple rules might prove confusing for practitioners who practice in multiple counties. More fundamentally however, some members felt that there was a due process concern that was implicit in the idea that some parties would have a greater ability to change judges than other parties would. Task force members believed that parties throughout the state should have the same ability to advance their causes in state courts and shouldn't have those abilities hindered simply by geography.

After considerable discussion, a general consensus emerged within the group that maintaining a single statewide rule was preferable to having different rules in different counties.

### **Opposition to limiting parties to a single motion**

Despite the general preference for a single statewide rule, members of the task force did not agree on what the rule should be. Many practitioners felt that overall, the current system has worked very well and that it was not appropriate to change the current system simply because it has inconvenient side effects in a small number of counties.

Some practitioners indicated there may be distinct advantages to having two motions for a change of judge. For example, having two motions may makes parties feel more comfortable using one of them. If a party has only a single motion available, then that party may be reluctant to actually use it for fear that the next judge could be more problematic than the first.

Other task force members stressed the importance of parties feeling like they are getting a fair hearing. If a party genuinely feels that they can't get a fair hearing in front of the current judge

– even if that belief is unreasonable – then moving for a change in judge may be the appropriate response regardless of whether you’ve been forced to do it before. The argument in this case is that the appearance of providing all parties with a fair decision maker is more important than judicial efficiency.

Some task force members argued that if there are motions for a change in judge being made inappropriately in some counties, that problem should be addressed directly. The circumstances of those motions could be investigated to determine whether there is a local cause that results in higher than normal numbers of motions in some districts. Limiting motions by lawyers who are using the process as it was intended to be used will not correct the behavior of a few bad actors, but instead risks doing harm to the overall integrity of the judicial system.

### **Statewide v. local problem**

The task force spent considerable time discussing whether this problem is statewide, or whether it appears to be significantly greater in specific geographic locations. Reliable data on this question is difficult to find. However, partial data provided by the Oregon Judicial Department, as well anecdotal evidence provided by judges and other task force members, appeared to indicate that the problem is much more prevalent in some counties than in others.

The Oregon Judicial Department was able to provide some data to the task force regarding the number of times court staff entered motions for a change of judge into OJIN. This data indicated very high numbers of motions to disqualify judges in Klamath and Union Counties as compared to other similar sized counties around the state. The data also appeared to indicate somewhat heightened rates in Washington and Clackamas counties, though this may simply stem from recordkeeping discrepancies between different counties. In numerous cases, smaller counties appeared to have more motions to disqualify than a larger neighboring county (e.g. Josephine recorded a higher number than Jackson).

Unfortunately, different counties do not enter these motions into OJIN in a consistent fashion, which makes comparing statistics across counties problematic. Without more reliable statistics it is impossible to be certain the task force is getting the whole picture.

Additionally, even in cases such as Klamath and Union counties, where it is clear that these motions are used at a higher than normal rate, it is unclear what conclusions should be drawn.

For example, a very high number of motions for change in judge in one geographic location could indicate that many lawyers have serious concerns with one or more of the local judges and seek to remove those judges whenever possible. This could indicate a discrete problem with those judges that should be investigated.

On the other hand, the same number of motions to disqualify could indicate that lawyers in those locations are making a habit of using these motions tactically. This might not imply any problem with the judges, but rather with the lawyers’ inappropriate use of the motion. In fact,

this situation might not even imply any particularly inappropriate intent among lawyers, but could stem from a slowly growing local acceptance of more and more expansive uses of these motions. If a lawyer sees other lawyers using these motions to gain a tactical advantage for their clients they may be tempted and indeed may even feel an obligation to do the same thing.

In the later case, limiting the number of motions available to parties might be a reasonable solution, but in the first case it clearly would not be. The task force was not able to determine from the information available if either of these two is the situation anywhere in Oregon, or if other factors are responsible. The legislature may want to consider directing the Oregon Judicial Department or another appropriate entity to attempt to gather more specific information on the situations in which these motions are used.

### **Procedural concerns with the current approach**

While not directly related to the question of how many motions parties should be entitled to, many task force members were interested in exploring the question of what form the act of removing a judge could take.

Under current law, parties are required to file a motion in which they assert their belief that they cannot get a fair hearing in front of the current judge. No inquiry is made into the accuracy or reasonableness of this belief, the only question is whether the party actually has it. Since it is virtually impossible to prove that a party does not have such a belief, these motions are essentially always granted.

There have been periods of time in Oregon where these motions were not summarily granted but were instead argued in an open hearing. Lawyers who have been involved in such hearings seem to universally feel that the hearings were not productive, and, if anything, further strained the relationships between lawyers and judges. No members of the task force expressed a preference that these types of motions be challenged with any regularity.

Some judges felt that the requirement to assert a belief that a client cannot get a fair hearing created unnecessary friction between lawyers and judges. Lawyers are required to question a judge's impartiality, and the judge has no real opportunity to challenge that belief. Some task force members suggested that since this motion largely functions as a preemptory challenge, it should be treated as such in the statute. Rather than requiring a motion that must be ruled on, lawyers should be allowed to simply notify the court that they are exercising their right to change the judge without making any accusation regarding the judges abilities.

However, it is unclear if such a rule would be constitutional. One case, *Bushmill v. Vandenberg* 203 OR 326 (1955) held that such a dismissal of a judge cannot be purely preemptory without violating separation of powers doctrine. Dismissals of a judge must be for some cause. The task force spent some time discussing how a statute could be worded to get around this problem without the current requirement that a judge's impartiality be questioned.

## **Other Western States**

As a part of this discussion, the task force also looked at how these motions are handled in other states and there does not appear to be a consistent approach. In some states a motion is required, but in others a party simply files a notice with the court. In some states a motion might be required to be accompanied by an affidavit and in others the motion stands alone. Some states also have different rules for civil and criminal cases. In an examination of the 15 western states, the task force saw no evidence that any other states specifically allow more than a single motion for a change in judge. Oregon appears to be unique in explicitly allowing two motions.

However, it should be noted that both in Oregon and in the other states, parties would always have the ability to move to remove a judge for cause, regardless of prior motions. This is a separate procedure in which a party is asserting actual bias, or some other disqualifying offense on the part of the judge that is decided on its merits. This is a fundamental due process right that all parties enjoy.

One approach to addressing this problem, that did appear to have some support within the task force, would be moving to a procedural system similar to that employed in Arizona. Under the Arizona rule, parties file a pleading entitled “Notice of Change in Judge”. This notice does not contain any particular claim regarding the current judge’s ability to be impartial, but instead simply contains an avowal by the attorney that the request is being made in good faith and that it is not being made for any of a list of inappropriate reasons (e.g. for the purpose of delay, for reasons of race, gender or religious affiliation, etc.)

## **Conclusions on the appropriate response**

The task force was not able to come to any final recommendation regarding whether a bill should be drafted for the 2015 session, and if so, what the content of that bill would be. In general the judges involved in the task force were in favor of limiting the number of motions for a change in judge, and the other lawyers involved were in favor of remaining at two.

While it is true that most other states appear to allow only a single motion for a change in judge, Oregon’s rule is now very much ingrained in the style of practice here. It seems likely that most practitioners would object to a rule change that suddenly limited them to a single change in judge.

Given that these motions appear to be used at a much higher rate in some counties, it is possible that a more detailed investigation into the reasons for this situation would be appropriate. That investigation, however, was beyond the scope or the abilities of this task force. Such an investigation would likely require collecting more information on the use of these motions than is currently collected by the courts.

The task force was also not opposed to legislation that would alter the form that an action to change a judge would take. There did appear to be general support for more of an Arizona style rule, assuming that such a rule can be crafted to survive constitutional scrutiny in Oregon. This change would not, however, address the fundamental question of how many such motions (or notices) should be permitted.

---

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** June 27, 2014  
**Memo Date:** June 27, 2014  
**From:** Travis Prestwich, Public Affairs Committee Chair  
**Re:** Proposed Oregon State Bar Legislative Priorities for 2015

---

### **Action Recommended**

Approve the proposed Oregon State Bar Legislative Priorities for 2015.

### **Options**

1. Approve the OSB Legislative Priorities for 2015.
2. Approve select OSB Legislative Priorities for 2015.
3. Decline to adopt all OSB Legislative Priorities for 2015.

### **Background**

Before each legislative session, the Oregon State Bar has traditionally adopted a set of Legislative Priorities for the upcoming year. These priorities serve as instructions to OSB staff, and help focus the bar's legislative advocacy. During session, board members and staff will work with legislators and other stakeholders to advance the priorities that the Board of Governors establish.

These priorities reflect the bar's commitment to maintaining the efficient functioning and the integrity of the Oregon judicial system. Priorities often focus on funding for the court system, indigent defense, legal services for the poor, and other critical needs. In recent years, OSB priorities have also included court facilities and the new Oregon eCourt system. Passage of the OSB Law Improvement Package is also generally included in the list of Legislative Priorities.

# Proposed Oregon State Bar Legislative Priorities for 2015

## 1. **Support Court Funding.** Support for adequate funding for Oregon's court.

- **Citizens Campaign for Court Funding.** Continue with efforts to institutionalize the coalition of citizens and business groups that was formed in 2012 to support court funding.
- **eCourt Implementation.** Support the Oregon Judicial Department's effort to fully implement eCourt.
- **Court Facilities.** Continue to work with the legislature and the courts to make critical improvements to Oregon's courthouses.

## 2. **Support legal services for low income Oregonians.**

- **Civil Legal Services.**
  - Our highest priority is to increase the current level of funding for low income legal services.
- **Indigent Defense.**
  - **Public Defense Services.** Constitutionally and statutorily required representation of financial qualified individuals in Oregon's criminal and juvenile justice systems:
    - Ensure funding sufficient to maintain the current service level.
    - Support fair compensation for publicly funded attorneys in the criminal and juvenile justice systems.
    - Support reduced caseloads for attorneys representing parents and children.

## 3. **Support OSB 2015 Law Improvement Package.**

- The bar's 2015 package of law improvement proposals has 22 proposals from 17 bar groups.

To be posted.

---

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** June 27, 2014  
**From:** Helen M. Hirschbiel, General Counsel  
**Re:** RPC 8.4 Drafting Committee Report

---

### Issue

The Board of Governors must decide whether to forward the proposed Oregon RPC 8.4 amendment to the House of Delegates with a recommendation to adopt the amendment.

### Options

1. Accept the proposed rule and forward to the HOD with a recommendation to pass.
2. Accept the proposed rule and forward to the HOD with a recommendation not to pass.
3. Accept the proposed rule and forward to the HOD with no recommendation.
4. Circulate the proposal for member comment.

### Background

In November 2013, the OSB House of Delegates approved an amendment to Oregon RPC 8.4 that would have prohibited a lawyer, in the course of representing a client, from knowingly manifesting bias or prejudice on a variety of bases. The HOD amendment was presented to the Supreme Court in accordance with ORS 9.490, but the Court deferred action on the proposal and asked the bar to consider changes that would address the Court's concerns that the RPC 8.4 amendment as drafted may impermissibly restrict the speech of OSB members.

Because of the strong HOD support for an anti-bias rule, the OSB Board of Governors decided to convene a special committee (the RPC 8.4 Drafting Committee) to develop a revised proposal that would satisfy the Court's concerns.

The attached report and proposed rule are the results of the Committee's efforts.

Attachments: June 2014 Report of the RPC 8.4 Drafting Committee

Oregon State Bar

**Report of the  
Oregon State Bar Board of Governors  
RPC 8.4 Drafting Committee  
June 2014**

In November 2013, the OSB House of Delegates approved an amendment to Oregon RPC 8.4 that would have prohibited a lawyer, in the course of representing a client, from knowingly manifesting bias or prejudice on a variety of bases. The HOD proposal reads as follows:

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

\*\*\*\*\*

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

\*\*\*\*\*

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

The HOD proposal was presented to the Supreme Court in accordance with ORS 9.490, but the Court deferred action on the proposal and asked the bar to consider changes that would address the Court's concerns.

Based on comments from members of the Court at the December 3, 2013 public meeting, as well as a letter from the Court's staff attorney, it was clear that the Court believed the RPC 8.4 amendment as drafted would impermissibly restrict the speech of OSB members. Specifically, the Court was concerned that the rule is violated by any manifestation of bias, even the mere expression of opinion, without a requirement that there be an adverse impact therefrom.

Because of the strong HOD support for an anti-bias rule, the OSB Board of Governors decided to convene a special committee (the RPC 8.4 Drafting Committee) to develop a revised proposal that would satisfy the Court's concerns.

The RPC Drafting Committee was comprised of nine individuals: two who had personally appeared and presented written objections to the HOD proposal at the Supreme Court public meeting in December 2013; three representatives of the Legal Ethics Committee who had participated in the development of the HOD proposal; two representatives of specialty bars who had also been involved in the development of the HOD proposal, and; two recommendations from the Court as having some expertise in Oregon free speech jurisprudence. In addition, Theresa Kohlhoff and Caitlin Mitchel-Markley were appointed as non-voting representatives for the Board.

In its appointment letter, the Committee was asked to leave to the BOG and HOD the policy question of whether the bar should have any rule on the issue, and to only recommend language that will not impermissibly restrict lawyer speech, while at the same time establishing a standard for appropriate professional conduct.

The Committee met four times during the spring of 2014. The agendas, minutes, and materials considered during the meetings, were all posted on the OSB website. As instructed, the Committee focused its efforts on developing a rule that would both address conduct the HOD proposal was trying to reach and pass constitutional muster by focusing on harmful effects, rather than expression. During the first two meetings, the Committee struggled with articulating harmful effects within the construct of the HOD proposal. Unable to make any headway using this approach, the Committee abandoned the prohibition against “manifesting bias or prejudice” and instead returned to the original purpose behind the development of the rule, which was to prohibit harassment, intimidation and discrimination.

Thereafter, the Committee considered what class or classes of individuals to protect. The Committee discussed at length whether to keep the original list contained in the HOD proposal, whether to limit the list to immutable characteristics, or whether to omit select classes of individuals. In particular, the question of whether to include socio-economic status, gender identity and gender expression generated considerable controversy. The list included in the HOD proposal had derived from a suggestion made to the Legal Ethics Committee in April 2013 that the list mirror those classes of individuals that are protected under Oregon law. With this in mind the Committee decided to omit socio-economic status and retain the remaining classes listed in the HOD proposal.

The Committee also discussed whether to apply the rule only to the lawyer “in the course of representing a client” or whether to expand its application to a lawyer representing himself or herself. In deference to the HOD rule, the Committee decided that the proposed rule should apply only to a lawyer acting “in the course of representing a client.”

Finally, the Committee discussed whether to retain the exception for legitimate advocacy, contained in the HOD-approved Rule 8.4(c). While some members of the Committee doubted the need for it, everyone agreed that there was no harm in retaining the exception for legitimate advocacy. On the other hand, the Committee also unanimously agreed that the second clause of the paragraph in HOD rule 8.4(c) should be omitted. It provides that a lawyer shall not be prohibited from “declining, accepting, or withdrawing from representation of a client in accordance with Rule 1.16.” Three reasons came out. First, there is already a rule governing withdrawal, which would apply regardless of the inclusion of RPC 8.4(c). Second, the second clause makes little sense in light of the changes to the substance of Rule 8.4(a)(7). Third, the clause may conflict with lawyers’ obligations under the public accommodation laws.

The Committee unanimously recommended that the attached proposal be presented to the Board of Governors for its consideration.

Submitted by: David Elkanich, chair, Kristin Asai, Thomas Christ, Kelly Ford, Keith Garza, Michael Levelle, Kathleen Rastetter, Bonnie Richardson, and the Honorable David Schumann.

RPC 8.4 Drafting Committee Proposal Adopted June 2, 2014

RULE 8.4 MISCONDUCT

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

\* \* \* \* \*

(7) in the course of representing a client, knowingly intimidate or harass a person because of that person's race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability.

\*\*\*\*\*

(c) Notwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein.

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** June 27, 2014  
**From:** Matt Kehoe, Chair, Executive Director Evaluation Special Committee  
**Re:** Executive Director Selection Process

---

### **Action Recommended**

The Committee seeks direction from the BOG regarding the desired process for selecting a new Executive Director.

### **Discussion**

Since 1985, the OSB has had four Executive Directors.<sup>1</sup> All but the current ED were selected after an open, competitive nationwide application process. The current ED, who previously served as General Counsel and Assistant General Counsel for a total of 18 years, was appointed by the BOG on the recommendation of the then-President and President-Elect.

Neither the Bar Act or the Bylaws mandate any particular selection process. The nature and scope of the selection process depends in the first instance on whether the BOG wants to limit candidates to lawyers, and if so, to Oregon lawyers. Further narrowing will come if the BOG decides that familiarity with the OSB is an important qualification. How to proceed in this instance is purely a policy choice for the BOG.

Hiring from within rather than conducting an open search has advantages: it is faster and cheaper, and the candidate is a “known quantity.” It also may allow an extended opportunity for the nominee to become familiar with all aspects and responsibilities of the position. Finally, it signals to existing staff that there is a “career path” available to them at the bar. On the other hand, an open selection process has the advantage of enhancing the BOG’s confidence that it has selected the most qualified candidate available.

Even if there is a desire to look beyond internal candidates, the BOG has considerable flexibility. If an open recruitment is undertaken, whether to interview any of the external candidates is a decision that can be made after a review of the applications. Another option would be to announce the anticipated vacancy (and its effective date) and invite letters of interest from potential candidates. Depending on the responses, the BOG can then decide whether there is a benefit to going through an open recruitment.

It should be expected, if the selection is made other than through an open process, that some criticism will surface from individuals who believe themselves to have been deprived of an opportunity to establish their qualifications; from individuals who believe that an open

---

<sup>1</sup> Celene Greene, May 1985-December 1995; Karen Garst, January 1996-December 2008; Theresa Schmid, January 2009-August 2010; and Sylvia Stevens, August 2010-present.

process is always preferable; or from those who will suspect undue influence by the candidate or staff, or dereliction of duty by the BOG.

You should be aware that the Public Meetings Law does not allow executive (closed) sessions to discuss the qualifications of a potential candidate unless the opening has been advertised as part of adopted hiring procedures.

---

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** June 26, 2014  
**Memo Date:** June 16, 2014  
**From:** Danielle Edwards, Director of Member Services  
**Re:** Committee Appointments

---

### **Action Recommended**

Consider an appointment to the Legal Ethics Committee as requested by the committee officers and staff liaison.

### **Background**

#### **Legal Ethics Committee**

Due to the resignation of one committee member the officers and staff liaison recommend the appointment of **Laurie Hager** (012715). She has practiced as Sussman Shank for more than a decade and handles a variety of business litigation matters. She indicated LEC was his first choice preference for appointment on the volunteer survey.

**Recommendation:** Laurie Hager, member, term expires 12/31/2016

## Sylvia Stevens

---

**From:** Lisa.J.NORRIS-LAMPE@ojd.state.or.us  
**Sent:** Thursday, May 15, 2014 11:15 AM  
**To:** Sylvia Stevens; Charles Schulz; Renee Starr; Dawn Evans  
**Subject:** Rule for Admission 13.20(1)(b), Certified Law Students, Semester Qualifications

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Good morning -- This email requests your input about a possible change to RFA 13.20(1)(b), which requires that, to become a certified law student, a student must have completed "legal studies amounting to at least four semesters of full-time law study or the equivalent[.]"

The Chief Justice has received an inquiry from Willamette University about the four-semester requirement, noting that more students are taking full-time course-loads over the summer, defined in the inquiry as 10 credits or more. A summer session is typically not thought of as a "semester," so Willamette was hoping to obtain some clarity in the rule -- beyond the current "or equivalent" wording, about student certification after first semester of 2L year, with a minimum 10-credit summer load.

The Chief asked me to email you to note that the issue has been raised and to ask for your input, particularly because similar issues about improving practical law student work experience were raised at the Deans' meeting that he attended last year. The Supreme Court is willing to consider potentially amending the rule, so as to consider qualified applicants who a full summer courseload that is the equivalent of a semester.

In evaluating a change to the rule, one question is whether 10 credits is an acceptable minimum, or whether it should be higher (that is also something that we could discuss with the law schools).

I look forward to hearing from you, thank you! -- Lisa

Lisa J. Norris-Lampe  
Appellate Legal Counsel  
Oregon Supreme Court  
1163 State Street  
Salem, OR 97301  
(503) 986-5711  
[lisa.j.NORRIS-LAMPE@ojd.state.or.us](mailto:lisa.j.NORRIS-LAMPE@ojd.state.or.us)

**RFA 13.20 Requirements and Limitations**

(1) To be eligible for certification pursuant to these rules, a law student must:

(a) Be duly enrolled in or have graduated from a law school approved by the American Bar Association;

(b) Have completed legal studies amounting to at least four semesters of full-time law study or the equivalent;

(c) Be of good character and be adequately trained to perform competently as a legal intern; and

(d) Certify in writing to the dean of the law school that the student has read and is familiar with the Model Rules of Professional Conduct of the American Bar Association and the Oregon Rules of Professional Conduct of the Oregon State Bar.

(e) Cause the dean of the student's law school to certify that the student is eligible under subsections (a), (b), (c) and (d) substantially in the form set forth in Appendix A.

(2) A certified law student shall neither ask for nor receive any compensation or remuneration of any kind for the student's services directly from the client on whose behalf service is rendered; but an attorney, legal aid organization, law school, public defender or any governmental body may pay compensation to the eligible law student as an employee, and the employer may charge for the student's services.

The certified law student's supervising attorney shall introduce the law student to the court or tribunal in which the student is to appear.

## Sylvia Stevens

---

**From:** Lisa.J.NORRIS-LAMPE@ojd.state.or.us  
**Sent:** Thursday, May 15, 2014 11:15 AM  
**To:** Sylvia Stevens; Charles Schulz; Renee Starr; Dawn Evans  
**Subject:** Rule for Admission 13.20(1)(b), Certified Law Students, Semester Qualifications

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Good morning -- This email requests your input about a possible change to RFA 13.20(1)(b), which requires that, to become a certified law student, a student must have completed "legal studies amounting to at least four semesters of full-time law study or the equivalent[.]"

The Chief Justice has received an inquiry from Willamette University about the four-semester requirement, noting that more students are taking full-time course-loads over the summer, defined in the inquiry as 10 credits or more. A summer session is typically not thought of as a "semester," so Willamette was hoping to obtain some clarity in the rule -- beyond the current "or equivalent" wording, about student certification after first semester of 2L year, with a minimum 10-credit summer load.

The Chief asked me to email you to note that the issue has been raised and to ask for your input, particularly because similar issues about improving practical law student work experience were raised at the Deans' meeting that he attended last year. The Supreme Court is willing to consider potentially amending the rule, so as to consider qualified applicants who a full summer courseload that is the equivalent of a semester.

In evaluating a change to the rule, one question is whether 10 credits is an acceptable minimum, or whether it should be higher (that is also something that we could discuss with the law schools).

I look forward to hearing from you, thank you! -- Lisa

Lisa J. Norris-Lampe  
Appellate Legal Counsel  
Oregon Supreme Court  
1163 State Street  
Salem, OR 97301  
(503) 986-5711  
[lisa.j.NORRIS-LAMPE@ojd.state.or.us](mailto:lisa.j.NORRIS-LAMPE@ojd.state.or.us)

## Responses to RFA 13.20(1)(b) Proposal

### ***Tom Kranovich:***

I have long been in favor of amending the rule.

Student appearance in front of the court should be controlled by some demonstration of proficiency and not by an arbitrary number of hours completed. I know that after a year of sitting in circuit court, as a second year student, I could do a credible job on many of the type tasks that are appropriate for delegation to students. Yet, I had to wait until mid-way through my third year (I was a night student – four year curriculum) to qualify for the student appearance rule. Using the total number of hours completed as a gateway shows nothing more than that the student went to a certain number of classes with at least minimally passing grades.

The minimum requirement I envision is certification by the supervising attorney that 1) he/she has reviewed and advised the student on the matter upon which the student is appearing; 2) the student is aware of how to properly conduct him/herself before the court; 3) the supervising attorney is confident the matter is within the student's knowledge and ability to handle; and 4) the supervising attorney is aware that he/she is responsible to the court and vicariously liable to the client for the student's performance. A possible additional requirement could be a certification that the student has appeared before the court, with a supervising attorney, or otherwise attended and witnessed similar matters on (fill in a number) previous occasions. My memory is that I had to do a similar certification to be admitted into the Federal District Court. Even if not a requirement, a "best practice" suggestion would be that a student should not appear in a court without having had at least some realistic exposure to the type of matter being handled and the proper way to conduct him/herself in front of the court. (When I was a pro tempore judge it was not common but not unusual for new lawyers to not know that they should identify themselves and who they represent and that once the hearing had started they should stand when addressing the court. (At least they knew to refer to me as "judge" or "your honor" and not "dude" or "judgie wudgie".)

As for hours of credit, with the certification by the supervising attorney I see no reason why any second year (or more) student should not be allowed to appear under the student appearance rules. Let the supervising attorney, as an officer of the court, be responsible for the preparation and competency of the student.

### ***Josh Ross:***

I was a certified student and enjoyed it very much—it gave me great opportunities to try cases and appear in court as a student. I recommend it to every student I speak to. That said, I do think having fairly strict requirements is a good thing (4 full semesters or about 60 credits seems right). Another issue is that, at least 12-13 years ago, summer jobs requiring certification

(primarily DAs offices and PDs offices) were VERY competitive even among just those incoming 3Ls that had the certification. I wouldn't want to make it even harder for those closest to graduation to get practical skills in favor of making it easier for 1Ls and 2Ls to get those jobs earlier.

My \$.02

***Rich Spier:***

OK with me if OK with the Court and the law schools.

To be posted.

**From:** [Andrew Schpak](#)  
**To:** [Sylvia Stevens](#)  
**Subject:** OSB Sponsorship of ABA YLD Fall Conference this October  
**Date:** Sunday, June 22, 2014 4:34:08 PM  
**Attachments:** [ABA YLD Sponsorship Options.pdf](#)

---

Good afternoon, Tom and Sylvia!

As I've mentioned once or twice, I am going to be bringing the 2014 ABA YLD Fall Conference to Portland this October. We're expecting around 350 young lawyers from around the world and I could not be more excited to be bringing everyone together in Oregon.

In addition to outstanding continuing legal education programs, we will also have a separate track of programming focusing exclusively on leadership, professional development, and networking skills. We will also have a third track of programming focused entirely on health and wellness, including programs focused on eating healthy while eating out, exercise and meditation at one's office desk, and yoga and running classes. Last but not least, we will launch Project Street Youth: Young Lawyers Advocating for Homeless Youth, a new public service initiative designed to train young attorneys to assist homeless and transition youth, which is obviously a huge problem here in Oregon. Of course, this conference and the related programming requires many resources.

We would like to invite the Oregon State Bar to become a Sponsor of the Fall Conference. Sponsorship opportunities are available at a variety of levels, as outlined in the attachment. We can also work with you to create a unique package for your specific needs or areas of interest.

I think it would be a great fit to have the OSB as a Sponsor in light of the new tracks. The OSB has programming that would be a great fit in these programming tracks and towards this target audience. We could structure the sponsorship based on your preferences and interests, but the options range anywhere from sponsoring the fresh fruit and other healthy snacks available at the conference, to making the OSB the sponsor of one of the programming tracks, to a simple financial sponsorship.

I hope you will take advantage of this invitation to participate in and support the ABA Young Lawyers Division efforts. This program promises to be an extraordinary networking opportunity for the Bar to increase its visibility to a diverse audience, offering the Bar excellent exposure when attorneys from across the country convene in Portland.

Thank you very much for your consideration. Please let me know if there is any additional information I can provide to assist you and the OSB with their consideration of this request.

Sincerely,  
Andrew Schpak  
2013-2014 ABA YLD Chair-elect  
2014-2015 ABA YLD Chair

[Andrew M. Schpak](#)

Barran Liebman LLP | Employment & Labor Law Firm

601 SW 2nd Avenue, Suite 2300 | Portland, Oregon 97204  
Direct (503) 276-2156 | Fax (503) 274-1212 | [www.barran.com](http://www.barran.com)

CONFIDENTIALITY NOTICE: This e-mail (including any attachments) may contain confidential and privileged information. The information contained in this transmission is intended for the addressee only. If you are not the addressee of this e-mail, please do not review, disclose, copy, or distribute. If you have received this transmission in error, please call me immediately. Thank you.

### Sponsorship and Exhibitor Opportunities

Sponsorship Descriptions	Gold- Premier \$20,000	Gold \$10,000	Silver \$5,000	Bronze \$2,500	Supporter \$1,000	Exhibitor \$2,500
<b>Fall Conference, October 9-11, 2014—Portland, OR (Special pricing if sponsor agrees to 2+ conferences.)</b>						
Name recognition in printed promotional pieces if confirmed by June 1, 2013	X	X				
A company brochure and/or promotional item included in registration packets	X	X	X			
Name Recognition and hyperlink to organization placed on the conference website	X	X	X	X		
Name recognition and hyperlink to organization placed on promotional and registrant emails	X	X	X	X		
Complimentary conference registrations	4	4	2	1		
Complimentary tickets to the Thursday Council Dinner	4	4				
Complimentary tickets to the Friday Night Gala	4	4				
Event Sponsorship	Council Dinner and Gala	Council Dinner and Gala	Welcome Reception	Choice of one on-site meeting event (luncheon, breakfast)		
Name recognition in onsite guide and event signage in Registration Area	X	X	X	X	X	
Table display for company brochure and other promotional items in Registration Area	X	X	X			X
Ribbon identifying Gold Sponsors	X	X				
<b>Spring Conference, May 12-14, 2015—Tampa Bay, Florida (Special pricing if sponsor agrees to 2+ conferences.)</b>						
Name recognition in printed promotional pieces if confirmed by June 1, 2013	X	X				
A company brochure and/or promotional item included in registration packets	X	X	X			
Name Recognition and hyperlink to organization placed on the conference website	X	X	X	X		
Name recognition and hyperlink to organization placed on promotional and registrant emails	X	X	X	X		
Complimentary conference registrations	4	4	2	1		
Complimentary tickets to the Thursday Council Dinner	4	4				
Complimentary tickets to the Friday Night Gala	4	4				
Event Sponsorship	Council Dinner and Gala	Council Dinner and Gala	Welcome Reception	Choice of one on-site meeting event (luncheon, breakfast)		
Name recognition in onsite guide and event signage in Registration Area	X	X	X	X	X	
Table display for company brochure and other promotional items in Registration Area	X	X	X			X
Ribbon identifying Gold Sponsors	X	X				

**Oregon State Bar**  
**Meeting of the Board of Governors**  
April 25, 2014  
**Open Session Minutes**

The meeting was called to order by President Tom Kranovich at 12:40 p.m. on April 25, 2014. The meeting adjourned at 5:30 p.m. Members present from the Board of Governors were James Chaney, Patrick Ehlers, Hunter Emerick, R. Ray Heysell, Matthew Kehoe, Theresa Kohlhoff, John Mansfield, Audrey Matsumonji, Caitlin Mitchel-Markley, Joshua Ross, Richard Spier, Timothy L. Williams and Elisabeth Zinser. Staff present were Sylvia Stevens, Helen Hierschbiel, Rod Wegener, Susan Grabe, Mariann Hyland, Judith Baker, Dawn Evans, Kateri Walsh, Dani Edwards and Camille Greene. Also present was Ben Eder, ONLD Chair; Ira Zarov, PLF CEO, Bruce Schaffer, PLF Director of Claims, Betty Lou Morrow, PLF CFO, and Cindy Hill, PLF Executive Assistant; Tim Martinez, Guy Greco, John A. Berge, Dennis Black, Theresa Statler, and Valerie Saiki, PLF Board of Directors; Mark Wada, Sandra Hansberger and David Thornburg, Campaign for Equal Justice; Michael Mason, Legal Aid; Norman Williams, Oregon Law Foundation; Dean Curtis Bridgeman, Willamette University College of Law, Dean Robert Klonoff, Lewis & Clark Law School, and Dean Michael Moffitt, University of Oregon School of Law. Honored guest, Chief Justice Thomas Balmer, was in attendance for the second half of the meeting.

**1. Call to Order/Adoption of the Agenda**

**Motion:** Mr. Kehoe moved, Ms. Mitchel-Markley seconded, and the board voted unanimously to accept the agenda as presented.

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

**A. Report of the President**

Mr. Kranovich reported on several activities not included on his written report, including his participation in ABA Lobby Day and at the swearing-in of Judge Chris Garrett to the Oregon Court of Appeals.

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

As written.

**C. Report of the Executive Director**

Ms. Stevens introduced Dawn Evans, new Director of Regulatory Services and Disciplinary Counsel. She announced that Amber Bevacqua-Lynott has been appointed to a new position in the discipline department: Chief Assistant Disciplinary Counsel & Deputy Director of Regulatory Services. She reminded the BOG that the ABA will be conducting its evaluation of the OSB disciplinary system during the week of June 9. . Finally, Ms. Stevens announced that she will be retiring effective January 1, 2016.

**D. Director of Regulatory Services**

As written. Ms. Evans updated the board on her activities during her first week at the Oregon State Bar.

**E. Director of Diversity & Inclusion**

Ms. Hyland reported that the annual OLIO Spring Social at Willamette was a success. The Diversity & Inclusion department has noticed a drop in student applications to participate in their program.

**F. MBA Liaison Reports**

Ms. Kohlhoff attended the March 5, 2014 MBA board meeting and Mr. Spier attended the April 2, 2014 MBA meeting. Mr. Spier reported that the MBA is discussing the future viability of the group health insurance. Ms. Kohlhoff reported that the MBA is always interested in what is happening at the bar.

**G. Oregon New Lawyers Division Report**

Mr. Eder briefly reported on a variety of ONLD projects and events described in his written report.

**3. Professional Liability Fund [Mr. Zarov]**

Mr. Zarov submitted a general update on the PLF's financial status **[Exhibit A]** and Ms. Morrow reported that the annual audit went well. The PLF does not anticipate seeking an increase in the assessment for 2015. The long-term goal is to lower the assessment. Mr. Greco outlined the profile for the open CEO position and the hiring process. September 1 is the target date for the new CEO to begin. **[Exhibit B]**

**4. CEJ and OLF Presentations**

Appearances were made by Mark Wada and Sandra Hansberger (CEJ), David Thornburg (Oregon Law Center), Michael Mason (President, Legal Aid Services of Oregon Board of Directors), and Norman Williams (Oregon Law Foundation). Mr. Wada congratulated the bar on its long history of supporting funding for Legal Aid. CEJ is a support arm for Oregon's legal aid programs. The Task Force on Legal Aid Funding was formed this year to take a comprehensive look at legal aid funding and how other states were funding their legal aid programs. Their goal is to double their funding. Mr. Williams explained how IOLTA funds are dispersed in the form of grants to direct service providers and to programs educating the public on the rule of law and diversity. IOLTA income has declined precipitously since 2008. Mr. Mason thanked Ms. Grabe for her lobbying work in Salem on behalf of legal aid and Kateri Walsh for her PR efforts.

**5. Law School Deans Presentations**

Mr. Kranovich introduced honored guest, Chief Justice Thomas Balmer.

Mr. Kranovich expressed the board's concern about the changes taking place in the profession and the impact the changes have had and will continue to have on the career prospects for Oregon's law school graduates, the pressure for law schools to modify their curriculums to produce "practice ready" graduates, and the reality that solutions to the current employment drought are not so simple.

Dean Curtis Bridgeman, Willamette University College of Law, talked about how Willamette emphasizes the importance of students getting practical experience while they are in law

school. Their academic programming is creative with adjusted rules to encourage participation in externships. Full-time externship programs are encouraged and enrollment has tripled over the past year. They have boosted their mentoring program for 2L and 3L students. They teach their students to understand clients and be business-minded. Dean Bridgeman asked the board to continue its outreach to young lawyers and law students. He also invited the board to let him know how he can help the board.

Dean Robert Klonoff, Lewis & Clark Law School, addressed the current crisis in legal education. There have been massive cuts in big law firm jobs, associate programs and new hires. The government jobs have been cut back and replaced by volunteers. Outsourcing of jobs and internet services are replacing jobs in the U.S. The high cost of tuition is adding to the crisis by causing enormous debt loads. In the past four years they have seen applications drop by 50%. They have nine practice areas that they teach through clinics. They have over 200 externships per year all over the world. These programs and the bar's mentoring have helped the law students upon graduation. To help reduce their budget they cut costs through the use of adjunct professors, reducing staff through attrition and reducing class size. He suggested that the bar could establish scholarships and encourage big firms, agencies and the courts to hire Oregon law school graduates.

Dean Michael Moffitt, University of Oregon School of Law, stated that all three Oregon law schools face the same difficulties, admit similar students, and are up against the same job market. The fundamental changes in the profession are causing them to look at their current funding models. The incoming students' skill sets and aptitudes are very different from years past, requiring additional training. It is troubling that fewer students of diversity are applying, nationwide. Skills classes are required at law schools by the ABA. The average student graduating from U of O has over four skills classes in their second and third year. Dean Moffitt had five requests for the board: help the law schools make relevant connections in the legal community; balance the desire for experiential learning against affordability; help make practical experiences available earlier in the educational process; continue UBE discussions; and help make access to education available to a broader population.

Chief Justice Balmer made two observations: we need to make more radical changes than have been discussed, such as less-expensive night school, two-year law schools, and a broader range of legal education; and the great irony is law schools are giving good students scholarships so they graduate with no debt and have an easier time finding a job, yet the other students who struggle to quickly find a good job will graduate with a high debt burden. He indicated a willingness to consider a student appearance rule that would allow students to get real courtroom experience earlier in their legal education. Mr. Kranovich asked the three deans to send rule proposals to the board for consideration.

## **6. OSB Committees, Sections and Councils**

### **A. Client Security Fund**

Ms. Stevens withdrew the request for the board to consider the Client Security Fund Committee's recommendation that Claim No. 2013-48 BERTONI (Monroy) be approved in the amount of \$5,000. Ms Stevens will be present the request at a future board meeting.

## CSF Committee Response to BOG Workgroup Recommendations

Mr. Emerick asked the board to consider the recommendations of the BOG CSF Workgroup to revise the CSF operating policy to enhance the integrity and sustainability of the Fund.

### **[Exhibit C]**

**Motion:** Mr. Hunter moved, Mr. Ross seconded, and the board voted unanimously to approve the rule changes as recommended by the work group.

### **B. MCLE Committee**

Ms. Hirschbiel presented the committee's proposed amendment to MCLE Rule 5.2(d) to include participation on the Oregon Judicial Conference Judicial Conduct Committee to the list of activities that qualify for legal ethics credit. **[Exhibit D]**

**Motion:** Mr. Heysell moved, Mr. Mansfield seconded, and the board voted to approve MCLE Rule 5.2(d) changes as requested.

Ms. Hirschbiel presented the committee's proposed amendments to MCLE Regulation 7.200(a) regarding late fees. **[Exhibit E]**

**Motion:** Mr. Mansfield moved, Ms. Mitchel-Markley seconded, and the board voted unanimously to approve MCLE 7.200(a) regulation changes as requested.

### **C. Legal Ethics Committee**

Ms. Hirschbiel asked the board to decide whether to adopt the proposed amendments to the formal ethics opinions. **[Exhibit F]**

**Motion:** Ms. Mitchel-Markley moved, Mr. Spier seconded, and the board voted unanimously to approve the various proposed amendments as requested.

### **D. Legal Services Program Committee**

Ms. Baker asked the board to approve disbursing the annual unclaimed client funds for 2014 as outlined in the chart titled 2014 Distribution. This includes approving the current reserve policy. Ms. Baker asked the board to approve disbursing the unclaimed client funds from the Strawn v Farmers class action as outlined in the chart titled 2014 Distribution. **[Exhibit G]**

**Motion:** Ms. Mitchel-Markley moved, Mr. Williams seconded, and the board voted unanimously to approve the disbursement of funds as outlined.

### **E. Unlawful Practice of Law Committee**

Ms. Hirschbiel asked the board to approve the Unlawful Practice of Law Committee's advisory opinion regarding unlawful practice of law issues that arise in the context of non-lawyer representation of friends and family. **[Exhibit H]**

**Motion:** Mr. Spier moved, Mr. Heysell seconded, and the board voted unanimously to approve the advisory opinion as requested.

## 7. BOG Committees, Special Committees, Task Forces and Study Groups

### A. Board Development Committee

Ms. Mitchel-Markley updated the board on the committee's actions and discussed the HOD election results, public member recruitment and the BOG outreach packet. She encouraged the board to take a packet and fill out their quarterly activity report.

### B. Budget and Finance Committee

Mr. Wegener updated the board on bar-related financial matters and reported that he had selected a consultant to assist with the selection of a database vendor. **[Exhibit I]**

### C. Governance and Strategic Planning Committee

Mr. Spier presented the committee motion to amend the standard section bylaws to clarify acceptable spouse and guest reimbursements. **[Exhibit J]**

**Motion:** The board voted to approve the committee motion to adopt the policy language as presented. Ms. Kohlhoff was opposed.

Mr. Spier presented the committee motion to amend the Diversity Action Plan by adding a new Strategy 9 for Goal 7 which addresses accessibility. **[Exhibit K]**

**Motion:** The board approved the committee motion on a unanimous vote.

Mr. Spier presented the committee motion to amend the Diversity & Inclusion Department's diversity definition to include evolving language and distinctions used to describe the concepts of sex, gender, gender identity and expression. **[Exhibit L]**

**Motion:** The board approved the committee motion on a unanimous vote.

### D. Public Affairs Committee

Mr. Emerick asked the board to approve the committee's Law Improvement Legislation Package Recommendations. **[Exhibit M]**

**Motion:** The board approved the committee motion on a unanimous vote.

### E. Appointments to CLNS Committee

Mr. Kranovich informed the board of the members of the newly formed committee. Mr. Ehlers and Mr. Prestwich will co-chair the committee composed of board members Jenifer Billman, Theresa Kohlhoff, Tim Williams and Josh Ross. The committee will be charged with finding a notice system everyone can agree upon, who will run it, and who will build the political coalition necessary to make it work.

**F. Indigent Defense Practitioners**

Mr. Emerick asked the board to adopt proposed changes to the Standards for Representation in Adult Criminal and Juvenile Delinquency Cases to provide guidance to practitioners. **[Exhibit N]**

**Motion:** The board voted unanimously to adopt the proposed changes as recommended by the Public Affairs Committee.

**8. Other Action Items**

Ms. Edwards asked the board to approve the appointments to various bar committees and boards. **[Exhibit O]**

**Motion:** Ms. Mitchel-Markley moved, Mr. Ehlers seconded, and the board voted unanimously to approve the various appointments.

**9. Consent Agenda**

**Motion:** Ms. Mitchel-Markley moved, Mr. Mansfield seconded, and the board voted unanimously to approve the consent agenda of past meeting minutes.

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

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

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

None.

**Oregon State Bar  
Board of Governors Meeting  
April 25, 2014  
Executive Session Minutes**

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

**A. Unlawful Practice of Law**

The UPL Committee has successfully negotiated a cease and desist agreement with Wanda Abioto. Pursuant to bar bylaw § 20.702(c), the UPL Committee asks the Board to approve the agreement.

**Motion:** Mr. Mansfield moved and Ms. Mitchel-Markley seconded to accept the recommendation that the Board approve the cease and desist agreement. The board unanimously approved the motion.

**B. Pending or Threatened Non-Disciplinary Litigation**

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

**C. Other Matters**

Ms. Hirschbiel asked the board to decide whether to approve William Wade Burns' claim for the return of \$26,259.07.

**Motion:** Ms. Mitchel-Markley moved and Mr. Emerick seconded to approve the claim as recommended.

Ms. Hirschbiel asked the board to decide whether to approve the proposed Operating Principles for the Oregon State Bar ("OSB") and the Board of Bar Examiners ("BBX") relating to attorney admissions. **[Exhibit P]**

**Motion:** Mr. Spier moved and Ms. Mitchel-Markley seconded to approve the proposed Operating Principles as recommended.

**Oregon State Bar  
Professional Liability Fund  
Financial Statements  
12/31/2013**

**TABLE OF CONTENTS**

<u>Page</u>	<u>Description</u>
2	Combined Balance Sheet
3	Primary Program Income Statement
4	Primary Program Operating Expenses
5	Excess Program Income Statement
6	Excess Program Operating Expenses
7	Combined Investment Schedule

**Oregon State Bar  
Professional Liability Fund  
Combined Primary and Excess Programs  
Balance Sheet  
12/31/2013**

	<u>ASSETS</u>	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Cash		\$3,354,491.17	\$2,931,542.67
Investments at Fair Value		44,675,979.03	42,396,004.86
Due from Reinsurers		1,685,944.28	1,378,613.35
Other Current Assets		280,612.93	265,996.39
Net Fixed Assets		866,682.61	980,612.12
Claim Receivables		36,258.04	66,271.00
Other Long Term Assets		<u>9,825.00</u>	<u>13,919.48</u>
<b>TOTAL ASSETS</b>		<b><u>\$50,909,793.06</u></b>	<b><u>\$48,032,959.87</u></b>
	<u>LIABILITIES AND FUND EQUITY</u>	<u>THIS YEAR</u>	<u>LAST YEAR</u>
<b>Liabilities:</b>			
Accounts Payable and Other Current Liabilities		\$155,314.46	\$193,841.75
Due to Reinsurers		\$18,893.00	\$17,381.00
Deposits - Assessments		9,794,480.00	10,128,861.50
Liability for Compensated Absences		370,817.99	445,620.51
Liability for Indemnity		11,100,000.00	14,200,000.00
Liability for Claim Expense		14,000,000.00	12,500,000.00
Liability for Future ERC Claims		2,400,000.00	2,700,000.00
Liability for Suspense Files		1,500,000.00	1,400,000.00
Liability for Future Claims Administration (AOE)		<u>2,300,000.00</u>	<u>2,400,000.00</u>
<b>Total Liabilities</b>		<b><u>\$41,639,505.45</u></b>	<b><u>\$43,985,704.76</u></b>
<b>Fund Equity:</b>			
Retained Earnings (Deficit) Beginning of the Year		\$4,047,255.11	(\$781,169.42)
Year to Date Net Income (Loss)		<u>5,223,032.50</u>	<u>4,828,424.53</u>
<b>Total Fund Equity</b>		<b><u>\$9,270,287.61</u></b>	<b><u>\$4,047,255.11</u></b>
<b>TOTAL LIABILITIES AND FUND EQUITY</b>		<b><u>\$50,909,793.06</u></b>	<b><u>\$48,032,959.87</u></b>

**Oregon State Bar  
Professional Liability Fund  
Primary Program  
Income Statement  
12 Months Ended 12/31/2013**

	YEAR TO DATE <u>ACTUAL</u>	YEAR TO DATE <u>BUDGET</u>	<u>VARIANCE</u>	YEAR TO DATE <u>LAST YEAR</u>	<u>ANNUAL BUDGET</u>
<b>REVENUE</b>					
Assessments	\$25,042,532.75	\$25,049,000.00	\$6,467.25	\$24,803,325.67	\$25,049,000.00
Installment Service Charge	391,097.00	390,000.00	(1,097.00)	394,631.00	390,000.00
Other Income	45,191.02	0.00	(45,191.02)	69,868.17	0.00
Investment Return	<u>4,319,796.86</u>	<u>2,462,823.00</u>	<u>(1,856,973.86)</u>	<u>4,295,120.04</u>	<u>2,462,823.00</u>
<b>TOTAL REVENUE</b>	<b><u>\$29,798,617.63</u></b>	<b><u>\$27,901,823.00</u></b>	<b><u>(\$1,896,794.63)</u></b>	<b><u>\$29,562,944.88</u></b>	<b><u>\$27,901,823.00</u></b>
<b>EXPENSE</b>					
<b>Provision For Claims:</b>					
New Claims at Average Cost	\$18,274,500.00			\$20,760,000.00	
Actuarial Adjustment to Reserves	(133,446.01)			(2,435,227.40)	
Net Changes in AOE Liability	(100,000.00)			100,000.00	
Net Changes in ERC Liability	(300,000.00)			0.00	
Net Changes in Suspense File Liab.	100,000.00			0.00	
Coverage Opinions	151,309.11			141,424.92	
General Expense	82,748.77			68,234.72	
Less Recoveries & Contributions	16,935.88			(161,352.20)	
Budget for Claims Expense		<u>\$20,725,920.00</u>			<u>\$20,725,920.00</u>
<b>Total Provision For Claims</b>	<b><u>\$18,092,047.75</u></b>	<b><u>\$20,725,920.00</u></b>	<b><u>\$2,633,872.25</u></b>	<b><u>\$18,473,080.04</u></b>	<b><u>\$20,725,920.00</u></b>
<b>Expense from Operations:</b>					
Administrative Department	\$2,191,872.31	\$2,283,201.00	\$91,328.69	\$2,215,883.07	\$2,283,201.00
Accounting Department	809,275.63	786,223.00	(23,052.63)	748,742.02	786,223.00
Loss Prevention Department	1,829,742.96	1,902,969.00	73,226.04	1,824,647.59	1,902,969.00
Claims Department	2,538,325.19	2,681,914.00	143,588.81	2,398,157.09	2,681,914.00
Allocated to Excess Program	<u>(1,105,104.00)</u>	<u>(1,105,104.00)</u>	<u>0.00</u>	<u>(1,099,825.92)</u>	<u>(1,105,104.00)</u>
<b>Total Expense from Operations</b>	<b><u>\$6,264,112.09</u></b>	<b><u>\$6,549,203.00</u></b>	<b><u>\$285,090.91</u></b>	<b><u>\$6,087,603.85</u></b>	<b><u>\$6,549,203.00</u></b>
Contingency (4% of Operating Exp)	\$0.00	\$306,172.00	\$306,172.00	\$23,693.21	\$306,172.00
Depreciation and Amortization	\$166,574.10	\$208,000.00	\$41,425.90	\$175,500.35	\$208,000.00
Allocated Depreciation	<u>(30,056.04)</u>	<u>(30,056.00)</u>	<u>0.04</u>	<u>(35,996.04)</u>	<u>(30,056.00)</u>
<b>TOTAL EXPENSE</b>	<b><u>\$24,492,677.90</u></b>	<b><u>\$27,759,239.00</u></b>	<b><u>\$3,266,561.10</u></b>	<b><u>\$24,723,881.41</u></b>	<b><u>\$27,759,239.00</u></b>
<b>NET INCOME (LOSS)</b>	<b><u>\$5,305,939.73</u></b>	<b><u>\$142,584.00</u></b>	<b><u>(\$5,163,355.73)</u></b>	<b><u>\$4,839,063.47</u></b>	<b><u>\$142,584.00</u></b>

**Oregon State Bar  
Professional Liability Fund  
Primary Program  
Statement of Operating Expense  
12 Months Ended 12/31/2013**

<u>EXPENSE:</u>	<u>CURRENT MONTH</u>	<u>YEAR TO DATE ACTUAL</u>	<u>YEAR TO DATE BUDGET</u>	<u>VARIANCE</u>	<u>YEAR TO DATE LAST YEAR</u>	<u>ANNUAL BUDGET</u>
Salaries	\$335,757.69	\$4,145,085.93	\$4,148,175.00	\$3,089.07	\$3,984,099.59	\$4,148,175.00
Benefits and Payroll Taxes	38,239.58	1,382,384.15	1,576,202.00	193,817.85	1,410,430.61	1,576,202.00
Investment Services	7,119.00	28,017.75	28,000.00	(17.75)	27,718.50	28,000.00
Legal Services	2,304.00	13,738.00	16,000.00	2,262.00	13,240.50	16,000.00
Financial Audit Services	0.00	22,600.00	22,600.00	0.00	21,700.00	22,600.00
Actuarial Services	0.00	19,731.25	19,000.00	(731.25)	18,900.00	19,000.00
Claims MMSEA Services	0.00	0.00	0.00	0.00	3,850.00	0.00
Information Services	2,372.50	136,221.29	96,000.00	(40,221.29)	86,814.17	96,000.00
Document Scanning Services	3,205.09	47,085.77	75,000.00	27,914.23	52,034.79	75,000.00
Other Professional Services	11,439.84	63,733.95	57,400.00	(6,333.95)	65,375.04	57,400.00
Staff Travel	1,946.78	17,375.84	12,450.00	(4,925.84)	16,159.55	12,450.00
Board Travel	10,197.62	35,514.23	39,000.00	3,485.77	38,011.15	39,000.00
NABRICO	0.00	10,958.51	10,500.00	(458.51)	9,996.13	10,500.00
Training	607.49	19,211.29	24,500.00	5,288.71	20,496.94	24,500.00
Rent	42,145.08	521,137.51	520,741.00	(396.51)	511,782.29	520,741.00
Printing and Supplies	7,779.16	59,290.46	79,000.00	19,709.54	60,187.24	79,000.00
Postage and Delivery	6,642.04	33,399.94	36,750.00	3,350.06	37,715.25	36,750.00
Equipment Rent & Maintenance	1,445.79	40,879.11	36,200.00	(4,679.11)	38,624.51	36,200.00
Telephone	4,879.82	48,674.50	43,000.00	(5,674.50)	36,563.64	43,000.00
L P Programs (less Salary & Benefits)	56,379.29	373,907.75	433,560.00	59,652.25	389,833.69	433,560.00
Defense Panel Training	0.00	9,969.91	23,100.00	13,130.09	0.00	23,100.00
Bar Books Grant	16,666.63	200,000.00	200,000.00	0.00	200,000.00	200,000.00
Insurance	32,593.49	71,471.49	90,129.00	18,657.51	70,792.93	90,129.00
Library	5,448.93	32,659.42	33,000.00	340.58	31,047.06	33,000.00
Subscriptions, Memberships & Other Allocated to Excess Program	3,618.96 (92,092.00)	36,168.04 (1,105,104.00)	34,000.00 (1,105,104.00)	(2,168.04) 0.00	42,056.19 (1,099,825.92)	34,000.00 (1,105,104.00)
<b>TOTAL EXPENSE</b>	<b><u>\$498,696.78</u></b>	<b><u>\$6,264,112.09</u></b>	<b><u>\$6,549,203.00</u></b>	<b><u>\$285,090.91</u></b>	<b><u>\$6,087,603.85</u></b>	<b><u>\$6,549,203.00</u></b>

**Oregon State Bar  
Professional Liability Fund  
Excess Program  
Income Statement  
12 Months Ended 12/31/2013**

	YEAR TO DATE <u>ACTUAL</u>	YEAR TO DATE <u>BUDGET</u>	<u>VARIANCE</u>	YEAR TO DATE <u>LAST YEAR</u>	<u>ANNUAL BUDGET</u>
<b><u>REVENUE</u></b>					
Ceding Commission	\$747,993.00	\$746,750.00	(\$1,243.00)	\$733,700.00	\$746,750.00
Prior Year Adj. (Net of Reins.)	7,912.66	1,500.00	(6,412.66)	1,478.20	1,500.00
Profit Commission	32,068.81	0.00	(32,068.81)	32,599.34	0.00
Installment Service Charge	41,433.00	38,000.00	(3,433.00)	37,180.00	38,000.00
Investment Return	<u>330,352.47</u>	<u>185,374.00</u>	<u>(144,978.47)</u>	<u>429,190.42</u>	<u>185,374.00</u>
<b>TOTAL REVENUE</b>	<b><u>\$1,159,759.94</u></b>	<b><u>\$971,624.00</u></b>	<b><u>(\$188,135.94)</u></b>	<b><u>\$1,234,147.96</u></b>	<b><u>\$971,624.00</u></b>
<b><u>EXPENSE</u></b>					
Operating Expenses (See Page 6)	<u>\$1,212,611.13</u>	<u>\$1,222,559.00</u>	<u>\$9,947.87</u>	<u>\$1,208,790.86</u>	<u>\$1,222,559.00</u>
Allocated Depreciation	<u>\$30,056.04</u>	<u>\$30,056.00</u>	<u>(\$0.04)</u>	<u>\$35,996.04</u>	<u>\$30,056.00</u>
<b>NET INCOME (LOSS)</b>	<b><u>(\$82,907.23)</u></b>	<b><u>(\$280,991.00)</u></b>	<b><u>(\$198,083.77)</u></b>	<b><u>(\$10,638.94)</u></b>	<b><u>(\$280,991.00)</u></b>

**Oregon State Bar  
Professional Liability Fund  
Excess Program  
Statement of Operating Expense  
12 Months Ended 12/31/2013**

	<u>CURRENT MONTH</u>	<u>YEAR TO DATE ACTUAL</u>	<u>YEAR TO DATE BUDGET</u>	<u>VARIANCE</u>	<u>YEAR TO DATE LAST YEAR</u>	<u>ANNUAL BUDGET</u>
<b><u>EXPENSE:</u></b>						
Salaries	\$56,197.34	\$672,433.78	\$669,654.00	(\$2,779.78)	\$675,415.08	\$669,654.00
Benefits and Payroll Taxes	20,929.02	250,994.01	253,531.00	2,536.99	238,810.28	253,531.00
Investment Services	381.00	1,982.25	3,000.00	1,017.75	2,281.50	3,000.00
Office Expense	0.00	0.00	0.00	0.00	0.00	0.00
Allocation of Primary Overhead	23,239.50	278,874.00	278,874.00	0.00	275,634.96	278,874.00
Reinsurance Placement & Travel	0.00	369.49	5,000.00	4,630.51	3,933.47	5,000.00
Training	0.00	0.00	500.00	500.00	0.00	500.00
Printing and Mailing	0.00	4,035.46	5,000.00	964.54	5,300.86	5,000.00
Program Promotion	0.00	3,922.14	5,000.00	1,077.86	6,069.71	5,000.00
Other Professional Services	0.00	0.00	2,000.00	2,000.00	1,345.00	2,000.00
Software Development	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>
<b>TOTAL EXPENSE</b>	<b><u>\$100,746.86</u></b>	<b><u>\$1,212,611.13</u></b>	<b><u>\$1,222,559.00</u></b>	<b><u>\$9,947.87</u></b>	<b><u>\$1,208,790.86</u></b>	<b><u>\$1,222,559.00</u></b>

**Oregon State Bar  
Professional Liability Fund  
Combined Investment Schedule  
12 Months Ended 12/31/2013**

	<b>CURRENT MONTH THIS YEAR</b>	<b>YEAR TO DATE THIS YEAR</b>	<b>CURRENT MONTH LAST YEAR</b>	<b>YEAR TO DATE LAST YEAR</b>
<b>Dividends and Interest:</b>				
Short Term Bond Fund	\$512.95	\$131,162.54	\$18,087.07	\$202,322.79
Intermediate Term Bond Funds	137,191.32	316,670.35	291,236.92	519,527.14
Domestic Common Stock Funds	107,399.45	347,873.97	83,747.53	110,842.17
International Equity Fund	131,330.99	131,330.99	156,700.72	156,700.72
Real Estate	40,971.75	178,276.84	45,383.33	183,008.94
Hedge Fund of Funds	0.00	0.00	0.00	0.00
Real Return Strategy	<u>140,219.50</u>	<u>253,902.86</u>	<u>169,213.58</u>	<u>270,621.57</u>
<b>Total Dividends and Interest</b>	<b><u>\$557,625.96</u></b>	<b><u>\$1,359,217.55</u></b>	<b><u>\$764,369.15</u></b>	<b><u>\$1,443,023.33</u></b>
<b>Gain (Loss) in Fair Value:</b>				
Short Term Bond Fund	(\$3,092.46)	(\$134,069.00)	(\$14,502.23)	\$284,635.31
Intermediate Term Bond Funds	(188,678.41)	(452,026.16)	(271,144.05)	248,701.30
Domestic Common Stock Funds	97,259.77	2,033,310.53	17,556.80	798,337.84
International Equity Fund	25,863.88	1,596,716.97	150,355.69	1,165,630.65
Real Estate	42,400.73	309,270.62	46,772.44	170,959.52
Hedge Fund of Funds	0.00	296,132.24	45,268.48	286,587.61
Real Return Strategy	<u>(84,399.24)</u>	<u>(358,403.42)</u>	<u>(134,459.99)</u>	<u>326,434.90</u>
<b>Total Gain (Loss) in Fair Value</b>	<b><u>(\$110,645.73)</u></b>	<b><u>\$3,290,931.78</u></b>	<b><u>(\$160,152.86)</u></b>	<b><u>\$3,281,287.13</u></b>
<b>TOTAL RETURN</b>	<b><u>\$446,980.23</u></b>	<b><u>\$4,650,149.33</u></b>	<b><u>\$604,216.29</u></b>	<b><u>\$4,724,310.46</u></b>
<b>Portions Allocated to Excess Program:</b>				
Dividends and Interest	\$21,022.50	\$81,847.63	\$48,002.38	\$107,876.77
Gain (Loss) in Fair Value	<u>(4,171.34)</u>	<u>248,504.84</u>	<u>(10,057.60)</u>	<u>321,313.65</u>
<b>TOTAL ALLOCATED TO EXCESS PROGRAM</b>	<b><u>\$16,851.16</u></b>	<b><u>\$330,352.47</u></b>	<b><u>\$37,944.78</u></b>	<b><u>\$429,190.42</u></b>

**Oregon State Bar  
PROFESSIONAL LIABILITY FUND**

**Chief Executive Officer Profile**

**POSITION SUMMARY:**

The CEO reports to the PLF Board of Directors for overall management and operation of the organization. Key responsibility areas include organization and staffing, claims management, budgeting, investments, and relationships with the organization's constituencies (covered attorneys, the Oregon State Bar, and reinsurers).

**KEY RESPONSIBILITIES:**

1. **Internal Management:** Through subordinate managers, provide direction in the following areas: administration; underwriting; claims; accounting and investments; claim prevention and personal and practice management services.
2. **Stakeholder Relations and Communications:** As part of the OSB, maintain relationships with covered attorneys, the courts, the state legislature, and other Oregon legal institutions. Build and maintain a high level of professional credibility with the legal profession in Oregon.
3. **Staff:** Maintain and positively influence PLF staff morale and productivity.
4. **Coverage:** Review and propose revisions to the Coverage Plan as needed, including actuarial reviews and assessment adjustments.
5. **Excess Program:** Oversee operation of the excess program, including underwriting and maintaining relationships with and reporting to reinsurers. Personally participate in reinsurance negotiations.
6. **Oregon State Bar Relationships:** Maintain positive working relationships with the PLF Board of Directors, the OSB Board of Governors, and the OSB staff. Staff all committees of the PLF Board of Directors. Research and organize material for presentation to the Board of Directors and, on behalf of the Board of Directors, to the Board of Governors.
7. **Asset Management:** Assure proper control and management of PLF assets, particularly monetary assets.
8. **Productivity:** Develop and implement management programs to assure optimum productivity and efficiency within the organization, with particular attention to claims management and defense.
9. **Projects:** Perform special projects as assigned by the Board of Directors.

## CANDIDATE QUALIFICATIONS:

Candidate qualifications will be considered in relation to the unique characteristics of the Professional Liability Fund.

1. **Management Experience:** The PLF's size and complexity require high-level professional management capability. The organization manages considerable assets, has multiple operating departments, and requires well-conceived systems and procedures for operations. Management expertise is essential, and should include personnel, budget, supervision of professional staff, effective delegation, communications, and maintenance of relationships.
2. **Familiarity with the PLF and the Oregon Legal Community:** PLF covered parties are Oregon attorneys, and most PLF business issues relate to malpractice coverage for Oregon attorneys engaged in private practice. Candidates must be capable of establishing personal and professional credibility in this environment.
3. **Understanding of Coverage Issues:** While the primary PLF product is professional liability coverage, the organization is not a traditional insurance company. Instead, it is part of a public corporation and a specialized provider and processor of professional liability coverage. Because the PLF is a part of the OSB, it is not subject to usual insurance regulation, but an understanding of basic coverage issues, underwriting, and reinsurance is important.
4. **Communication Skills:** The PLF CEO is in a highly visible position. He/she spends extensive time in communication with individual attorneys, and with the Oregon State Bar and its components. Excellent communication skills with both large and small groups are essential.

CEO candidates will be evaluated against the ideal qualifications listed below. Final candidates will be selected based on judgment of their ability to perform the CEO position.

1. **Professional Experience:** Candidates must have proven leadership skills and management experience involving business planning, selection of key personnel, organization development, financial control, and workflow management. Successful experience in senior management is important whether acquired in a law practice, in a business enterprise, in a public organization or in some other relevant organization.

Preference will be given to lawyers, particularly with an Oregon connection, who have private practice and litigation experience. Knowledge of the insurance industry, specifically professional liability coverage, is desirable but not mandatory.

2. **Personal Characteristics:** Candidates must be capable of representing the PLF in public, including speaking engagements. Excellent communication skills are required. Candidates should display leadership and diplomatic abilities and be able to address conflict and perform under pressure. Strong analytical and strategic thinking skills are needed.

Judgment, integrity, and objectivity must be at high levels. Candidates must be capable of establishing credibility with the legal profession in Oregon.

Existing organizational culture is characterized by openness, informality, flexibility, collaboration, and strong support for the staff. The ideal candidate will have a management and leadership style characterized by patience, an ability to listen, an ability to delegate, mutual confidence and trust, and an ability to deal with diversity.

## Client Security Fund Rules

*(As approved by the Board of Governors through February 22, 2013)*

### TABLE OF CONTENTS

Section 1. Definitions.....	2
Section 2. Reimbursable Losses.....	2
Section 3. Statement of Claim for Reimbursement.....	3
Section 4. Processing Statements of Claim.....	4
Section 5. Subrogation for Reimbursements Made.....	5
Section 6. General Provisions.....	6

DRAFT

## Section 1. Definitions.

For the purpose of these Rules of Procedure, the following definitions shall apply:

- 1.1 “Administrator” means the ~~person designated by the~~ OSB Executive Director or other person designated by the Executive Director to oversee the operations of the Client Security Fund.
- 1.2 “Bar” means the Oregon State Bar.
- 1.3 “Committee” means the Client Security Fund Committee.
- 1.4 “Fund” means the Client Security Fund.
- 1.5 “Lawyer” means one who, at the time of the act or acts complained of, was an active member of the Oregon State Bar and maintained an office for the practice of law in Oregon.
- 1.6 “Client” means the individual, partnership, corporation, or other entity who, at the time of the act or acts complained of, had an established attorney-client relationship with the lawyer.
- 1.7 “Claimant” means one who files a claim with the Fund.
- 1.8 “Dishonest conduct” means a lawyer’s willful act against a client’s interest by defalcation, by embezzlement, or by other wrongful taking.

## Section 2. Reimbursable Losses.

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

- 2.1 The claim is made by the injured client or the client’s conservator, personal representative, guardian ad litem, trustee, or attorney in fact.
- 2.2 The loss was caused by the lawyer’s dishonest conduct.
  - 2.2.1 In a loss resulting from a lawyer’s refusal or failure to refund an unearned legal fee, “dishonest conduct” shall include (i) a lawyer’s misrepresentation or false promise to provide legal services to a client in exchange for the advance payment of a legal fee or (ii) a lawyer’s wrongful failure to maintain the advance payment in a lawyer trust account until earned.
  - 2.2.2 A lawyer’s failure to perform or complete a legal engagement shall not constitute, in itself, evidence of misrepresentation, false promise or dishonest conduct.
  - 2.2.3 Reimbursement of a legal fee will be allowed only if (i) the lawyer provided no legal services to the client in the engagement; or (ii) the legal services that the lawyer actually provided were, in the Committee’s judgment, minimal or insignificant; or (iii) the claim is supported by a determination of a court, a fee arbitration panel, or an accounting acceptable to the Committee that establishes that the client is owed a refund of a legal fee. No award reimbursing a legal fee shall exceed the actual fee that the client paid the attorney.
  - 2.2.4 In the event that a client is provided equivalent legal services by another lawyer without cost to the client, the legal fee paid to the predecessor lawyer will not be eligible for reimbursement, except in extraordinary circumstances.
- 2.3 The loss was not covered by any similar fund in another state or jurisdiction, or by a bond, surety agreement or insurance contract, including losses to which any bonding agent, surety or insurer is subrogated.
- 2.4 The loss was not to a financial institution covered by a “banker’s blanket bond” or similar insurance or surety contract.
- 2.5 The loss arose from, and was because of:
  - 2.5.1 an established lawyer-client relationship; or

2.5.2 the failure to account for money or property entrusted to the lawyer in connection with the lawyer's practice of law or while acting as a fiduciary in a matter related to the lawyer's practice of law.

2.6 As a result of the dishonest conduct, either:

2.6.1 The lawyer was found guilty of a crime;

2.6.2 A civil judgment was entered against the lawyer, or the lawyer's estate, and that judgment remains unsatisfied; or

2.6.3 In the case of a claimed loss of \$5,000 or less, the lawyer was disbarred, suspended, or reprimanded in disciplinary proceedings, or the lawyer resigned from the Bar.

2.7 A good faith effort has been made by the claimant to collect the amount claimed, to no avail.

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

2.9 A claim approved by the Committee shall not include attorney's fees, interest on a judgment, prejudgment interest, any reimbursement of expenses of a claimant in attempting to make a recovery or prevailing party costs authorized by statute, except that a claim may include the claimant's actual expense incurred for court costs, as awarded by the court.

2.10 ~~No attorney's fees shall be paid directly from the Fund for services rendered by an attorney in preparing or presenting a claim to the Fund.~~ Members of the Bar are encouraged to assist claimants without charge in preparing and presenting a claim to the Fund. Nevertheless, a member of the Bar may contract with a claimant for a reasonable attorney fee, which contract must be disclosed to the Committee at the time the claim is filed or as soon thereafter as an attorney has been retained. The Committee may disapprove an attorney fee that it finds to be unreasonable. No attorney shall charge a fee in excess of the amount the Committee has determined to be reasonable, and ~~no the~~ attorney fee shall be paid ~~from, and not~~ in addition to, the award. In determining a reasonable fee, the Committee may refer to factors set out in ORS 20.075.

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

### **Section 3. Statement of Claim for Reimbursement.**

3.1 All claims for reimbursement must be submitted on the form prepared by the Bar.

3.2 The claim form shall require, as minimum information:

3.2.1 The name and address of the lawyer alleged to have engaged in "dishonest conduct."

3.2.2 The amount of the alleged loss.

3.2.3 The date or period of time during which the alleged loss occurred.

3.2.4 A general statement of facts relative to the claim, including a statement regarding efforts to collect any judgment against the lawyer.

3.2.5 The name and address of the claimant and a verification of the claim by the claimant under oath.

3.2.6 The name of the attorney, if any who is assisting the claimant in presenting the claim to the Client Security Fund Committee.

3.3 The Statement of Claim shall contain substantially the following statement: ALL DECISIONS REGARDING PAYMENTS FROM THE CLIENT SECURITY FUND ARE DISCRETIONARY. Neither the Oregon State Bar nor the Client Security Fund are responsible for the acts of individual lawyers.

#### Section 4. Processing Statements of Claim.

4.1 All statements of claim shall be submitted to Client Security Fund, Oregon State Bar, 16037 SW Upper Boones Ferry Rd., P. O. Box 1689, Tigard, Oregon 97281-1935.

4.2 The Administrator shall cause each statement of claim to be sent to a member of the Committee for investigation and report. Such member shall be reimbursed by the State Bar for reasonable out of pocket expenses incurred by said attorney in making such investigation. A copy of the statement of claim shall be sent by regular mail to the lawyer who is the subject of the claim at the lawyer's last known address. Before transmitting a statement of claim for investigation, the Administrator may request of the claimant further information with respect to the claim.

4.3. A Committee member to whom a statement of claim is referred for investigation shall conduct such investigation as seems necessary and desirable to determine whether the claim is for a "reimbursable loss" and is otherwise in compliance with these rules in order to guide the Committee in determining the extent, if any, to which such claim shall be reimbursed from the Fund.

4.4 Reports with respect to claims shall be submitted by the Committee member to whom the claim is assigned for investigation to the Administrator within a reasonable time after the referral of the claim to that member. Reports submitted shall contain criteria for payment set by these rules and shall include the recommendation of the member for the payment of any amount on such claim from the Fund.

4.5 The Committee shall meet from time to time upon the call of the chairperson. At the request of at least two members of the Committee and with reasonable notice, the chairperson shall promptly call a meeting of the Committee.

4.6 At any meeting of the Committee, claims may be considered for which ~~a report~~ an investigation has been completed. In determining each claim, the Committee shall be considered the representative of the Board of Governors and, as such, shall be vested with the authority conferred by ORS 9.655.

4.7 Records of the Client Security Fund are public records within the meaning of the Public Records Law and Meetings of the Committee are public meetings within the meaning of the Public Records-Meetings Law. The claimant, the claimant's attorney, the lawyer or the lawyer's attorney may attend meetings and, at the discretion of the chair, be allowed to present their respective positions on a claim regarding the claim at a meeting called to consider a claim.

4.8 No reimbursement shall be made to any claimant if the claim has not been submitted and reviewed pursuant to these rules. No reimbursement shall be made to any claimant unless approved by a majority of a quorum of the Committee.

~~The Committee, in its sole discretion, shall determine the amount of loss, if any, for which any claimant shall be reimbursed from the Fund. The Committee may, in its sole discretion, allow further reimbursement in any year to a claimant who received only a partial payment of a "reimbursable loss" solely because of the balance of the Fund at the time such payment was made.~~

4.9 The Committee shall determine the amount of loss, if any, for which any claimant shall receive an award from the Fund. The Committee may give final approval to an award of less than \$5,000 and shall submit regular reports to the Board reflecting all awards finally approved by the Committee since the last Board meeting.

~~No reimbursement shall be made to any claimant if the claim has not been submitted and reviewed pursuant to these rules. No reimbursement shall be made to any claimant unless approved by a majority of a quorum of the Committee. The Committee shall be authorized to accept or reject claims in whole or in part to the extent that funds are available to it, and the Committee shall have the discretion to determine the order and manner of payment of claims.~~

4.10 The ~~denial of a claim by the~~ Committee's denial of a claim shall be final unless a claimant's written request for review by the Board ~~of Governors~~ is received by the Executive Director of the Bar within 20 days of the Committee's decision. The 20 days shall run from the date the Committee's decision is sent to the claimant by mail, exclusive of the date of mailing.

~~4.11. Claims for which the award is less than \$5,000 may be finally approved by the Committee. All other claims approved by the Committee shall be reviewed by the Board of Governors prior to final action being taken thereon. The Committee shall provide reports to the Board of Governors reflecting all awards finally approved by the Committee since the last Board meeting.~~

~~4.12-11~~ Claims for which the committee finds an award should be for \$5,000 or more shall be submitted to the Board for approval. Recommendations and decisions of the Committee which are reviewed by the Board ~~of Governors~~ shall be considered under the criteria stated in these rules. The Board shall approve or deny each claim presented to it for review, or it may refer a claim back to the Committee for further investigation prior to making a decision.

4.12 Awards from the Fund are discretionary. The Board may deny claims in whole or in part for any reason. The Board may determine the order and payment of awards; may defer or pro-rate awards based on CSF funds available in any calendar year; and may allow further reimbursement in any subsequent year to a claimant who received only partial payment of an award. In exercising its discretion, the Board shall be guided by the following objectives:

4.12.1 Timely and complete payment of approved awards;

4.12.2 Maintaining the integrity and stability of the Fund; and

4.12.3 Avoiding frequent or significant fluctuations in the member assessment.

~~4.13-13~~ A finding ~~The Committee, in its sole discretion, may make a finding of "dishonest conduct" by the Committee shall be~~ for the sole purpose of adjudicating/resolving a claim. ~~Such a determination and~~ shall not be construed to be a finding of unprofessional misconduct for purposes of discipline or otherwise.

~~4.14-14~~ The Committee may recommend to the Board of Governors that information obtained by the Committee about a lawyer's conduct be provided to the appropriate District Attorney or to the Oregon Department of Justice when, in the Committee's opinion, a single serious act or a series of acts by the lawyer might constitute a violation of criminal law or of a civil fraud or consumer protection statute.

## **Section 5. Subrogation for Reimbursements Made.**

5.1.1 As a condition of reimbursement, a claimant shall be required to provide the Bar with a pro tanto transfer of the claimant's rights against the lawyer, the lawyer's legal representative, estate or assigns, and of the claimant's rights against the person or entity who may be liable for the claimant's loss.

5.1.2 Upon commencement of an action by the Bar as subrogee or assignee of a claim, it shall advise the claimant, who may then join in such action to recover the claimant's unreimbursed losses.

5.1.3 In the event that the claimant commences an action to recover unreimbursed losses against the lawyer or another person or entity who may be liable for the claimant's loss, the claimant shall be required to notify the Bar of such action.

5.1.4 The claimant shall be required to agree to cooperate in all efforts that the Bar undertakes to achieve restitution for the Fund.

5.2 A claimant shall not release the lawyer from liability or impair the Bar's assignment of judgment or subrogated interest without the prior approval of the Board of Governors.

5.3 The Administrator shall be responsible for collection of Fund receivables and shall have sole discretion to determine when such efforts would be futile. The Administrator may undertake collection efforts directly or may assign subrogated claims to a collection agency or outside counsel. The Administrator may authorize the expenditure of money from the Client Security Fund for reasonable costs and expenses of collection.

**Section 6. General Provisions.**

6.1 These Rules may be changed at any time by a majority vote of a quorum of the Committee subject to approval by the Board of Governors of the Oregon State Bar. A quorum is a majority of the entire Committee membership.

6.2 No reimbursement from the Fund on any one claim shall exceed \$50,000.

6.3 A member of the Committee who has or has had a lawyer-client relationship or financial relationship with a claimant or lawyer who is the subject of a claim shall not participate in the investigation or review of a claim involving the claimant or lawyer.

6.4 These Rules shall apply to all claims pending at the time of their enactment.

6.5 The Administrator shall prepare an annual report to the membership and may from time to time issue press releases or other public statements about the Fund and claims that have been paid. The annual report and any press releases and other public statements shall include the name of the lawyer, the amount of reimbursement, the general nature of the claim, the lawyer's status with the bar and whether any criminal action has been instituted against the lawyer for the conduct giving rise to the loss. If the claimant has previously initiated criminal or civil action against the lawyer, the press release or public statement may also include the claimant's name. The annual report, press release or other public statement may also include general information about the Fund, what claims are eligible for reimbursement, how the Fund is financed, and who to contact for information.

DRAFT

---

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** April 25, 2014  
**From:** MCLE Committee  
**Re:** Amendment to MCLE Rule 5.2(d)

---

### Issue

The MCLE Committee recommends amending MCLE Rule 5.2(d) to include participation on the Oregon Judicial Conference Judicial Conduct Committee to the list of activities that qualify for legal ethics credit.

### Options

Option 1 – Make no change to Rule 5.2(d) and leave as set forth below:

MCLE Rule 5.2(d) Legal Ethics Service. A member serving on the Oregon State Bar Legal Ethics Committee, Client Security Fund Committee, Commission on Judicial Fitness & Disability, Local Professional Responsibility Committees, State Professional Responsibility Board, and Disciplinary Board or serving as volunteer bar counsel or volunteer counsel to an accused in Oregon disciplinary proceedings may earn two ethics credits for each twelve months of service.

Option 2 - Amend Rule 5.2(d) to include service on the Oregon Judicial Conference Judicial Conduct Committee to the list of activities that qualify for legal ethics credit.

MCLE Rule 5.2(d) Legal Ethics Service. A member serving on the Oregon State Bar Legal Ethics Committee, Client Security Fund Committee, Commission on Judicial Fitness & Disability, Oregon Judicial Conference Judicial Conduct Committee, Local Professional Responsibility Committees, State Professional Responsibility Board, and Disciplinary Board or serving as volunteer bar counsel or volunteer counsel to an accused in Oregon disciplinary proceedings may earn two ethics credits for each twelve months of service.

### Discussion

Judge David Schuman recently suggested that participation on the Judicial Conduct Committee be added to the list of activities that qualify for ethics credit under MCLE Rule 5.2(d). The Judicial Conduct Committee gives formal and informal advisory opinions to judges. It is basically the equivalent of the OSB's Legal Ethics Committee.

Pursuant to Judge Schuman's suggestion, the MCLE Committee recommends amending MCLE Rule 5.2(d) as set forth in Option 2 above.

---

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** April 25, 2014  
**From:** MCLE Committee  
**Re:** Amendment to MCLE Regulation 7.2(a)

---

### Issue

The MCLE Committee recommends amending Regulation 7.2(a) regarding late fees.

### Options

Option 1 – Make no change to Regulation 7.2(a) and leave as set forth below:

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

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

Option 2 – Amend Regulation 7.2(a) per recommendation of the MCLE Committee:

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

(a) The late fee for curing a failure to timely file a completed compliance report is \$50 if the report is filed and the late fee is paid ~~within 30 days of the filing deadline~~ after the filing deadline and no more than 30 days after the mailing of the notice of noncompliance and \$100 if the report is filed and the late fee is paid more than 30 days after the mailing of the notice of noncompliance ~~filing deadline~~ but within the 60 day cure period; if additional time for filing is granted by the MCLE Administrator, the fee shall increase by \$50 for every additional 30 days or part thereof.

### Discussion

At its July 2013 meeting, the Board of Governors approved amending various MCLE regulations regarding filing deadlines and notices to members. MCLE Regulation 7.200(a), (see Option 1 above), was amended to align with MCLE Rule 7.5 regarding curing noncompliance issues.

While preparing the Notices of Noncompliance for the 2013 reporting period, staff realized that the way Regulation 7.200(a) currently reads, the late fee for failure to timely file a completed compliance report would have already increased to \$100 before the member was notified that a late fee was due. Therefore, the MCLE Committee recommends amending Regulation 7.200(a) as set forth in Option 2 above.

---

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** April 25, 2014  
**From:** Legal Ethics Committee  
**Re:** Updating Formal Ethics Opinions

---

### Issue

The Board of Governors must decide whether to adopt the proposed amendments to the formal ethics opinions.

### Options

1. Adopt the proposed amendments to the formal ethics opinions.
2. Decline to adopt the proposed amendments to the formal ethics opinions.

### Discussion

In the last year, the Oregon Supreme Court has adopted numerous amendments to the Oregon Rules of Professional Conduct. The Legal Ethics Committee is in the process of reviewing all of the formal ethics opinions to determine whether and how the opinions need to be amended to bring them into conformance with the new rules. The attached is the first batch of opinions that require amendments.

This first batch of amended opinions consists of pure housekeeping amendments. All amendments consist of swapping out the relevant prior rule and replacing it with the amended rule. There are otherwise no changes to the analysis or substance of the attached opinions.

Staff recommends adopting the proposed amended opinions.

Attachments: OSB Formal Ethics Op Nos: 2005-23, 2005-25, 2005-39, 2005-50, 2005-55, 2005-81, 2005-95, 2005-96, 2005-117, 2005-129, 2005-133, 2005-136, 2005-148, 2005-155, 2005-157, 2005-167, 2006-176

**FORMAL OPINION NO. 2005-23**

**[REVISED 2014]**

**Information Relating to the Representation of a Client:  
Retired and Former Lawyer**

**Facts:**

Lawyer, who has retired, would like to give some files to an educational institution for historical purposes. The files to be given contain confidential information that Lawyer has obtained from clients over the years.

After Lawyer has retired, the new lawyer for one of Lawyer's former clients approaches Lawyer and asks for information about the prior representation.

**Questions:**

1. May Lawyer give the files to the educational institution?
2. May Lawyer convey client confidences or secrets to the new lawyer?

**Conclusions:**

1. No, qualified.
2. No, qualified.

**Discussion:**

These questions are governed by Oregon RPC 1.6, which provides, in pertinent part:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by law
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
  - (2) to prevent reasonably certain death or substantial bodily harm;
  - (3) to secure legal advice about the lawyer's compliance with these Rules;
  - (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
  - (5) to comply with other law, court order, or as permitted by these Rules; or
  - (6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from

~~changes in the composition or ownership of a firm to provide . . . information in discussions preliminary to the sale of a law practice under Rule 1.17. . . .~~

~~(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. . . .~~

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

See ORS 9.460(3), which requires a lawyer to “[m]aintain the confidences and secrets of the lawyer’s clients consistent with the rules of professional conduct.”<sup>1</sup>

Absent informed consent from the affected clients or some other applicable exception, it would be improper for Lawyer either to turn over files to an educational institution or to inform a new lawyer for the same client about any prior confidences or secrets.

Approved by Board of Governors, ~~August 2005~~ April 2014.

---

<sup>1</sup> Former DR 4-101 also used the phrase *confidences and secrets* to describe the information that a lawyer is ethically required to protect. The definition of *information relating to the representation of a client* in Oregon RPC 1.0(f) encompasses the definitions of *confidences* and *secrets* in former DR 4-101.

COMMENT: For additional information on this general topic and related subjects, see THE ETHICAL OREGON LAWYER §6.1 et seq. (Oregon CLE 2003); OEC 503 (general lawyer-client privilege); LAIRD C. KIRKPATRICK, OREGON EVIDENCE §503.01 et seq. (4th ed 2002); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §59 et seq. (2003); and ABA Model Rule 1.6.

**FORMAL OPINION NO. 2005-25**

**[REVISED 2014]**

**Fee Agreements:**

**Suspended and Disbarred Lawyers, Fees and Division of Fees**

**Facts:**

Lawyer *A* has been suspended or disbarred. When the suspension or disbarment order took effect, Lawyer *A* had several open matters, including both hourly and contingent fee cases, which were subsequently taken over by Lawyer *B*. The suspension or disbarment was unrelated to the work that Lawyer *A* had done on behalf of any of the clients whose work was taken over by Lawyer *B*.

**Questions:**

1. Is Lawyer *A* entitled to be paid for the work done by Lawyer *A* before the suspension or disbarment took effect?
2. May Lawyer *B* share fees with Lawyer *A* in the contingent fee case?

**Conclusions:**

1. Yes, qualified.
2. Yes, qualified.

**Discussion:**

Oregon RPC 1.5(a) states that “[a] lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.” The mere fact that Lawyer *A* was suspended or disbarred would not mean that the collection of a fee would automatically violate this rule, and it would be proper for Lawyer *A* to seek to collect an ethically appropriate fee for past work.

The matter of the sharing of fees between Lawyer *A* and Lawyer *B* is covered by Oregon RPC 1.5(d):

A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the client gives informed consent to the fact that there will be a division of fees, and
- (2) the total fee of the lawyers for all legal services they rendered the client is not clearly excessive.

Also relevant is Oregon RPC 5.4(a), which provides:

A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm or firm members may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons.

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(5) a lawyer may pay the usual charges of a bar-sponsored or operated not-for-profit lawyer referral service, including fees calculated as a percentage of legal fees received by the lawyer from a referral.

During the period of suspension or disbarment, a suspended or disbarred lawyer is a nonlawyer within the meaning of Oregon RPC 5.4(a).<sup>1</sup> *Cf. Parquit Corp. v. Ross*, 273 Or 900, 901, 543 P2d 1070 (1975) (treating suspended lawyer as nonlawyer); OSB Formal Ethics Op No 2005-24. Consequently, Lawyer *B* could not share any fee for Lawyer *B*'s own work with Lawyer *A*. On the other hand, there is no prohibition against Lawyer *B* forwarding to Lawyer *A* the portion of any fee to which Lawyer *A* was entitled by reason of work performed before the suspension or disbarment. *Cf. In re Griffith*, 304 Or 575, 748 P2d 86 (1987) (refusing to find violation of *former* DR 3-102(A) when nonlawyer simply acted as conduit for payment of fees to counsel).

Approved by Board of Governors, April 2014 August 2005.

---

<sup>1</sup> See, e.g., *State ex rel Oregon State Bar v. Lenske*, 284 Or 23, 31, 34–35, 584 P2d 759 (1978) (employment of disbarred or suspended lawyer is permitted under same unauthorized practice limitations that govern nonlawyers generally).

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§3.38–3.41 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §10 (2003); and ABA Model Rules 1.5(e), 5.4.

FORMAL OPINION NO. 2005-39

**[REVISED 2014]**

**Lawyer as Pro Tem Judge**

**Facts:**

Lawyer A and Lawyer B are partners. Lawyer B is occasionally asked to serve as a pro tem judge or hearing officer. Both Lawyer A and Lawyer B would like to continue representing clients with matters pending before other judges or hearing officers of the same court or body for which Lawyer B acts on a pro tem basis.

**Questions:**

1. May Lawyer A and Lawyer B do so?
2. What special disclosure and consent requirements, if any, apply in such circumstances?

**Conclusions:**

1. Yes, qualified.
2. See discussion.

**Discussion:**

Pursuant to Oregon RPC 3.5(a), a lawyer shall not “seek to influence a judge, juror, prospective juror or other official by means prohibited by law.” There is no indication on the facts presented above, however, that such conduct is intended or is likely to occur.

Similarly, there is no particular reason to believe that there will be a violation of either Oregon RPC 1.12(a)<sup>1</sup> or Oregon RPC 1.11(d).<sup>2</sup> Lawyer A and Lawyer B may proceed as planned if they do not violate these rules.

---

<sup>1</sup> Oregon RPC 1.12(a) provides:

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

<sup>2</sup> Oregon RPC 1.11(d) provides:

Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

With respect to disclosure and consent requirements, Oregon RPC 1.7(a)(2) provides that a current conflict of interest exists if

there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

On these facts, there is no reason to believe that the representation of any of Lawyer A's or Lawyer B's clients will be materially limited by Lawyer B's obligations as a pro tem judge. Accordingly, it is not necessary for Lawyer A or Lawyer B to make special disclosure to, or obtain consent from, their clients. Cf. *In re Zafiratos*, 259 Or 276, 486 P2d 550 (1971) (lawyer disciplined for bringing civil action for property damage arising out of motor vehicle collision when accused had acted as judge in related proceeding); *In re Lemery*, 7 DB Rptr 125 (1993) (former district attorney disciplined for representing private client adversely to state in matter significantly related to matter he worked on while serving as district attorney, without first obtaining state's consent).

Approved by Board of Governors, ~~April 2014~~August 2005.

---

(1) is subject to Rules 1.7 and 1.9; and

(fn 1 cont'd)

(2) shall not:

...

(ii) use the lawyer's public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client. . . .

COMMENT: For additional information on this general topic and related subjects, see THE ETHICAL OREGON LAWYER §§14.28–14.30 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§133, 135 comment f (2003); and ABA Model Rules 1.11–1.12. See also OSB Formal Ethics [Op Nos 2005-7](#), [2005-38](#), [2005-102](#).

**FORMAL OPINION NO. 2005-50**

**[REVISED 2014]**

**Conflicts of Interest, Current Clients:  
Office Sharers Representing Opposing Parties**

**Facts:**

Lawyer *A* and Lawyer *B*, who maintain independent practices, share office space. Both lawyers handle personal injury litigation.

**Questions:**

1. May Lawyer *A* represent the plaintiff in a lawsuit in which Lawyer *B* represents the defendant?
2. Would the answer be different if Lawyer *A* and Lawyer *B* share a common employee who is in possession of confidences and secrets of both Lawyer *A*'s clients and Lawyer *B*'s clients?

**Conclusions:**

1. Yes, qualified.
2. Yes.

**Discussion:**

If Lawyer *A* and Lawyer *B* were part of the same firm, the simultaneous representation of a plaintiff and a defendant in the same litigation would give rise to a prohibited, nonwaivable conflict of interest. See, e.g., Oregon RPC 1.7,<sup>1</sup> discussed in OSB Formal Ethics Op No 2005-28.

---

<sup>1</sup> Oregon RPC 1.7 provides:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:
  - (1) the representation of one client will be directly adverse to another client;
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or
  - (3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.
- (b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:
  - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

Nevertheless, and as long as Lawyer A and Lawyer B (1) do not hold themselves out to the public as members of the same firm through joint advertising, a joint letterhead, or otherwise; (2) respect the confidentiality of information relating to the representation of their respective clients and cause their employees to do so; and (3) keep their respective files separately, there is no reason why Lawyer A and Lawyer B cannot represent opposite parties. *See also* Oregon RPC 1.0(d).<sup>2</sup>

We do not believe that these requirements prohibit office sharers from using the same telephone system or the same file room as long as the files are physically separated and the appropriate limitations on access to files are made clear to, and are observed by, the lawyers and their employees. If a common telephone system is used, however, office sharers may not represent adverse parties unless they have taken steps to assure that telephone messages that contain confidential client information or legal advice (i.e., information relating to the representation of a client<sup>3</sup>) are not given to or transmitted by shared personnel. Similarly, mail must not be opened by shared personnel.

- 
- (2) the representation is not prohibited by law;
  - (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
  - (4) each affected client gives informed consent, confirmed in writing.

<sup>2</sup> Oregon RPC 1.0(d) provides:

“Firm” or “law firm” denotes a lawyer or lawyers, including “Of Counsel” lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

<sup>3</sup> Oregon RPC 1.6 provides, in pertinent part:

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

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

- (1) to disclose the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime;
- (2) to prevent reasonably certain death or substantial bodily harm;
- (3) to secure legal advice about the lawyer’s compliance with these Rules;

If, on the other hand, Lawyer A and Lawyer B share a secretary or other employee who is in possession of the confidences or secrets of both Lawyer A's clients and Lawyer B's clients, or if any of the other steps outlined above are not taken, the simultaneous representations of the plaintiff and the defendant would be prohibited by either if not both Oregon RPC 1.6 and Oregon RPC 1.7. *See also* Oregon RPC 1.0(f).<sup>4</sup> *Cf.* OSB Formal Ethics Op Nos 2005-44, 2005-28, 2005-12.

Approved by Board of Governors, ~~August 2005~~ April 2014.

---

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) ~~in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17. . . .~~

~~(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. . . .~~

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

<sup>4</sup> Oregon RPC 1.0(f) provides:

Information relating to the representation of a client" denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested by held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

COMMENT: For additional information on this general topic and related subjects, see THE ETHICAL OREGON LAWYER §§2.19, 9.23, 12.3–12.5 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §123 (2003); and ABA Model Rules 1.6, 1.7. *See also* Barbara Fishleder, *Office Sharing*, 52 OSB BULLETIN 23 (June 1992). *Cf. State v. Charlesworth/Parks*, 151 Or App 100, 951 P2d 153 (1997) (*former* DR 4-101(D) imposed duty to exercise reasonable care to prevent employees from disclosing client secrets; but this rule is not ground to suppress evidence obtained as result of the disclosure).

**FORMAL OPINION NO. 2005-55**

**[REVISED 2014]**

**Lawyer as Escrow Agent**

**Facts:**

Lawyer has a substantial business practice.

**Questions:**

1. May Lawyer act as escrow agent in a transaction in which Lawyer represents none of the parties?
2. May Lawyer act as escrow agent in a transaction in which Lawyer represents one of the parties?
3. If the answer to the second question is no, may Lawyer nonetheless hold client funds, documents, or other property pursuant to the terms of an agreement between Lawyer's client and the other party to the agreement?

**Conclusions:**

1. Yes.
2. No.
3. Yes, qualified.

**Discussion:**

The word "escrow" by definition means 'neutral,' independent from the parties to the transaction." *Banif Corp v. Black*, 12 Or App 385, 388, 507 P2d 49 (1973); ORS 696.505(3). There is no reason that a lawyer cannot play this role in a transaction in which the lawyer does not represent any of the parties. Cf. ORS 696.520(2), which exempts from the definitions and restrictions of the statute a lawyer "rendering services in the performance of duties as attorney at law." See also Oregon RPC 2.4, permitting lawyers to act as mediators.<sup>1</sup>

---

<sup>1</sup> Oregon RPC 2.4 provides:

- (a) A lawyer serving as a mediator:
  - (1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and
  - (2) must clearly inform the parties of and obtain the parties' consent to the lawyer's role as mediator.
- (b) A lawyer serving as a mediator:
  - (1) may prepare documents that memorialize and implement the agreement reached in mediation;

On the other hand, a lawyer cannot simultaneously be both counsel to a party to a transaction and a neutral escrow agent for the transaction. *Cf. In re Phelps*, 306 Or 508, 510 n 1, 760 P2d 1331 (1988); *In re Barrett*, 269 Or 264, 524 P2d 1208 (1974). The obligation of neutrality is in direct contradiction to the obligations that a lawyer has to a client. The simultaneous role would constitute a situation in which there is a significant risk that the representation of the client will be materially limited by the lawyer’s responsibilities as a neutral escrow, in violation of Oregon RPC 1.7(a)(2). This self-interest conflict can be waived only if the lawyer has the informed consent of the client as required by Oregon RPC 1.7(b). Moreover, the lawyer’s failure to disclose the dual role to the other party would be tantamount to “conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law” in violation of Oregon RPC 8.4(a)(3).<sup>2</sup>

There is no reason, however, a lawyer cannot hold client funds, documents, or other property as part of a transaction involving a client as long as the lawyer is not described as an

---

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

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

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

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

<sup>2</sup> Because of these conclusions, it is unnecessary to consider the potential applicability of Oregon RPC 1.8 and 5.4(c). For opinions discussing these rules, see, e.g., OSB Formal Ethics Op Nos 2005-10, 2005-22, and 2005-30.

“escrow agent” and the lawyer’s role is not otherwise misdescribed or misrepresented. With regard to the duty to hold client funds in trust accounts, see OSB Formal Ethics Op No 2005-48.

Approved by Board of Governors, ~~August 2005~~ April 2014.

**DRAFT**

---

COMMENT: For more information on this general topic and related subjects, see THE ETHICAL OREGON LAWYER §11.1 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§4 comment c, 44 comment b, 48 comment d (2003); and ABA Model Rules 2.6, 8.4(c). *See also In re Benjamin*, 312 Or 515, 823 P2d 413 (1991) (disbarring lawyer for spending \$1,900 of client’s money while acting as escrow agent and for withholding in lawyer’s trust account \$480 that belonged to client).

**FORMAL OPINION NO. 2005-81**

**[REVISED 2014]**

**Communicating with Represented Persons: Information Relating to the  
Representation of a Client,  
Second Opinions**

**Facts:**

Lawyer A is approached by Potential Client. Potential Client tells Lawyer A that Potential Client is unhappy with work being done for Potential Client by Lawyer B. Potential Client asks Lawyer A for a second opinion.

**Questions:**

1. May Lawyer A provide the second opinion?
2. May Lawyer A inform Lawyer B of Potential Client's request?

**Conclusions:**

1. Yes.
2. No, qualified.

**Discussion:**

Oregon RPC 4.2 provides:

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

- (a) the lawyer has the prior consent of a lawyer representing such other person;
- (b) the lawyer is authorized by law or by court order to do so; or
- (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

This rule applies when a lawyer is representing a client or the lawyer's own interests in a matter, but not when the lawyer is approached by a prospective client. Neither this rule or its predecessor, *former* DR 7-104, has ever been interpreted to prohibit a lawyer from providing a

second opinion to a represented party. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS<sup>1</sup> and ABA Model Rule 4.2.<sup>2</sup>

Whether Lawyer A can inform Lawyer B of Potential Client's request depends on ORS 9.460(3)<sup>3</sup> and Oregon RPC 1.6.<sup>4</sup> *Cf. State v. Keenan/Waller*, 307 Or 515, 771 P2d 244 (1989).

---

<sup>1</sup> A lawyer who does not represent a person in the matter and who is approached by an already-represented person seeking a second professional opinion or wishing to discuss changing lawyers or retaining additional counsel may, without consent from or notice to the original lawyer, respond to the request, including giving an opinion concerning the propriety of the first lawyer's representation. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §99 comment c (2003).

<sup>2</sup> “[T]his Rule [does not] preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.” ABA Model Rule 4.2 comment [4] (2002).

Other jurisdictions have issued ethics opinions similar to the Oregon position. *See, e.g.*, Florida Ethics Op No 02-5; South Carolina Ethics Op No 97-07; Utah Ethics Op No 110 (1993); Philadelphia Ethics Op Nos 91-32 and 2004-1; Kentucky Ethics Op No E-325 (1987); Michigan Ethics Op No CI-883 (1983).

<sup>3</sup> ORS 9.460(3) provides that a lawyer shall “[m]aintain the confidences and secrets of the lawyer’s clients consistent with the rules of professional conduct established pursuant to ORS 9.490.”

<sup>4</sup> Oregon RPC 1.6 provides:

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

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

(1) to disclose the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer’s compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

Potential Client's request for a second opinion would be information relating to the representation of the client. Consequently, Lawyer A cannot reveal this request to Lawyer B unless Potential Client consents or one of the other exceptions to the duty of confidentiality within Oregon RPC 1.6 applies. Cf. OSB Formal Ethics Op No 2005-23.

Approved by Board of Governors, ~~August 2005~~ April 2014.

---

~~(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.~~

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

~~(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. 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 of such clients whether or not the sale of the practice closes or the client ultimately consents to the representation by the purchasing lawyer.~~

COMMENT: For additional resources on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§5.1–5.3, 5.10, 6.1–6.5, 6.8, 7.42–7.43, 7.46 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§99–100, 102 (2003); and ABA Model Rules 1.6, 4.2.

FORMAL OPINION NO. 2005-95

**[REVISED 2014]**

**Duty to Report Misconduct**

**Facts:**

During the course of representing Client, Lawyer A learns that Lawyer B, who formerly represented Client, and Lawyer C, who never represented Client, have violated the Oregon RPCs.

When Lawyer A discusses these observations with Client, Client informs Lawyer A that Client does not wish Lawyer A to report these violations to the Oregon State Bar because doing so could embarrass Client or could otherwise harm Client.

**Questions:**

1. May Lawyer A report Lawyer B's or Lawyer C's violations?
2. If no information relating to the representation of a client is involved, when must a lawyer report another lawyer's violation of an Oregon RPC?

**Conclusions:**

1. No.
2. See discussion.

**Discussion:**

Oregon RPC 8.3 provides, in pertinent part:

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Oregon State Bar Client Assistance Office.

....

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6 or ORS 9.460(3). . . .

Pursuant to this rule, a lawyer may not report another lawyer's Oregon RPC violation if the source of knowledge of the violation is protected by Oregon RPC 1.6 or ORS 9.460(3), unless one of the exceptions permitting disclosure is present. In the present circumstance, it appears that no exception permitting disclosure is available. *Cf.* OSB Formal Ethics Op No 2005-81; ORS 9.460(3);<sup>1</sup> Oregon RPC 1.6.<sup>2</sup>

---

<sup>1</sup> ORS 9.460(3) requires a lawyer to "[m]aintain the confidences and secrets of the lawyer's clients consistent with the rules of professional conduct established pursuant to ORS 9.490." For a discussion of the relationship between ORS 9.460(3) and *former* DR 4-101 (current Oregon RPC 1.6), see *State v. Keenan/Waller*, 307 Or 515, 771 P2d 244 (1989).

---

<sup>2</sup> Oregon RPC 1.6 provides:

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

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

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

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

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

Even if Client authorizes or consents to the report to the Oregon State Bar,<sup>3</sup> Lawyer would be required to report a violation only if Lawyer knows,<sup>4</sup> rather than merely suspects, that the violation occurred and if the violation raises “a substantial question as to [the reported] lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” This language in Oregon RPC 8.3(a) is identical to the language in ABA Model Rule 8.3. The official comment to ABA Model Rule 8.3 provides, in pertinent part:

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. *The term “substantial” refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.* A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct. [Emphasis supplied.]

*See 2 GEOFFREY C. HAZARD JR. & W. WILLIAM HODES, THE LAW OF LAWYERING §64.3 (3d ed 2001) (“the rule [applies] to cases of known violations that directly implicate the integrity of the legal profession. . . . Merely technical violations of the conflict of interest rules, for example, would not qualify, whereas destruction of evidence under subpoena, suborning perjury, or self-dealing with trust funds would.”). See also Arizona State Bar Op No 87-26, 4 ABA/BNA Lawyers’ Manual on Professional Conduct 449 (1988 & supps) (willful failure to file tax returns meets “substantial question” test).*

**Approved by Board of Governors, ~~August 2005~~ April 2014.**

---

~~such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.~~

<sup>3</sup> If Client directs Lawyer to report a rule violation to the bar, Lawyer must do so. *Cf.* OSB Formal Ethics Op No 2005-26.

<sup>4</sup> Oregon RPC 1.0(h) defines *knows* as “actual knowledge of the fact in question. . . . A person’s knowledge may be inferred from circumstances.”

---

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§6.2–6.4, 6.8, 6.11–6.12, 12.23, 13.2–13.8, 20.1–20.15 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§5, 78 (2003); and ABA Model Rules 1.6, 8.3. *See also* Washington Formal Ethics Op No 175; Washington Informal Ethics Op Nos 1247, 1633, 1701 (unpublished).

DRAFT

**FORMAL OPINION NO. 2005-96**  
**[REVISED 2014]**  
**Information Relating to the Representation of a Client:**  
**Notarial Journals**

**Facts:**

Pursuant to ORS 194.152, an Oregon notary must keep a journal that contains the name, address, and signature of the person who signs certain notarized documents, as well as a notation of the type of document signed. When lawyers or members of their office staff are notaries, the persons whose documents are notarized may be clients.

**Question:**

What steps, if any, must a lawyer take or cause the lawyer's staff to take to protect subsequent signers of the notarial journal from reviewing prior entries?

**Conclusion:**

See discussion.

**Discussion:**

ORS 9.460(3) provides that a lawyer must “[m]aintain the confidences and secrets of the lawyer’s clients consistent with the rules of professional conduct established pursuant to ORS 9.490.” Oregon RPC 1.6 also offers broad protection to information relating to the representation of a client.<sup>1</sup> *See also State v. Keenan/Waller*, 307 Or 515, 771 P2d 244 (1989); OSB Formal Ethics Op Nos 2005-81, 2005-141.

---

<sup>1</sup> Oregon RPC 1.6 provides:

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

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

(1) to disclose the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer’s compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against

If the information pertaining to a prior notarization constitutes or contains protected client information, lawyers must prohibit, and cause their office staff to prohibit, subsequent signers from reviewing these confidences or secrets. Presumably, this can be done either by covering over the names and signatures of other clients at the time of the subsequent signing or by having a separate page of the journal for notarial actions in which protected information relating to the representation of a client is involved.

---

the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

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

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

~~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 of such clients whether or not the sale of the practice closes or the client ultimately consents to the representation by the purchasing lawyer.~~

COMMENT: For additional information relating to this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§6.1–6.8, 15.21 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§59–60, 68–72, 77, 80 (2003); and ABA Model Rule 1.6. *See also* Washington Formal Ethics Op No 175.

Approved by Board of Governors, ~~August 2005~~April 2014.

DRAFT

**FORMAL OPINION NO. 2005-117**

**[REVISED 2014]**

**Trust Accounts:  
Funds Held in IOLTA or Non-IOLTA Account,  
Types of Depository Institutions**

**Facts:**

Lawyer represents Defendant in litigation. In aid of settlement negotiations, Defendant forwards a substantial sum to Lawyer so that Lawyer will be in a position to effect payment promptly if a settlement is reached in the future. Defendant would like to see to it that the maximum possible rate of return is earned on the funds while the funds are held by Lawyer.

**Question:**

What limits exist on the type of institution or type of account in which Lawyer can place Defendant's funds?

**Conclusion:**

See discussion.

**Discussion:**

Oregon RPC 1.15-1(a) provides, in pertinent part:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to Rule 1.15-2. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

Oregon RPC 1.15-2 provides, in pertinent part:

(a) A lawyer trust account for client funds that cannot earn interest in excess of the costs of generating such interest ("net interest") shall be referred to as an IOLTA (Interest on Lawyer Trust Accounts) account. A lawyer or law firm establishing an IOLTA account shall so advise the Oregon Law Foundation in writing within 30 days of its establishment.

(b) All client funds shall be deposited in the lawyer's or law firm's IOLTA account unless a particular client's funds can earn net interest. All interest earned by funds held in the IOLTA account shall be paid to the Oregon Law Foundation as provided in this rule.

(c) Client funds that can earn net interest shall be deposited in an interest bearing trust account for the client's benefit and the net interest earned by funds in such an account shall be held in trust as property of the client in the same manner as is provided in paragraphs (a) through (d) of Rule 1.15-1 for the principal funds of the client. The interest bearing account shall be either:

- (1) a separate account for each particular client or client matter; or
- (2) a pooled lawyer trust account with subaccounting which will provide for computation of interest earned by each client's funds and the payment thereof, net of any bank service charges, to each client.

(d) In determining whether client funds can or cannot earn net interest, the lawyer or law firm shall consider the following factors:

- (1) the amount of the funds to be deposited;
- (2) the expected duration of the deposit, including the likelihood of delay in that matter for which the funds are held;
- (3) the rates of interest at financial institutions where the funds are to be deposited;
- (4) the cost of establishing and administering a separate interest bearing lawyer trust account for the client's benefit, including service charges imposed by financial institutions, the cost of the lawyer or law firm's services, and the cost of preparing any tax-related documents to report or account for income accruing to the client's benefit;
- (5) the capability of financial institutions, the lawyer or the law firm to calculate and pay income to individual clients; and
- (6) any other circumstances that affect the ability of the client's funds to earn a net return for the client.

(e) The lawyer or law firm shall review the IOLTA account at reasonable intervals to determine whether circumstances have changed that require further action with respect to the funds of a particular client.

(f) If a lawyer or law firm determine that a particular client's funds in an IOLTA account either did or can earn net interest, the lawyer shall transfer the funds into an account specified in paragraph (c) of this rule and request a refund for the lesser of either: any interest earned by the client's funds and remitted to the Oregon Law Foundation; or the interest the client's funds would have earned had those funds been placed in an interest bearing account for the benefit of the client at the same bank.~~any interest earned by the client's funds that may have been remitted to the Oregon Law Foundation.~~

(1) The request shall be made in writing to the Oregon Law Foundation within a reasonable period of time after the interest was remitted to the Foundation and shall be accompanied by written verification from the financial institution of the interest amount.

(2) The Oregon Law Foundation will not refund more than the amount of interest it received from the client's funds in question. The refund shall be remitted to the

financial institution for transmittal to the lawyer or law firm, after appropriate accounting and reporting.

(g) No earnings from a lawyer trust account shall be made available to a lawyer or the lawyer's firm.

(h) A lawyer or law firm may maintain a lawyer trust account only at a financial institution that:

(1) is authorized by state or federal banking laws to transact banking business in the state where the account is maintained;

(2) is insured by the Federal deposit Insurance Corporation or an analogous federal government agency;

(3) has entered into an agreement with the Oregon Law Foundation:

(i) to remit to the Oregon Law Foundation, at least quarterly, interest earned on the average daily balance in the lawyer's or law firm's IOLTA account, less reasonable service charges, if any; and

(ii) to deliver to the Oregon Law Foundation a report with each remittance showing the name of the lawyer or law firm for whom the remittance is sent, the number of the IOLTA account as assigned by the financial institution, the average daily account balance for each month for which the remittance is made, the rate of interest applied, the period for which the remittance is made, and the amount and description of any service charges deducted during the remittance period; and

(4) has entered into an overdraft notification agreement with the Oregon State Bar requiring the financial institution to report to the Oregon State Bar Disciplinary Counsel when any properly payable instrument is presented against such account containing insufficient funds, whether or not the instrument is honored.

Because the amount of money involved is substantial and is expected to be held for enough time that it could earn net interest, Defendant's funds must be placed in an interest-bearing trust account in one of the institutions identified in Oregon RPC 1.15-2(h), with the interest accruing to the benefit of the client. Oregon RPC 1.15-2(c).

Nothing in Oregon RPC 1.15-2 prohibits Defendant from waiving the right to interest earned on funds held by Lawyer and authorizing the payment of the interest to the Oregon Law Foundation. There may be tax implications in Defendant's waiver of interest income and the corollary charitable contribution. Lawyer should inform Defendant of that possibility and recommend that Defendant seek independent tax advice before deciding how to proceed. If Lawyer chooses to advise Defendant on this point, Lawyer may have a self-interest conflict under Oregon RPC 1.7(a)(2) in giving such advice and, if so, must obtain Defendant's informed consent pursuant to Oregon RPC 1.7(b). If those steps are followed, Lawyer may, with Defendant's agreement, deposit Defendant's funds into Lawyer's IOLTA trust account.<sup>1</sup>

---

<sup>1</sup> Although the client is not required to give "informed consent" to the waiver, we believe that Oregon RPC 1.4(b) applies to this situation: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Approved by Board of Governors, ~~August 2005~~April 2014.

DRAFT

---

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§11.1–11.5, 11.7, 11.9, 11.11–11.13 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§44–45 (2003); and ABA Model Rule 1.15. *See also* Washington Formal Ethics Op Nos 174, 193.

**FORMAL OPINION NO. 2005-129**

**[REVISED 2014]**

**Competent Representation,  
Information Relating to the Representation of a Client:  
Responsibilities on Death of a Sole Practitioner**

**Facts:**

Lawyer is a sole practitioner with no partners, associates, or employees. Lawyer's files contain information relating to the representation of clients.

**Questions:**

1. Must Lawyer take steps to safeguard the interests of Lawyer's clients, and the information relating to their representations, if Lawyer dies or is disabled?
2. If Lawyer makes arrangements for a successor lawyer to disburse his or her files if Lawyer dies or becomes disabled, what steps must or may the successor lawyer undertake?

**Conclusions:**

1. See discussion.
2. See discussion.

**Discussion:**

Oregon RPC 1.1 provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Oregon RPC 1.6(a) provides:

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).<sup>1</sup>

---

<sup>1</sup> Oregon RPC 1.6(b) provides:

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

- (1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
- (2) to prevent reasonably certain death or substantial bodily harm;
- (3) to secure legal advice about the lawyer's compliance with these Rules;
- (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

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

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

~~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 of~~

ORS 9.705–9.755 set forth a statutory scheme pursuant to which a nonperforming lawyer’s law practice may be placed under the jurisdiction of the court and steps taken to protect the interests of the nonperforming lawyer’s clients. For a lawyer who has no partners, associates, or employees, however, there could well be a significant lapse of time after the lawyer’s death or disability during which the lawyer’s telephone would go unanswered, mail would be unopened, deadlines would not be met, and the like.

The duty of competent representation includes, at a minimum, making sure that someone will step in to avoid client prejudice in such circumstances. The person may, but need not, be a lawyer. Depending on the circumstances, it may be sufficient to instruct the person that if the lawyer dies or becomes disabled, the person should contact the presiding judge of the county circuit court so that the procedure set forth in ORS 9.705–9.755 can be commenced.<sup>2</sup> The person also should be instructed, however, about the lawyer’s duties to protect information relating to the representation of a client pursuant to Oregon RPC 1.6. *Cf.* OSB Formal Ethics Op Nos 2005-50, 2005-44, 2005-23.

A lawyer may, however, go further than this and may specifically arrange for another lawyer to come in and disburse the lawyer’s files if the lawyer dies or becomes disabled. Nothing in ORS 9.705–9.755 makes it the exclusive means of handling such circumstances. Like a court-

---

~~such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.~~

*See also* Oregon RPC 5.3:

With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and

(b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the 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 person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

<sup>2</sup> There may be circumstances, however, in which the lawyer must do more. This would be true if, for example, a client were to request that particular steps be taken. It would also be true if the lawyer learns in advance that he or she would be able to continue practicing law for only a limited additional time. In this event, the lawyer should begin the process of notifying the lawyer’s clients as soon as possible to inquire how each client wishes to have his or her files handled.

appointed custodial lawyer, a voluntary lawyer must be mindful of the need to protect the client's confidential information. Also like a court-appointed custodial lawyer, the voluntary lawyer must promptly inform the clients of the sole practitioner that the voluntary lawyer has possession of the client's files and must inquire what the clients wish the voluntary lawyer to do with the files.

DRAFT

Unlike the court-appointed custodial lawyer, however, the voluntary lawyer may offer in writing to take over the work of the lawyer's clients, if the voluntary lawyer complies with Oregon RPC 7.3 on solicitation of clients.<sup>3</sup> *Cf.* ORS 9.730; OSB Formal Ethics Op No 2005-127.

Approved by Board of Governors, ~~August 2005~~April 2014.

DRAFT

---

<sup>3</sup> The voluntary lawyer could not do so if, for example, the voluntary lawyer is not qualified to handle the work in question or if doing so would create conflict of interest problems under Oregon RPC 1.7. *Cf.* Oregon RPC 1.1; OSB Formal Ethics Op Nos 2005-119, 2005-110. With regard to the sale of a law practice, see Oregon RPC 1.17.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§7.2–7.5 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§16, 59–60 (2003); and ABA Model Rules 1.1, 1.6.

**FORMAL OPINION NO. 2005-133**

**[REVISED 2014]**

**Attorney Fees:  
Financing Arrangement**

**Facts:**

A company owned by nonlawyers (“Company”) offers a plan in Oregon (“the Financing Plan”) to enable clients to finance legal fees through Company. Under the Financing Plan, participating lawyers negotiate fee agreements with their clients in accordance with their customary practice. In appropriate circumstances, however, Lawyer may inform Client of the availability of the Financing Plan. If Client is interested, Lawyer will describe the Financing Plan in greater detail.<sup>1</sup> If Client is interested in using the Financing Plan, Client will complete Company’s written credit application at Lawyer’s office, and Lawyer will forward to the application Company.<sup>2</sup>

Company will review the credit application and, if it is approved, establish a “credit facility” for Client to pay Lawyer’s legal fees up to the credit limit established by Company.

---

<sup>1</sup> It is assumed that either Company or Lawyer will provide Client full disclosure regarding the interest rate charged and all other material terms and conditions of the credit agreement used in connection with the Financing Plan. It is also assumed that all disclosures required under Regulation Z and Oregon consumer lending laws will be properly given and that the terms of the Financing Plan and the documents used in connection with the Financing Plan will be consistent with all applicable credit laws. Failure to comply with these requirements could involve Lawyer’s violation of applicable substantive law as well as Oregon RPC 8.4(a)(3), which provides that it is professional misconduct for a lawyer to “[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

<sup>2</sup> It is assumed that the Financing Plan will not be actively marketed to the public by either Company or Lawyer and that in discussing the Financing Plan option with Client, Lawyer will present the option in a low-key, factual manner, as a convenience to Client without attempting to induce Client to choose this option. Public advertising of the Financing Plan could raise issues under Oregon RPC 7.1–7.3 (advertising and solicitation).

Lawyer will submit a voucher to Company as services are rendered. Only vouchers for uncontested services will be submitted to Company. Before Lawyer submits a voucher to Company, Client must confirm that the amount of the voucher is appropriate for the services.<sup>3</sup> Vouchers will be submitted only for services actually rendered.<sup>4</sup>

On receipt of a voucher, Company will pay to Lawyer the amount of the voucher (up to Client's unused credit limit), minus a service charge of 10%.

Client must repay the amount of each voucher plus interest, on an installment basis. Interest will be charged at a rate that is comparable to the rates of interest charged on bank credit cards. Company will require Client to deposit a substantial reserve to reduce Company's collection risks.

Company will be responsible for collecting amounts owed by Client and, with certain limited exceptions, Company will have no recourse against Lawyer for uncollected amounts.

**Question:**

May Lawyer participate in the Financing Plan?

**Conclusion:**

Yes, qualified.

**Discussion:**

The Financing Plan is designed to serve the interests of both Lawyer and Client. The Financing Plan enables Lawyer to reduce the risk of nonpayment by Client and to reduce the delay and expense involved in collecting client accounts. At the same time, it enables Client to finance legal fees through a credit facility offered by Company.

---

<sup>3</sup> If such approvals result in Client's waiver of his or her rights to contest the legal fee at a later point in the representation, the Financing Plan would create a conflict of interest under Oregon RPC 1.7. See discussion at 2.a below.

<sup>4</sup> If payments are received for future services, Lawyer may be required to deposit such payments in his or her trust account. *See* Oregon RPC 1.15.

Discussed below are potential issues raised under the Oregon RPC by each of these aspects of the Financing Plan.

1. *Collection Aspect.*

Oregon RPC 5.4(a) provides:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm or firm members may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons.

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(5) a lawyer may pay the usual charges of a bar-sponsored or operated not-for-profit lawyer referral service, including fees calculated as a percentage of legal fees received by the lawyer from a referral.

Because Company will deduct 10% as a service charge from loan proceeds used to pay the legal fees, an issue arises whether such arrangement constitutes an impermissible division of legal fees by Lawyer and a nonlawyer. The purpose of Oregon RPC 5.4(a), however, is to protect Lawyer's professional independence of judgment. It does not prohibit Lawyer from using a nonlawyer to collect legal fees, even when the nonlawyer is paid from the collected fees. *See In re Griffith*, 304 Or 575, 611, 748 P2d 86 (1987).

2. *Financing Aspect.*

As a general matter, the financing aspect of the Financing Plan is analogous to Client's using a credit card to finance legal fees. See OSB Formal Ethics Op No 2005-97, which recognizes that lawyers may accept credit cards for payment of legal fees. In addition, that opinion sanctioned a rate of interest comparable to that charged on "many credit cards."<sup>5</sup>

---

<sup>5</sup> If the Financing Plan involves an excessive interest rate, it is possible that Lawyer's fee could be deemed excessive. *See* Oregon RPC 1.15. *See also* OSB Formal Ethics Op No 2005-98 (lawyer could enter into flat fee arrangement that might result in more or less fees than what lawyer would earn under hourly billing rate; question is not whether lawyer would earn more than permissible hourly billing rate with respect to particular case but "whether agreement, as a whole, provides excessive compensation"); OSB Formal Ethics Op No 2005-54 (agreement that transforms contingent fee into hourly fee if client rejects settlement offer that lawyer

Nevertheless, the financing aspect of the Financing Plan raises two potential issues that should be considered:

a. *Conflict of interest.*

Oregon RPC 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

...

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer;

....

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.

Oregon RPC 1.0(b) and (g) provide:

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

....

(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

---

deems reasonable could "very well turn an otherwise lawful fee into a 'clearly excessive fee'").

Although negotiation of fee arrangements with clients does not, in general, involve a conflict of interest under Oregon RPC 1.7, certain features of the Financing Plan might not be in a particular client's best interest, which could create a conflict of interest for Lawyer's offering the Financing Plan to Client. For example, Lawyer may have an incentive to encourage Client to participate in the Financing Plan to accelerate Lawyer's receipt of fees or to avoid the risk and expense of collecting fees. If there is a significant risk that Lawyer's professional judgment will be materially limited by Lawyer's own financial interest in having Client choose this payment option, then Lawyer should not offer the Financing Plan to Client without obtaining Client's consent to acceptance or continuation of the employment relationship based on informed consent, confirmed in writing. Oregon RPC 1.7(a)(2), (b).<sup>6</sup>

b. *Preservation of information relating to the representation of a client.*

Oregon RPC 1.6 provides:

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

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

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

---

<sup>6</sup> If the Financing Plan were structured so that Client's obligation to repay Company is not subject to all the claims and defenses arising in connection with the legal representation that Client could assert against Lawyer, the Financing Plan could significantly diminish Client's rights. Under such circumstances, disclosure of this fact would be required to meet the requirements of Oregon RPC 1.7 and 1.0.

(6) \_\_\_\_\_ in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

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

(c) \_\_\_\_\_ A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. ~~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 of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.~~

It is possible that the Financing Plan could involve disclosure of information relating to the representation of Client through the submission of detailed billing vouchers. Either appropriate permission to disclose must be obtained from Client or the vouchers must not disclose protected information.

Approved by Board of Governors, ~~August 2005~~ April 2014.

---

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§3.22, 3.32 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§10, 59–62, 125 (2003); and ABA Model Rules 1.6–1.7, 5.4.

FORMAL OPINION NO. 2005-136

**[REVISED 2014]**

**Information Relating to the Representation of a Client:  
Lawyer's Wrongful Termination Claim**

**Facts:**

Lawyer is in-house counsel and general manager of Company. In the course of applying for a patent on behalf of Company, Lawyer learned that the product was not invented by Company, but was in fact invented by Company's customer. The patent application required Lawyer to swear on behalf of Company that Company was the "original and first inventor." A person who makes a misrepresentation on a patent application is subject to criminal prosecution. Lawyer refused to make the representation that Company was the original and first inventor, and was fired. Lawyer wishes to pursue a civil action for wrongful termination in which it will be necessary to disclose information about these events.

**Question:**

May Lawyer bring a civil action for wrongful termination if bringing the action requires disclosure of information relating to Lawyer's representation of Company?

**Conclusion:**

Yes, qualified.

**Discussion:**

Relying on the general rule that "a client may terminate the relationship between himself and his lawyer with or without cause,"<sup>1</sup> some courts decline to recognize the tort of wrongful discharge in the case of in-house counsel. Some courts reach that conclusion, in part, because recognizing the claim would permit lawyers to disclose client confidences and secrets. *Balla v. Gambro, Inc.*, 585 NE2d 104, 109, 145 Ill2d 492 (1991); *Eckhous v. Alfa-Laval, Inc.*, 764 F Supp 34, 37 (SDNY). There are presently no dispositive Oregon Supreme Court cases on this issue.

---

<sup>1</sup> *Herbster v. North American Co. For Life & Health Insurance*, 501 NE2d 343 (Ill 1986). See generally D. Reynolds, *Wrongful Discharge of Employed Counsel*, 1 GEO J LEGAL ETHICS 553 (1988).

A discussion of whether, or under what circumstances, a former in-house counsel can state a claim for wrongful termination is a matter of substantive law, and beyond the scope of this opinion. For purposes of discussion, however, we assume that such a claim can be stated.

In asserting such a claim, Lawyer is bound by Oregon RPC 1.6, which provides:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
  - (2) to prevent reasonably certain death or substantial bodily harm;
  - (3) to secure legal advice about the lawyer's compliance with these Rules;
  - (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
  - (5) to comply with other law, court order, or as permitted by these Rules; or
  - (6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.
  - (7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.  
~~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 of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.~~

*See also* ORS 9.460(3). Lawyer is bound to protect information relating to the representation of Company even after termination of employment. OSB Formal Ethics Op No 2005-23.

Because the information at issue here is protected from disclosure by Oregon RPC 1.6, Lawyer may not use it in the claim for wrongful termination unless one of the applicable exceptions is satisfied. Oregon RPC 1.6(b)(4) applies to a “claim or defense on behalf of a lawyer in a controversy between the lawyer and the client.” If a legally viable and nonfrivolous claim exists, disclosure may be made. Nevertheless, there are limits on how much Lawyer may reveal and the circumstances of the revelation. The information that Lawyer seeks to disclose must be reasonably necessary to establish the claim asserted. *See* OSB Formal Ethics Op No 2005-104. Lawyer must ensure that any confidential information is revealed in the least public manner, including insistence on an appropriate protective order. *Cf. In re Huffman*, 328 Or 567, 983 P2d 534 (1999) (lawyer disciplined for making disclosures of confidential information that were not required for lawyer to assert viable defense).

Approved by Board of Governors, ~~August 2005~~April 2014.

---

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§4.3, 6.13 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§59–60, 64–65 (2003); and ABA Model Rule 1.6.

DRAFT

**FORMAL OPINION NO. 2005-148**

**[REVISED 2014]**

**Conflicts of Interest, Former Clients:  
Representing One Spouse in Dissolution  
aAfter Joint Estate Planning**

**Facts:**

Lawyer previously represented Wife and Husband in family estate-planning matters. Wife now has asked Lawyer to represent her in the dissolution of the parties' marriage. Neither Husband nor Wife is still a current client of Lawyer.

**Question:**

May Lawyer undertake the representation of Wife against Husband in the dissolution proceedings?

**Conclusion:**

See discussion.

**Discussion:**

1. *Former Client Conflicts Generally.*

Oregon RPC 1.9(a) and (c) provide:

(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.

....

(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.

Oregon RPC 1.0(b) and (g) provide:

(b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

. . . .

(g) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be give

Finally, Oregon RPC 1.6(a) provides:

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).<sup>1</sup>

---

<sup>1</sup> The exceptions in Oregon RPC 1.6(b) do not apply here:

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

- (1) to disclose the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime;
- (2) to prevent reasonably certain death or substantial bodily harm;
- (3) to secure legal advice about the lawyer’s compliance with these Rules;
- (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;
- (5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client’s identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

In this scenario, Wife is a potential current client and Husband is a former client. It is necessary to determine whether the proposed representation would constitute a former client conflict under Oregon RPC 1.9(a). We do this by determining whether the current and former matters are the same or substantially related within the meaning of the rule. As with former client conflicts under *former* DR 5-105(C), matters are substantially related if there is either a matter-specific conflict as discussed in OSB Formal Ethics Op No 2005-11 or an information-specific former client conflict as discussed in OSB Formal Ethics Op No 2005-17. If either type of former client conflict exists, Lawyer may proceed only if both Wife and Husband give their informed consent and the consent is suitably confirmed in writing. If neither type of former client conflict exists, Lawyer may proceed without the consent of either Husband or Wife.

On the limited facts presented, it does not appear that Lawyer would be in possession of information relating to the representation of Husband that would not already be known to Wife or to which Wife would not otherwise have access. *Cf. In re Brandsness*, 299 Or 420, 702 P2d 1098 (1985); OEC 503(4)(e) (no privilege as between jointly represented clients who have a falling-out); OSB Formal Ethics Op No 2005-17. If this is so, no information-specific former client conflict would exist.

Are the estate planning and the marital dissolution the same or substantially related matters because they are “matter-specific”? Without more, it cannot be said that estate planning on the one hand and marital dissolution on the other constitute the same matter. *See, e.g., PGE v. Duncan, Weinberg, Miller & Pembroke*, 162 Or App 265, 986 P2d 35 (1999); *cf.* OSB Formal Ethics Op No 2005-11.

---

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

---

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

~~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 of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.~~

The key question, then, is whether Lawyer's representation of Wife in the marital dissolution is a matter-specific conflict because it will work to Husband's injury or prejudice in connection with the estate planning that Lawyer did for him. Even though it may generally be true, pursuant to ORS 112.315, that a divorce revokes all provisions in a will in favor of the testator's former spouse, the revocation of wills in that manner is not sufficient to create a conflict of interest unless the parties are legally bound not to revoke or change their wills. *Cf.* ABA Formal Ethics Op No 05-434 (absent additional factors, there is no conflict in representing testator in disinheriting beneficiary who is also client, because testator is free to change will at any time).

If, however, Wife and Husband had legally bound themselves not to change their wills or if Lawyer's representation of Wife would require Lawyer to try to wrest control away from Husband of business or estate planning entities that Lawyer had formed while representing Wife and Husband, a matter-specific former client conflict would exist. *In re Brandsness, supra.* In this case, Lawyer could not represent Wife adversely to Husband in the marital dissolution without first obtaining informed consent from both Wife and Husband that is confirmed in writing.

Approved by Board of Governors, ~~August 2005~~ April 2014.

---

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§9.3–9.6 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§121, 132 (2003); and ABA Model Rule 1.9.

DRAFT

**FORMAL OPINION NO. 2005-155**

**[REVISED 2014]**

**Conflicts of Interest:  
Multiple “Of Counsel” Relationships**

**Facts:**

Lawyer *A* operates Law Firm 1 as a sole practitioner. Lawyer *A* is also Of Counsel to Law Firm 2 and is listed as such on Law Firm 2’s letterhead. Lawyer *B* is a sole practitioner who wishes to be Of Counsel to Law Firm 1.

**Question:**

What conflict-of-interest issues are implicated by the proposed arrangement?

**Conclusion:**

See discussion.

**Discussion:**

The Oregon RPC do not provide a precise definition of the “Of Counsel” relationship, but such relationships clearly are permitted. Oregon RPC 1.0(d) provides:

(d) “Firm” or “law firm” denotes a lawyer or lawyers, including “Of Counsel” lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

Oregon RPC 7.5(~~be~~) provides in part:

(~~eb~~) A lawyer may be designated “Of Counsel” on a letterhead if the lawyer has a continuing professional relationship with a lawyer or law firm, other than as ~~a~~ partner or associate. ...

As Of Counsel, Lawyer *B* is a member of Law Firm 1 and Lawyer *A* is a member of Law Firm 2. As a result, Law Firm 1, Law Firm 2, and Lawyer *B*’s sole practice will be treated as a single unit for conflict-of-interest purposes. The clients of Law Firm 2 are deemed to be clients of Law Firm 1 (through the Of Counsel relationship of Lawyer *A* and Law Firm 2) while the clients of Law Firm 1 (including the clients of Law Firm 2), will be deemed to be clients of Lawyer *B*.

The Of Counsel relationship can and should be distinguished from the situation in which law firms, or a lawyer and a law firm, associate with each other or are employed as co-counsel

on specific cases. An occasional collaboration with no indicia sufficient to establish a de facto law firm among the lawyers will avoid the implication that they are members of the same firm.

Approved by Board of Governors, ~~August 2005~~ April 2014.

---

COMMENT: See OSB Formal Ethics [Op Nos 2005-50](#), [2005-44](#), [2005-12](#). For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §2.19 (Oregon CLE 2003) and RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§9, 123 (2003).

**FORMAL OPINION NO. 2005-157**

**[REVISED 2014]**

**Information Relating to the Representation of a Client:  
Submission of Bills to Insurer's Third-Party Audit Service**

**Facts:**

Lawyer represents Client whose insurance carrier is paying the bills. The insurance carrier asks Lawyer to submit Client's detailed bills to a third-party audit service.

**Questions:**

1. May Lawyer submit Client's bills to a third-party audit service at the request of Client's insurance carrier?
2. May Lawyer ethically seek Client's consent to submit Client's bills, which contain information relating to the representation of a client, to a third-party audit service?

**Conclusions:**

1. No, qualified.
2. Yes, qualified.

**Discussion:**

Absent an agreement to the contrary, an Oregon lawyer who represents an insured in an insurance defense case will generally have two clients: the insurer and the insured. OSB Formal Ethics Op Nos 2005-121, 2005-77, 2005-30. Both the Oregon RPCs and insurance law as interpreted in Oregon require that a lawyer hired by the insurer to defend an insured must treat the insured as "the primary client" whose protection must be the lawyer's "dominant" concern. OSB Formal Ethics Op No 2005-121.

One of a lawyer's most important duties is the preservation of information relating to the representation of a client. Oregon RPC 1.6 provides:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
  - (2) to prevent reasonably certain death or substantial bodily harm;
  - (3) to secure legal advice about the lawyer's compliance with these Rules;
  - (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil

claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

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

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

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 of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.

#### 1. *Submission of Bills to Third Party.*

If the bills contain no information protected by Oregon RPC 1.6, Lawyer may submit the bills to the third-party audit service. On the other hand, if the bills contain such information, Lawyer may not disclose them unless one of the exceptions contained in Oregon RPC 1.6 applies. In effect, this means that absent Client's consent, Lawyer must not reveal the information. Depending on the facts of the matter and the substantive law applicable to such situations, Lawyer may need to discuss with Client the risks, if any, that the submission of the detailed bills to the third-party audit service may entail. This might include, for example, a risk

of inappropriate disclosure of protected information, a risk of waiver of the lawyer-client privilege,<sup>1</sup> or a risk of adverse effects on the insurer-insured relationship.

2. *Seeking Consent to Disclose Bills.*

Oregon RPC 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.

Oregon RPC 1.0(b) and (g) provide:

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

....

(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

---

<sup>1</sup> For a discussion regarding the waiver of lawyer-client privilege on the disclosure of bills to a government auditor, see *U.S. v. Massachusetts Institute of Technology*, 129 F3d 681 (1st Cir 1997).

Whether an insurer's demand for Lawyer to provide confidential client information to a third party would give rise to a conflict and, if so, whether the conflict would be waivable or nonwaivable, will depend on the specific facts of the matter. *Cf.* Washington Formal Ethics Op No 195 (1999) ("it is almost inconceivable that it would ever be in the client's best interests to disclose confidences or secrets to a third party"). *See also* New York Formal Ethics Op No 716 (1999); Massachusetts Informal Ethics Op No 1997-T53 (1997) (auditor must take steps to protect confidentiality of disclosed information). Unless a conflict exists that cannot be waived, it is permissible for Lawyer to ask Client for consent.

Approved by the Board of Governors, ~~August 2005~~April 2014.

DRAFT

---

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§6.10, 9.17 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§59–60, 62, 121, 128 (2003); and ABA Model Rules 1.6–1.7.

DRAFT

FORMAL OPINION NO. 2005-167

**[REVISED 2014]**

**Lawyer as Mediator:  
Attempted Fraud by One Party**

**Facts:**

Lawyer-Mediator is retained by parties to mediate a domestic relations matter. During the mediation, Party A discloses to the mediator the existence of assets that are unknown to Party B. Lawyer-Mediator knows that the assets are important to decision-making by Party B. Party A instructs Lawyer-Mediator to withhold these facts from Party B.

**Questions:**

1. May Lawyer-Mediator continue to mediate the matter to conclusion?
2. Does it make any difference if Lawyer-Mediator is unfamiliar with the substantive law of the matter?

**Conclusions:**

1. No.
2. No.

**Discussion:**

Oregon RPC 2.4 provides:

- (a) A lawyer serving as a mediator:
  - (1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and
  - (2) must clearly inform the parties of and obtain the parties' consent to the lawyer's role as mediator.
- (b) A lawyer serving as a mediator:
  - (1) may prepare documents that memorialize and implement the agreement reached in mediation;
  - (2) shall recommend that each party seek independent legal advice before executing the documents; and
  - (3) with the consent of all parties, may record or may file the documents in court.

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

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

In light of Oregon RPC 2.4(a)(1), Lawyer-Mediator cannot have a lawyer-client relationship with a mediating party with respect to the mediation. Oregon RPC 2.4(a)(1) does not, however, prohibit Lawyer-Mediator from mediating a matter involving persons who are represented by Lawyer-Mediator in other separate matters.

Whether or not Lawyer-Mediator represents either of the parties on other matters, Lawyer-Mediator is bound by the applicable rules of professional conduct, including Oregon RPC 8.4(a)(3) (prohibiting “conduct involving dishonesty, fraud, deceit or misrepresentation”), Oregon RPC 8.4(a)(4) (prohibiting “conduct that is prejudicial to the administration of justice”), and Oregon RPC 3.3(a)(5) (prohibiting illegal conduct generally). Thus, a lawyer who is also a mediator cannot engage in a knowing misrepresentation or concealment of a material fact. *See, e.g., In re Williams*, 314 Or 530, 840 P2d 1280 (1992). It follows that Lawyer-Mediator cannot complete a mediation based in whole or in part on the fraud of a mediating party.<sup>1</sup>

At a minimum, Lawyer-Mediator must inform Party A that as a result of Party A’s nondisclosure, Lawyer-Mediator will be obligated to withdraw from the mediation. *Cf.* OSB Formal Ethics Op No 2005-34. Lawyer-Mediator may also go one step further and inform Party A that if Party A does not allow disclosure, Lawyer-Mediator will inform Party B that no further reliance should be placed on any statements that may theretofore have been made to Party B. ABA Formal Ethics Op No 92-366.<sup>2</sup>

The remaining question is whether Lawyer-Mediator may go still further and inform Party B of the attempted fraud. ORS 36.220 provides:

- (1) Except as provided in ORS 36.220 to 36.238:
  - (a) Mediation communications are confidential and may not be disclosed to any other person.

Unless the disclosure falls within a statutory exception, the mediator is bound to keep the communication confidential. The exceptions include communications that the mediator or a party reasonably believes must be disclosed “to prevent a party from committing a crime that is likely to result in death or substantial bodily injury to a specific person.” ORS 36.220(6). Neither this exception nor any other exception permits disclosure to prevent a commercial or monetary fraud. Alternatively stated, the mediation privilege statute lacks the broad exception for future criminal conduct of all types that is contained in Oregon RPC 1.6(b)(1) (permitting disclosure of a client’s “intention . . . to commit a crime and the information necessary to prevent the crime”). In other words, Lawyer-Mediator may not disclose Party A’s intended fraud. *Cf. Rojas v.*

---

<sup>1</sup> For a discussion of a lawyer’s duty when the lawyer’s client has lied in the course of a proceeding or intends to perpetrate a fraud, see OSB Formal Ethics Op Nos 2005-131 and 2005-132.

<sup>2</sup> In the context of a lawyer-client relationship, this kind of withdrawal-plus-disclaimer is known as a “noisy withdrawal.” *See, e.g.,* ABA Formal Ethics Op No 92-366; THE ETHICAL OREGON LAWYER §§21.11, 21.15 (Oregon CLE 2003).

*Superior Ct.*, 33 Cal4th 407, 93 P3d 260, 15 Cal Rptr3d 643 (2004) (declining to create exception to parallel California statute when legislature did not create one).

We reject the argument that Lawyer-Mediator could make the disclosure if, in fact, Party A happened to be a client in one or more other matters. At least in the absence of contrary holdings by courts of competent jurisdiction, the statutory nondisclosure obligation appears to us to predominate over the right of permissive disclosure contained in Oregon RPC 1.6(b)(1).

Approved by Board of Governors, ~~August 2005~~ April 2014.

---

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§2.19, 7.35, 7.39 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§94, 130 (2003); and ABA Model Rule 2.4.

**FORMAL OPINION NO. 2006-176**

**[REVISED 2014]**

**Conflicts of Interest:  
Lawyer Functioning in Multiple Roles  
in Client's Real Estate Transaction**

**Facts:**

Client informs Lawyer that Client would like to buy or sell real estate. Lawyer is willing to represent Client in the transaction and does not represent any other party in the transaction. Lawyer would, however, like to act not only as lawyer but also as a real estate agent or broker and as a mortgage broker or loan officer in the transaction.

**Question:**

May Lawyer serve in all three capacities?

**Conclusion:**

Yes, qualified.

**Discussion:**

1. *Potential Limitations of Substantive Law.*

This Committee is authorized to construe statutes and regulations pertaining directly to lawyers but not to construe substantive law generally. We therefore begin with the observation that if this joint combination of roles is prohibited by substantive law pertaining to real estate agents or brokers, mortgage brokers, or loan officers, Lawyer could not play multiple roles. Similarly, Lawyer would be obligated to meet in full any licensing, insurance, disclosure, or other obligations imposed by the substantive law pertaining to these lines of business. In the discussion that follows, therefore, we assume that there are no such requirements or, alternatively, that Lawyer will meet all such requirements.

2. *Lawyer-Client Conflicts of Interest.*

These facts present the potential for conflicts of interest between the client and the lawyer. Oregon RPC 1.7 states, in part:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client;
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

(3) . . . .

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
- (4) each affected client gives informed consent, confirmed in writing.

Under Oregon RPC 1.7, Lawyer's other business interests in the real estate transaction would give rise to a conflict under Oregon RPC 1.7(a)(2) since there is a significant risk that these other roles would interfere with Lawyer's representation of Client. This would be true whether Lawyer plays the nonlawyer roles as the owner or co-owner of a non-law business or as an employee or independent contractor for such a business. In either instance, Lawyer's interest in fees or income from these other roles, if not also Lawyer's liability concerns from those other roles, would create a significant risk that Lawyer's ability to "exercise independent professional judgment and render candid advice" (Oregon RPC 2.1) would be compromised.

It follows that Lawyer can undertake multiple roles only if Lawyer can and does comply with each of the requirements of Oregon RPC 1.7(b).<sup>1</sup> Before we turn to the requirements of Oregon RPC 1.7(b), however, we note that since Lawyer will be doing business with Client in Lawyer's additional roles, it is also necessary to consider the conflict-of-interest limitations in Oregon RPC 1.8(a):

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

---

<sup>1</sup> As noted above, we have assumed that the multiple roles are legally permissible under applicable substantive law and thus need not consider Oregon RPC 1.7(b)(2). And since it is assumed that Lawyer represents Client and only Client, we need not consider Oregon RPC 1.7(b)(3).

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

There is significant overlap between Oregon RPC 1.7(b) and Oregon RPC 1.8(a). For example, both rules would apply whether Lawyer plays the nonlawyer role (or roles) as the owner or co-owner of a non-law business or as an employee or independent contractor for such a business. In addition, both rules require Lawyer to obtain Client's informed consent<sup>2</sup> and to confirm that consent in a contemporaneous writing.<sup>3</sup> See Oregon RPC 1.7(b)(4), 1.8(a)(3).<sup>4</sup> The informed consent requirements under Oregon RPC 1.8(a)(3) are more stringent, however:

- It is not enough that Lawyer confirm Client's waiver by a writing sent by Lawyer, as would be the case under Oregon RPC 1.7. Lawyer must also receive Client's informed consent "in a writing signed by the client."
- Lawyer's writing must clearly and conspicuously set forth each of the essential terms of each aspect of Lawyer's business relations with Client and the role that Lawyer will play in each such regard, as well as the role that Lawyer will play as Client's lawyer. This would include, for example, the fees that Lawyer or others would earn in each capacity

---

<sup>2</sup> Oregon RPC 1.0(g) provides:

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

<sup>3</sup> Oregon RPC 1.0(b) provides:

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

<sup>4</sup> For prior formal opinions citing to both Oregon RPC 1.7(a) and Oregon RPC 1.8(a), see OSB Formal Ethics Op Nos 2005-10 (in addition to lawyer's private practice, lawyer also owns a real estate firm and a title insurance company that occasionally do business with lawyer's clients) and 2005-28 (discussing conflict of interest in representing both sides in adoption).

and the circumstances under which each such fee would be payable (e.g., only upon closing or without regard to closing). It would also include a clear explanation of any limitation of liability provisions that might exist regarding Lawyer's other roles.<sup>5</sup>

- In addition to recommending that Client consult independent counsel, Lawyer must expressly inform Client *in writing* that such consultation is desirable and must make sure that Client has a reasonable opportunity to secure the advice of such counsel.
- Communications between Lawyer and Client as part of their lawyer-client relationship are subject to Lawyer's duties of confidentiality under Oregon RPC 1.6.<sup>6</sup> Communications between Lawyer and Client in other capacities would not be subject to Oregon RPC 1.6, and Lawyer must explain to Client why this distinction is potentially significant.<sup>7</sup> This explanation must be given whether Lawyer's multiple roles are carried out from a single office or from physically distinct offices.<sup>8</sup>

---

<sup>5</sup> For cases and ethics opinions discussing the general level of disclosure requirements when lawyers do business with clients, see, for example, OSB Formal Ethics Op No 2005-32.

<sup>6</sup> Oregon RPC 1.6 provides:

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

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

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. . . . to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17.

<sup>7</sup> See, e.g., *United States v. Huberts*, 637 F2d 630, 639–640 (9th Cir 1980), *cert. denied*, 451 US 975 (1981) (lawyer as business agent; no privilege); *United States v. Davis*, 636 F2d 1028, 1043–1044 (5th Cir), *cert. denied*, 454 US 862 (1981) (lawyer as tax preparer; no privilege); *Diamond v. City of Mobile*, 86 FRD 324, 327–328 (SD Ala 1978) (lawyer as investigator; no privilege); *Neuder v. Battelle Pacific Northwest Nat'l Lab*, 194 FRD 289, 292–297 (DDC 2000) (when corporate lawyer acts in nonlegal capacity in connection with

Two requirements remain to be discussed. One requirement is that the terms of the business aspects of the transactions between Lawyer and Client be “fair and reasonable” pursuant to Oregon RPC 1.8(a)(1). We assume that this requirement will be met if Client would be unable to obtain the same services from another under more favorable terms. Whether, or to what extent, the “fair and reasonable” requirement could be met if there were other available suppliers at materially lower cost is a subject on which this Committee cannot define any bright-line rule. Other jurisdictions have been more inclined to approve lawyers’ business relations with clients when the client is relatively sophisticated. *See, e.g., Atlantic Richfield Co. v. Sybert*, 441 A2d 1079 (Md Ct Spec App 1982) (lawyers who acted as realty brokers for sophisticated corporate seller were not barred from recovering real estate commission); *McCray v. Weinberg*, 340 NE2d 518 (Mass App Ct 1976) (declining to set aside foreclosure of lawyer’s mortgage loan, one of a series, to knowledgeable and experienced client).

The other requirement is that Lawyer must “reasonably believe[ ] that [Lawyer] will be able to provide competent and diligent representation to” Client under Oregon RPC 1.7(b)(1). This means not only that Lawyer must have the subjective belief that Lawyer can do so but also that Lawyer’s belief must be objectively reasonable under the circumstances. *See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* §126, comment e (2000). Other state bar ethics committees have split on whether such an objectively reasonable belief can exist if, for example, a lawyer wishes to act both as legal counsel to and insurance agent for a client or as legal counsel to and securities broker for a client.<sup>9</sup> We cannot say that it will always be unreasonable for a lawyer to conclude that the lawyer can provide competent and diligent legal advice to a client while also fulfilling other roles. We note, however, that there will be times when the lawyer’s conflicting obligations and interests will preclude such roles. *Cf. In re Phelps*, 306 Or 508, 510 n 1, 760 P2d 1331 (1988) (lawyer cannot be both counsel to

---

employment decisions, communications between lawyer and corporate representatives not privileged). A variant could arise if Lawyer’s role were ambiguous, resulting in Client’s inability to carry the burden of proof on lawyer-client privilege. *See Groff v. S.I.A.C.*, 246 Or 557, 565–566, 426 P2d 738 (1967) (person asserting privilege has burden of showing that one asserting privilege and nature of testimony offered are both within ambit of privilege); ORS 40.030(1) (OEC 104(1)).

<sup>8</sup> The explanation about privilege and confidentiality issues might, for example, include a discussion about the effect that a lack of confidentiality could have on an opposing party’s ability to call Lawyer as a witness in any subsequent litigation and thus on Lawyer’s ability to represent Client in that litigation in light of the lawyer-witness rule, Oregon RPC 3.7.

<sup>9</sup> *See, e.g.,* Cal Formal Ethics Op No 1995-140 (lawyer as insurance broker); NYSBA Formal Ethics Op No 2002-752 (lawyer may not provide real estate brokerage services in the same transaction as legal services); NYSBA Formal Ethics Op No 2005-784 (lawyer also acting in entertainment management role).

a party in a transaction and escrow for that transaction); OSB Formal Ethics Op No 2005-55 (same).

3. *Additional Caveats and Concluding Remarks.*

Given these numerous and delicate potential issues, one might fairly conclude that multidisciplinary practice means having multiple opportunities to be disciplined. *See generally In re Phillips*, 338 Or 125, 107 P3d 615 (2005) (36-month suspension for violation of multiple provisions in former Code of Professional Responsibility in connection with program to help insurance agents sell insurance products to lawyer's estate planning clients and share in resulting commissions). Nevertheless, it will sometimes, but not always, be permissible for Lawyer to play these multiple roles. The answer will depend on factors including the fairness and reasonableness of the multiple roles, whether it is objectively reasonable to believe that Lawyer can provide competent and diligent representation while playing multiple roles, and whether Lawyer can and does obtain Client's informed consent in a writing signed by the client. Before concluding this opinion, however, we note three caveats:

DRAFT

- If someone other than Client were to pay Lawyer for the provision of legal services to Client, Lawyer would also have to comply with Oregon RPC 1.8(f).<sup>10</sup>
- If Lawyer were to endeavor to use Lawyer's role as real estate broker or agent or mortgage broker or loan officer to obtain clients for Lawyer's practice of law, Lawyer would have to comply with applicable advertising and solicitation requirements in Oregon RPC 7.1 et seq.<sup>11</sup>
- Lawyers covered by the Oregon State Bar Professional Liability Fund who do not wish to risk losing potentially available legal malpractice coverage should review Form ORPC 1 and Exclusions 5 and 8 of the PLF 2006 Claims Made Plan, which can be found at page 66 of the 2006 Oregon State Bar Membership Directory, or any later amendments thereto.

Approved by Board of Governors, ~~July 2006~~ April 2014.

---

<sup>10</sup> Oregon RPC 1.8(f) provides:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information related to the representation of a client is protected as required by Rule 1.6.

For an ethics opinion discussing this rule, see OSB Formal Ethics Op No 2005-30 (legal fees paid by insurer).

<sup>11</sup> For the present text and prior formal ethics opinions addressing these requirements, see OSB Formal Ethics Op Nos 2005-106 (lawyer who purchases tax advice business may not use that business to engage directly or indirectly in improper solicitation of legal clients), 2005-101 (lawyer and psychologist may market a joint "Family Mediation Center"), and 2005-108 (lawyer may advertise family mediation service in marriage and family therapy section of Yellow Pages).

## OREGON STATE BAR

### Legal Services Program Committee

---

**Meeting Date:** April 25, 2014

**Memo Date:** April 11, 2014

**From:** Legal Services Program Committee

**Re:** Disbursing Unclaimed Client Funds from the Legal Services Program

---

#### **Action Recommended**

- 1) Approve disbursing the annual unclaimed client funds for 2014 as outlined in the chart below titled 2014 Distribution. This includes approving the current reserve policy.
- 2) Approve disbursing the unclaimed client funds from the Strawn v Farmers class action as outlined in the chart below titled 2014 Distribution.

#### **Background**

Unclaimed or abandoned client funds held in a lawyers' trust account are sent to the Oregon State Bar (OSB), pursuant to ORS 98.386. Revenue received is used for the funding of legal services by the legal aid providers, the payment of claims and the payment of expenses incurred by the OSB in the administration of the Legal Services Program.

In 2012 the committee and subsequently the BOG approved a recommendation regarding the distribution method of the unclaimed client funds. The distribution method was that the LSP hold \$100,000 in reserve to cover potential claims and distribute the revenue that arrives each year above that amount. The amount of funds disbursed changes from year to year depending on the unclaimed funds received and claims made each year. In addition, the OSB entered into an agreement with the legal aid providers in which the legal aid providers agreed to reimburse the OSB if the allotted reserve gets diminished or depleted. This disbursement method and reserve policy was approved again in 2013.

#### **2014 Disbursement Recommendation Unclaimed Funds Received 2013/14**

There is currently about \$161,000 funds available for distribution in 2014. The LSP Committee recommends that the reserve policy remain the same allowing \$100,000 to be held in reserve and \$61,000 disbursed to the legal aid providers. The legal aid providers are recommending that the amount be disbursed according to the formula used last year (6% CNPLS, 11% LCLAC, 1% CCLA, 41% LASO, 41% OLC). The amounts each provider will receive are outlined in the chart below.

#### **Distribution of Unclaimed Client Funds Strawn v Farmers Class Action**

The LSP Program received approximately \$520,000 in one time unclaimed client funds from the Strawn v Farmers Class Action on January 31, 2014. It is recommended that the funds be distributed as follows:

- Disburse the one-time funds in equal amounts over three years with 1/3 of the funds being disbursed in 2014 and the remainder of the funds held in

reserve. Disbursing the one-time funds over three years is more sustainable and allows the legal aid providers to make the most efficient and effective use of the funds. It will also allow time to understand the amount of funds that may be claimed in the future.

- Disburse the funds by poverty population with 6% going to the Center for Nonprofit Legal Services (CNPLS), 11% to Lane County Legal aid and Advocacy Center (LCLAC), and 1% to Columbia County Legal Aid (CCLA). The remaining 82% which is usually divided by Legal Aid Services of Oregon (LASO) and the Oregon Law Center (OLC) for statewide services shall be allocated entirely to LASO. This is pursuant to legal aid’s strategic plan that calls for using new funds to add new staff positions on a prioritized list. The highest priority positions in the strategic plan are to be located at LASO.
- Allow the CNPLS to receive its full share of the distribution in 2014. CNPLS has lost both county and city funds. Allowing them to get their full three year allocation will prevent them from having to lay off staff.

	<b>Annual Unclaimed Fund</b>	<b>Farmers Class Action Fund</b>
<b>Total Received to Date</b>	\$ 454,221	\$518,900
<b>Claims</b>	\$(31,118)	\$(6,363)
<b>Previous Distributions to Programs</b>	\$(262,000)	
<b>Subtotal</b>	\$161,103	\$ 512,537
<b>Reserve Policy</b>	\$100,000	\$321,190
<b>Funds Available for Distribution</b>	<b>\$61,103</b>	<b>\$191,347</b>
<b>Total Funds Available</b>	<b>\$673,640</b>	
<b>Number of Properties Received</b>	<b>1138</b>	<b>476</b>
<b>Number of Properties Claimed</b>	<b>16</b>	<b>7</b>

<b>2014 Distribution</b>		
Center for Non Profit Legal Services	\$3,666	\$30,752
Lane County Law & Advocacy	\$6,721	\$17,665
Columbia County Legal Aid	\$611	\$1,606
Legal Aid Services of Oregon	\$25,052	\$141,324
Oregon Law Center	\$ 25,052	\$ -
<b>Total Distribution</b>	<b>\$61,103</b>	<b>\$191,347</b>

**UPL ADVISORY OPINION NO. 2014 - 3**

**REPRESENTATION OF FAMILY AND FRIENDS**

**FACTS:**

1. Mother graduated from law school but is not licensed to practice law in Oregon or any other state. She would like to defend her son in a criminal matter in circuit court.
2. A contractor with no background in law would like to represent his friend in a construction dispute with a homeowner in a county justice court.
3. A contractor with no background in law would like to represent his friend in a construction dispute with a homeowner before the small claims department of a circuit court.
4. Friend, who has worked as a legal assistant, would like to assist her acquaintance, wife, with selecting pleading forms and drafting pleadings to file in a pending divorce case in circuit court.

**QUESTIONS:**

1. Can mother represent her son in circuit court?
2. Can contractor represent his friend in justice court?
3. Can contractor represent his friend in small claims court?
4. Can friend assist wife with selecting pleading forms and drafting pleadings to file in a divorce case?

**ANSWERS:**

1. No.
2. Yes.
3. No.
4. No.

**DISCUSSION:**

- I. Question No. 1 (Non-lawyer Parent Representing Child in Circuit Court)

A non-lawyer mother who tries to represent her child in circuit court would very likely engage in the unlawful practice of law.<sup>1</sup> Although people may represent themselves *pro se* in circuit court, only active members of the Oregon State Bar and out-of-state lawyers admitted *pro hac vice* may represent other persons. ORS 9.320 (a party may only prosecute or defend a lawsuit *pro se* or through an attorney).<sup>2</sup>

It makes no difference that mother seeks to represent her own child. As a general rule, non-lawyer parents do not have a right to provide legal advice to their children or serve as their children's lawyers.<sup>3</sup> Because mother is not an active member of the Oregon State Bar or any other state bar, she may not defend son in a criminal matter in circuit court. Mother's legal education does not give her the right to defend son. Attending law school or having a law degree does not give a person the right to represent others in court.<sup>4</sup>

## II. Question No. 2 (Non-lawyer Representation of Friend in Justice Court)

Non-lawyers such as contractor may represent other people in justice courts. ORS 52.060 states "[a]ny person may act as attorney for another in a justice court, except a person or officer serving any process in the action or proceeding, other than a subpoena." Therefore, in this example, the contractor would likely be able to represent his friend in justice court regarding the construction dispute with the homeowner.

## III. Question No. 3 (Non-lawyer Representation of Friend in Small Claims Department)

Non-lawyer contractor would likely be engaging in the unlawful practice of law if he tried to represent his friend in a small claims department of a circuit court. Generally, people must represent themselves in small claims courts unless the court orders otherwise. ORS 46.415(4) (in small claims proceedings, no "person other than the plaintiff and defendant . . . shall appear on behalf of any party").<sup>5</sup>

## IV. Question No. 4 (Non-lawyer Selecting Forms and Drafting Pleadings for Friend)

---

<sup>1</sup> ORS 9.160(1).

<sup>2</sup> Accord ORS 9.160(2); see *Oregon Peaceworks Green, PAC v. Sec'y of State*, 311 Or 267, 270-71, 810 P2d 836, 837 (1991) ("ORS 9.160 unequivocally prohibits a nonattorney from practicing law. ORS 9.320 states the key exception to the ORS 9.160 prohibition: representation of oneself. Neither statute empowers a nonattorney to represent another in state court, a fundamental aspect of law practice.").

<sup>3</sup> In some cases involving minor children, parents may have independent, enforceable rights to prosecute on their own behalf. See e.g., *Winkelman v. Parma City School District*, 550 US 516 (2007) (holding parents have authority to bring an action under the Individuals with Disabilities Education Act (IDEA) as an aggrieved party with independent rights).

<sup>4</sup> But see Rules for Admission of Attorneys in Oregon 13.05 (Law School Appearance Program allowing limited court appearances by eligible law students who are certified by the court and supervised by an active member of the bar).

<sup>5</sup> Exceptions may apply when a party is a government entity (e.g., the State of Oregon) or a party obtains permission from the court to be represented by an attorney. ORS 46.415.

Non-lawyer friend may not select legal forms or draft pleadings for wife's divorce case because to do so would very likely be the unlawful practice of law. ORS 9.160 (1). As a general rule, non-lawyers may not select legal forms or draft pleadings for others to file in circuit court, because such activity would amount to the unlawful practice of law.<sup>6</sup> Even though friend has some limited training and experience as a legal assistant, she may not give legal advice to another person.

DRAFT

---

<sup>6</sup> *Oregon State Bar v. Security Escrows, Inc.*, 233 Or 80, 89, 377 P2d 334 (1962) (holding that the practice of law “includes the drafting or selection of documents and the giving of advice in regard thereto any time an informed or trained discretion must be exercised in the selection or drafting of a document to meet the needs of the persons being served”).

# REPORT

## BOG Budget & Finance Committee

---

**Report Date:** April 25, 2014  
**Location:** Oregon State Bar Center  
**Chair:** Hunter Emerick  
**Vice-Chair:** Matthew Kehoe  
**Members:** Jim Chaney, Patrick Ehlers, Ray Heysell, Theresa Kohlhoff, Joshua Ross, Richard Spier, Charles Wilhoite, Elisabeth Zinser. Staff Liaison: Rod Wegener

---

### INFORMATION ITEMS/REPORTS

#### 1. This is a Report Only

There is no Budget & Finance Committee meeting scheduled for April 25 except a joint meeting with the Governance & Strategic Planning Committee to review CLE Seminars and other program matters scheduled for 11:00am.

The purpose of this report is to update the Committee and BOG on bar-related financial matters.

#### 2. Financial Report – March 31, 2014

With the personnel change in the Accounting Department near the end of the fiscal year and the audit preparation, the monthly financial statements have been delayed. Each month statement is prepared and the March statements and report will be finalized and sent to the board before the meetings on April 25.

The data for the first quarter is very promising for a financially successful 2014. The preliminary Net Operating Revenue (NOR) through March 31 is \$313,098. This compares favorably with the \$277,918 Net Operating Revenue at March 31, 2013.

The very positive NOR is generally due to expenses well below budget (but not likely to continue through the rest of the year). An item that will be addressed in the report is Membership Fee revenue which is 1.4% less than a year ago, and the reasons for that decline.

*For more information contact:*

Rod Wegener, [rwegener@osbar.org](mailto:rwegener@osbar.org)  
503-431-6313, 1-800-452-8260, ext. 313

#### 3. Investment Portfolio Reports

At the April meeting typically the first quarter benchmarks and reports from the two investment firms are presented. However, the bar has not received either except the detail of the first quarter transactions from Becker Capital. Washington Trust Bank is in the process of creating a new online system, but has had delays and neither the first quarter or March 2014 reports are available.

The March 31 financial statements will report the Becker Capital portfolio balance is \$2,648,768. The balance at December 31, 2013 was \$2,633,534, so there has been little gain on that portfolio so far in 2014.

If a member wants a copy of the Becker March 31 statement, call or send me an email.

#### **4. Other Business**

- The bar's CFO and Controller are finishing the draft of the report for the auditors' review and acceptance. The report is expected to be presented to the Committee at its May 23 meeting.
- Jennifer Walton, who had served as the temporary Controller since mid November, accepted the regular position at the bar on March 17.
- The bar's IT manager and CFO interviewed three IT consulting services firms and their references and narrowed the list to one candidate. Bar's general counsel is currently reviewing the agreement. More will be shared once the agreement is executed.

#### **5. Next Committee meeting**

The next meeting is scheduled for May 23, 2014 at the bar center. Here are the key topics for the next upcoming meetings:

May 23 Review and accept the 2012-2013 audit report

June 27 Discussion of items, changes for the 2015 budget

July 25 Review the 2015 Executive Summary Budget report – a report based on trends, estimates, and program considerations for the 2015 budget

---

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** April 25, 2014  
**From:** Rich Spier, Chair, Governance & Strategic Planning Committee  
**Re:** Section Guest Expense Reimbursement Request

---

### Issue

During the November 23, 2013 meeting the BOG voted to amend the standard section bylaws to prohibit executive committee guest reimbursements except as specifically approved by the Board of Governors. After notifying all section chairs of the bylaw amendment the Business Law Section and the Real Estate and Land Use Section requested exception to the bylaw.

The Governance & Strategic Planning Committee reviewed these requests during the February meeting and directed staff to draft policy language allowing guest expense reimbursements in limited situations.

### Discussion

When the BOG amended the section bylaws last November three reasons were offered as the basis for the change:

1. Bring the section bylaws into alignment with OSB Bylaw 7.500,
2. Proactively prevent violations of the Oregon Government Ethics Laws and prevent a perception of unfairness,
3. Eliminate the administrative cost associated with tracking guest reimbursement amounts to ensure compliance with tax laws because guest expenses are not a business expense.

An exception is made to Bylaw 7.500 which allows reimbursement of BOG guests in certain situations. Taking this exception into account, as well as the Oregon Government Ethics Laws, the following policy wording is offered to allow sections the option of reimbursing guest expenses:

**With prior approval from a Section's Executive Committee, guest expenses will be reimbursable under the following conditions:**

1. **Guests must be a spouse, domestic partner, or household member of an executive committee member;**
2. **Reimbursement is only allowed for official executive committee meals (not including alcohol) which the spouse, domestic partner, or household member is expected to attend. Reimbursement is not allowed for guest transportation or lodging expenses separate and above the executive committee member's expense, and;**
3. **Reimbursement of guest expenses made to an executive committee member must be less than \$600 per calendar year.**

## Goal 7: Expand public and bar member education, outreach, and service

<b>Strategy 9 - Identify and remedy barriers to accessibility experienced by individuals with disabilities who access bar programs, services, activities and premises</b>			
<b>Action Items</b>	<b>Target Measures</b>	<b>Lead</b>	<b>Timeline</b>
9.1 Establish an assessment review team and implement an assessment process to identify barriers to accessibility experienced by individuals with disabilities.	Assessment team established and assessment of bar's programs, services, activities and premises complete	General Counsel; Director of Communications and Public Services	2014
9.2 Develop and implement a plan to remedy identified accessibility barriers.	Prioritize action items and implement plan with steady progress toward remedying identified barriers	General Counsel; Director of Communications and Public Services	Yearly for 2014-16
9.3 Develop and implement a process to facilitate reporting and tracking of accessibility concerns. Communicate with constituents when barriers addressed.	Reporting and feedback process established	General Counsel; Director of Communications and Public Services	Yearly for 2014-16

## OSB Diversity & Inclusion Definition, Business Case Statement and Tag Line

**Definition:** Diversity and inclusion mean acknowledging, embracing and valuing the unique contributions our individual backgrounds make to strengthen our legal community, increase access to justice, and promote laws and creative solutions that better serve clients and communities. Diversity includes, but is not limited to: age; culture; disability; ethnicity; gender and gender identity or expression; geographic location; national origin; race; religion; sex; sexual orientation; and socio-economic status.

**Business Case Statement:** A diverse and inclusive bar is necessary to attract and retain talented employees and leaders; effectively serve diverse clients with diverse needs; understand and adapt to increasingly diverse local and global markets; devise creative solutions to complex problems; and improve access to justice, respect for the rule of law, and credibility of the legal profession.

**Tag Line:** Diversity and Inclusion: Making us Stronger.

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** April 25, 2014  
**From:** Travis Prestwich, Public Affairs Committee Chair  
**Re:** 2015 Law Improvement Program package

---

### Issue

Should the Board of Governors approve all or part of proposed 2015 Law Improvement Program package?

### Options

- 1) Approve the 2015 Law Improvement Program package with the expectation that bar groups will continue to refine their proposals while working with internal and external stakeholders and relevant state agencies. The PAC has identified concerns regarding five of the proposals, specifically:
  - a. The Family Law section's proposal to allow for the exchange of financial documents without a modification proceeding,
  - b. The Consumer Law section's proposal to transfer the responsibility for homeowner association fees,
  - c. The Estate Planning and Administration section's proposal to update the Uniform Trust Code,
  - d. The Military and Veterans Law section's proposal regarding service member diversion, and
  - e. The proposal from the Unlawful Practice of Law Committee regarding legal entities appearing through counsel.

For each of the identified proposals, the PAC recommends that the board allow the section or committee to move forward with their proposal with the expectation that each group will implement the suggestions of the PAC and report back on its progress. The five concepts should be monitored and evaluated by the PAC as they move through the process.

- 2) Approve the 2015 Law Improvement Program package, in toto.
- 3) Approve a 2015 Law Improvement Program package containing a subset of the proposals.

### Discussion

Every long session, the Oregon State Bar submits proposed legislation as part of the Law Improvement Program to the Oregon State Legislature for passage. On April 17, 2014, the Public Affairs Committee hosted the Oregon State Bar Legislative Forum. This year seventeen Oregon State Bar sections, workgroups, and committees submitted twenty-three law improvement

proposals for consideration by the Board of Governors to be included as part of the 2015 law improvement program package.<sup>1</sup>

Law improvement concepts are proposed legislation that clarify statutory ambiguities, remove unnecessary procedural requirements, modify unforeseen glitches in previous legislation, or otherwise improve the practice of law. Policy changes are also included in the bar package of legislation when deemed appropriate. In order for a legislative concept to be considered at the Legislative Forum, it must be approved by a majority of the executive committee (we encourage executive committees to be representative of the diverse views on the section). Bar groups are encouraged to be mindful of differing viewpoints in the practice area.

The proposals were reviewed by the Public Affairs Committee to ensure that they meet the criteria established by both the Oregon State Bar bylaws and the U.S. Supreme Court case, *Keller v. State of California*, 499 US 1, 111 S.Ct 2228 (1990).<sup>2</sup>

#### What is the Keller Rule?

In 1990, the United States Supreme Court ruled in *Keller v. State Bar of California*, 499 US 1, 111 SCt 2228 (1990) that an integrated (mandatory) bar's use of compulsory dues to finance political and ideological activities violates the 1st Amendment rights of dissenting members when such expenditures are not germane to the bar's purpose, which the court identified as regulating the legal profession and improving the quality of legal services.

*Keller* does not prohibit integrated bars from using member dues to advance political or ideological positions that are not germane to the bar's purpose; however, it requires that dissenting members receive a refund of the portion of dues attributable to the non-germane activity.

If the BOG approves the Law Improvement Program package, there are still several opportunities for the board to review the legislative concept before filing. The legislative concepts are not submitted to the legislature until the fall of 2014. Throughout this process, the board will have the ability to ask questions, review the process and proposals, and, if necessary, pull a concept from the package at any point.

Attached is the list of legislative proposals from bar groups reviewed by the PAC. If approved by the board, these legislative concepts will be submitted to Legislative Counsel's office to be drafted, introduced through the Judiciary Committee, and pre-session filed for the 2015 legislative session. The Public Affairs Department will continue to monitor these bills and address any concerns.

Direct link to proposals: <http://osblip2015.homestead.com/OSB-2015-Law-Improvement-Package.html>

<sup>1</sup> The Public Affairs Committee is still considering a chapter 9 placeholder as well.

<sup>2</sup> For more information on the Oregon State Bar bylaws and the *Keller* case, please visit [http://www.osbar.org/leadership/bog/bog\\_resources.html](http://www.osbar.org/leadership/bog/bog_resources.html).

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** April 25, 2014  
**From:** Travis Prestwich, Public Affairs Committee Chair  
**Re:** Best Practices for Indigent Defense Providers

---

### Issue

Whether to adopt proposed changes to the Standards for Representation in Adult Criminal and Juvenile Delinquency Cases to provide guidance to practitioners.

### Options

Adopt proposed changes to the Standards for Representation in Adult Criminal and Juvenile Delinquency Cases and include a foreword with a statement of intent that these guidelines are not intended to establish a legal standard of care.

Adopt proposed changes to the Standards for Representation in Adult Criminal and Juvenile Delinquency Cases to provide guidance to practitioner.

Decline to adopt proposed changes to the Standards for Representation in Adult Criminal and Juvenile Delinquency Cases.

### Discussion

The Oregon State Bar has a history of concern for the quality of representation provided to persons, in criminal, delinquency, dependency, civil commitment, and post-conviction proceeding. There have been at least four OSB task forces devoted to this subject. Adoption of the performance standards by the Bar was a key recommendation of the first task force in 1996. They have become a critical component of training and education efforts for lawyers practicing in the areas addressed by the standards. Oregon Public Defense Services Commission considers them an essential part of its mission to "ensure the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice." ORS 151.216(1)(a). Public defense services have improved significantly since the first OSB task force in 1996, but further improvement is still needed in criminal, delinquency and dependency representation. Keeping the OSB standards updated and relevant is important.

Nonetheless, concerns have been raised that the standards might create a standard of care and create a malpractice trap for indigent defense practitioners. One suggestion in light of the last Public Affairs Committee discussion is to include a statement similar to what is contained in the 2006 version as follows:

"These guidelines are not rules of practice and are not intended to establish a legal standard of care. Some of the guidelines incorporate existing standards, such as the Oregon Rules of Professional Conduct, however, which are mandatory."

Identical language was included in the foreword to the standards for post-conviction relief practitioners, which the BOG adopted in 2009.

In the 18 years since the standards were originally adopted malpractice claims against criminal defense attorneys have been rare. This is due to case law in Oregon holding that a malpractice claim against a criminal defense trial attorney does not accrue unless "that person has been exonerated of the criminal offense through reversal on direct appeal, through post-conviction relief proceedings, or otherwise." *Stevens v. Bispham*, 316 Or 221, 238, 851 P2d 556 (1993).

## **Background**

In 1996, the Oregon State Bar Board of Governors approved the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases. In 2006, the Board revised the 1996 standards. In 2012, two separate task forces revised the standards in criminal, delinquency and dependency cases. One group focused on juvenile dependency standards (expected to be completed soon). The other revised adult criminal and juvenile delinquency standards.

## **Proposed Revised Adult Criminal and Juvenile Delinquency Standards**

Attached are new standards produced by the criminal workgroup which replace what is published on the OSB website as "Specific Standards for Representation in Criminal and Juvenile Delinquency Cases". These changes, when combined with the proposed revisions to the third specific standard (juvenile dependency – expected to be completed soon) will make the "general standards" in Section 1 unnecessary.

The task force included academia, the bench, private practice, and public defender offices. Task force members were Margie Paris, Professor of Law, University of Oregon; Shaun McCrea, in private practice in Eugene; the Honorable Lisa Grief, Jackson County Circuit Court; Lane Borg, Executive Director, Metropolitan Public Defender; Julie McFarlane, Supervising Attorney, Youth, Rights & Justice; Shawn Wiley, Chief Deputy Defender, Appellate Division, Office of Public Defense Services. Paul Levy, General Counsel, Office of Public Defense Services, served as chair of the task force.

The task force examined existing standards and reviewed other state and national standards. The task force found that although Oregon's standards are grounded in the

standards promulgated by the National Legal Aid and Defender Association (NLADA) in 1994, Oregon's standards differed.

The variations from the NLADA standards were good and bad. On the positive side, they recognized that the role of a juvenile defender is highly specialized and complex, requiring skills unique to delinquency cases in addition to those required in adult criminal cases. The standards emphasized the collateral consequences of criminal convictions, addressed in the U.S. Supreme Court's decision in *Padilla v. Kentucky*, 559 US 356 (2010). Indeed, the existing Oregon standards serve as guideposts to effective criminal and juvenile defense.

The task force decided that the organization of NLADA's standards provided the best structure for our own standards, while preserving the best of Oregon's standards. Thus, within a new structure we keep a format of the short standard, followed by more detailed one. Also included is a revised commentary for the standards which provides additional guidance regarding criminal or delinquency defense.

The task force also benefited from National Juvenile Defense Standards (2012), which present a systematic approach to defense practice in juvenile court. (The NJDC standards are available at <http://www.njdc.info/publications.php>.) While the revision recognizes this work as establishing a national norm for representation in delinquency cases, it melds parts of this work into Oregon standards.

The revision, if approved by the BOG, will serve as a useful tool for both the new and experienced lawyer as a guide on the best practices for diligent and high quality representation. The revision may also serve as a helpful guide for courts, clients, the media and who wish to understand the expectations for defense lawyers in criminal and delinquency cases.

In conclusion, the revised standards may serve to increase Oregon Lawyers' expertise while not increasing exposure to malpractice claims.

## **Foreword to the 2014 revision of the Principles and Standards for Counsel in Criminal, Delinquency and Dependency Cases**

The original version of the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases (hereafter, the performance standards) was approved by the Board of Governors on September 25th, 1996. Significant changes to the original performance standards were adopted in 2006, and a new set of standards pertaining to representation in post-conviction standards were adopted in 2009.

As noted in the earlier revision, in order for the performance standards to continue to serve as valuable tools for practitioners and the public, they must be current and accurate in their reference to federal and state laws and they must incorporate evolving best practices.

The Foreword to the original performance standards noted that “[t]he object of these [g]uidelines is to alert the attorney to possible courses of action that may be necessary, advisable, or appropriate, and thereby to assist the attorney in deciding upon the particular actions that must be taken in a case to ensure that the client receives the best representation possible.” This continues to be the case, as does the following, which was noted in both the Foreword to the 2006 revision and the Foreword to the 2009 post-conviction standards:

“These guidelines, as such, are not rules or requirements of practice and are not intended, nor should they be used, to establish a legal standard of care. Some of the guidelines incorporate existing standards, such as the Oregon Rules of Professional Conduct, however, which are mandatory. Questions as to whether a particular decision or course of action meets a legal standard of care must be answered in light of all the circumstances presented.”

We hope that the revised Performance Standards, like the originals, will serve as a valuable tool both to the new lawyer or the lawyer who does not have significant experience in criminal and juvenile cases, and to the experienced lawyer who may look to them in each new case as a reminder of the components of competent, diligent, high quality legal representation.

---

Tom Kranovich  
Oregon State Bar President

Oregon State Bar

# Report of the Task Force on Standards of Representation in Criminal and Juvenile Delinquency Cases

**April 25, 2014**

DRAFT

# **Report of the Task Force on Standards of Representation in Criminal and Juvenile Delinquency Cases**

## **Summary and Background**

In September of 1996, the Oregon State Bar Board of Governors approved the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases. In May of 2006, the Board accepted revisions to the 1996 standards. In 2012, at the direction of the OSB Board of Governors, the two separate workgroups began meeting to work on significant revisions to the standards in criminal, delinquency and dependency cases. One group focused on juvenile dependency standards, and the other on adult criminal and juvenile delinquency standards.

On the following pages will find new standards produced by the criminal workgroup which are recommended to replace what is currently published on the OSB website as the second specific standard “Specific Standards for Representation in Criminal and Juvenile Delinquency Cases”. These changes, when combined with the proposed revisions to the third specific standard (juvenile dependency – expected to be completed soon) will make the “general standards” in Section 1 unnecessary.

The task force included representative from academia, the bench and from both private practice and public defender offices. Task force members were Margie Paris, Professor of Law, University of Oregon; Shaun McCrea, in private practice in Eugene; The Honorable Lisa Grief, Jackson County Circuit Court; Lane Borg, Executive Director, Metropolitan Public Defender; Julie McFarlane, Supervising Attorney, Youth, Rights & Justice; Shawn Wiley, Chief Deputy Defender, Appellate Division, Office of Public Defense Services. Paul Levy, General Counsel, Office of Public Defense Services served as chair of the task force.

The task force began its work by conducting a detailed examination of the existing standards and a review of other states' standards and the standards of national organizations. The task force found that although Oregon's standards, like those of most other states, are firmly grounded in the standards first promulgated by the National Legal Aid and Defender Association (NLADA) in 1994, the structure and substance of Oregon's standards had significant changes.

The variations from the NLADA standards were both good and bad. On the positive side, through an earlier revision of the Bar standards in 2005, they reflected a growing recognition that the role of a juvenile defender is highly specialized and complex, requiring knowledge and skills unique to delinquency cases in addition to those required in adult criminal cases. The standards also placed emphasis on the collateral consequences of criminal convictions, presaging the U.S. Supreme Court's seminal decision on that subject in *Padilla v. Kentucky*, 559 US 356 (2010). Indeed, overall, the existing Oregon standards serve as strong and valid guideposts to effective criminal and juvenile defense.

But the task force also found that the structure of the standards was confusing and unhelpful. Why, for instance, should we have five "general standards," only to repeat them again in another set of "specific standards"? And is it really necessary to set out in the standards specific provisions of the Oregon Rules of Professional Conduct when those obligations already exist for all attorneys in the state? More fundamentally, since the last revision in 2005, the defense of both criminal and delinquency cases has become increasingly complex and challenging. Advances in neuroscience, for instance, have challenged traditional notions of accountability in both delinquency and adult criminal cases. Adult criminal defense has changed dramatically with the evolution of constitutional doctrine applying the right to jury trial to some sentencing proceedings.

The ubiquity of computers and smartphones has dramatically changed the type of evidence lawyers are likely to encounter, as well as how lawyers are likely to do their own work.

The task force decided that the original organization of NLADA's standards provided the best structure for our own standards, while preserving much of the good work that had already been done to update the Oregon standards prior to our revision. Thus, within a new structure we have maintained a format of a short statement of a standard, followed by more detailed implementation language. New for this revision, and in keeping with the NLADA and many other state standards, is commentary following many of the standards, which provides additional background and guidance regarding a particular aspect of criminal or delinquency defense.

The task force also had the benefit of recently published National Juvenile Defense Standards (2012), a work of the highly regarded National Juvenile Defender Center, which present a systematic approach to defense practice in juvenile court. (The NJDC standards are available at <http://www.njdc.info/publications.php>.) While the new revision specifically recognizes this work as establishing a national norm for representation in delinquency cases, it also incorporates specific elements of this work into relevant Oregon standards.

The task force also brought its own considerable expertise and perspective to the review of existing standards and the drafting of revisions, consulting as required with other practitioners with recognized expertise in certain areas of practice. Building on an existing set of very good standards, the revision, if approved by the BOG, will serve as a useful tool for both the lawyer new to criminal and delinquency defense and the experienced lawyer who seeks guidance on the best practices for diligent and high quality representation. As such, the revision should be a useful tool for lawyers and law firms providing training for new lawyers. And they should serve as a helpful guide for courts, clients, the media and others in the interested public who wish to understand the expectations for defense lawyers in criminal and delinquency cases.

## Introduction to the Revised Standards

Since 2005, when these performance standards were last revised, the defense of criminal and delinquency cases has become increasingly complex and challenging. Advances in neuroscience, for instance, have challenged traditional notions of the legal status of juveniles under the United States Constitution, as reflected in cases limiting the authority of states to impose the most severe penalties on juvenile offenders<sup>1</sup> and requiring consideration of a youth's age in determining whether *Miranda* warnings should be given.<sup>2</sup> Likewise, adult criminal defense has changed dramatically with the evolution of constitutional doctrine applying the right to jury trial to sentencing proceedings<sup>3</sup> and expanding the obligations of lawyers to advise clients concerning

---

<sup>1</sup> *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

<sup>2</sup> *J.D.B. v. North Carolina*, 131 S. Ct. 502 (2011).

<sup>3</sup> *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004).

the collateral consequences of guilty pleas.<sup>4</sup> The performance standards that follow reflect new best practices that have developed in response to these and other developments in the law, science and professional responsibilities of lawyers.

As in earlier versions of these standards, most of the guidance that follows applies in both adult criminal and juvenile delinquency cases. However, this revision reflects a growing recognition, already evident in the 2005 revision, that the role of a juvenile defender is highly specialized and complex, requiring knowledge and skills unique to the duties of counsel in delinquency cases in addition to those required to perform most of the functions of counsel in an adult criminal case. In addition, since the last revision, the National Juvenile Defender Center has published the *National Juvenile Defense Standards* (2012), which present a systematic approach to defense practice in juvenile court and establish a national norm for this work. These new standards have informed the standards presented here but should also be consulted directly for detailed guidance on the obligations of counsel in delinquency cases.

The standards that follow do not address the special obligations of counsel in capital cases. While lawyers representing clients facing the death penalty will ordinarily be expected to meet the standards that follow here, additional duties of counsel in capital cases are presented and explained in detail in the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003). Lawyers in death penalty cases should continue to consult the ABA standards as well as the standards in this revision.

As noted in earlier versions of these standards, the guidance here will serve as a valuable tool for both the lawyer new to criminal or delinquency cases but also the experienced lawyer who seeks guidance on the best practices for diligent and high quality legal representation. But these standards should serve others as well. While they are not intended, nor should they be used, to establish a mandatory course of action in every case, they do reflect the current best practices for representation in criminal and delinquency cases. As such, they are a useful tool for lawyers and organizations providing training for new lawyers. They should also serve as a helpful guide for courts, clients, the media and others in the interested public who wish to understand the expectations for defense lawyers in criminal and delinquency cases.

## **Specific Standards for Representation in Criminal and Juvenile Delinquency Cases**

---

<sup>4</sup> *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010).

## **STANDARD 1.1 – ROLE OF DEFENSE COUNSEL**

**The lawyer for a defendant in a criminal case and for a youth in a delinquency case should provide quality and zealous representation at all stages of the case, advocating at all times for the client’s expressed interests. The lawyer shall abide by the Oregon Rules of Professional Conduct and applicable rules of court.**

### Implementation:

1. In abiding by the Oregon Rules of Professional Conduct, a lawyer should ensure that each client receives competent, conflict-free representation in which the lawyer keeps the client informed about the representation and promptly responds to reasonable requests for information.
2. The defense of a delinquency case requires knowledge and skills specific to juvenile defense in addition to what is required for the defense of an adult criminal case. Lawyers representing clients in juvenile court should be familiar with and follow the National Juvenile Defender Center’s *National Juvenile Defense Standards* (2012).
3. In both criminal and juvenile delinquency cases, a lawyer is bound by the client’s definition of his or her interests and should not substitute the lawyer’s judgment for that of the client regarding the objectives of the representation. In delinquency cases, a lawyer should explain to the client and, where appropriate, to the client’s parents that the lawyer may not substitute either his or her own view of the client’s best interests or a parent’s interests or view of the client’s best interests for those expressed by the client.
4. A lawyer should provide candid advice to the client regarding the probable success and consequences of pursuing a particular position in the case and give the client the information necessary to make informed decisions. A lawyer should consult with the client regarding the assertion or waiver of any right or position of the client.
5. A lawyer should consult with the client on the strategy and means by which the client’s objectives are to be pursued and exercise the lawyer’s professional judgment concerning technical and tactical decisions involved in the representation.

### Commentary:

The paramount obligation of a lawyer is to advocate for a client’s cause with zeal, skill and devotion. It is wrong to assert that the vague notion that a lawyer’s role as an “officer of the court” should temper a lawyer’s commitment to a client’s cause. “The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the [client’s] counselor and advocate with courage and devotion and to render effective, quality representation.” *ABA Standards for Criminal Justice, Standard 4.1.2 The Function of Defense Counsel* (3d ed. 1993). Indeed, a former Oregon State Bar General Counsel and Executive

Director has argued convincingly that “the notion that [lawyers] have ethical duties to courts and judges as ‘officers of the court’ is erroneous and confusing.” [Officers of the Court: What does it mean?](#) George Riemer, Bar Counsel Column, Oregon State Bar Bulletin, August 2001.

Especially in criminal and delinquency cases, where lawyers often represent troubled clients accused of conduct that may be widely condemned, the overarching duty of counsel is a “vigorous advocacy of the client’s cause,” guided by “a duty of loyalty” and the employment of the skill and knowledge necessary for a reliable adversarial system of justice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). As a matter of professional responsibility, “[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” *ABA Model Rules of Professional Conduct, Commentary to Rule 1.3*, ABA Center for Professional Responsibility (2007).

The same obligations of counsel in criminal cases apply with equal force in representing youth in juvenile delinquency proceedings. “At each stage of the case, juvenile defense counsel acts as the client’s voice in the proceedings, advocating for the client’s expressed interests, not the client’s ‘best interest’ as determined by counsel, the client’s parents or guardian, the probation officer, the prosecutor, or the judge.” [The Role of Juvenile Defense Counsel in Delinquency Court](#), p. 7, National Juvenile Defender Center (2009). Likewise, “[t]here is no exception to attorney-client confidentiality in juvenile cases for parents or guardians,” nor in service of what counsel or others consider the client’s “best interest.” *Id.*, p. 12. Nor does a juvenile’s minority status “automatically constitute diminished capacity such that a juvenile defense attorney can decline to represent the client’s expressed interests.” *Id.*, p. 10.

In both delinquency and criminal cases, “[c]ertain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel.” *ABA Standards for Criminal Justice, The Defense Function, Standard 4-5.2, Control and Direction of the Case* (3<sup>rd</sup> ed. 1993). In both circumstances, however, decisions by either the client or lawyer should be made after full consultation between the two. The ABA standards identify decisions for the client as what pleas to enter; whether to accept a plea agreement; whether to waive jury trial; whether to testify in his or her own behalf; and whether to appeal. The ABA standards likewise identify strategic and tactical decisions to be made by the lawyer to include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions to make, and what evidence should be introduced.

As noted, that allocation of decisional authority applies with equal force in delinquency cases. See, [National Juvenile Defense Standards](#), Standard 2.2, Explain the Attorney-Client Relationship, National Juvenile Defender Center (2012). However, in delinquency cases a lawyer may need to emphasize that the client is “in charge” of the critical decisions in the case. “In

clear, concise, and developmentally appropriate terms, counsel must exercise special care at the outset of representing a client to clarify the scope and boundaries of the attorney-client relationship.” *Id.*

Although Standard 1.1 calls for a strong client-centered model of advocacy, “[d]efense counsel is the professional representative of the accused, not the accused’s alter ego.” *ABA Standards for Criminal Justice, Standard 4.1.2 The Function of Defense Counsel* (3d ed. 1993). Thus, defense counsel “has no duty to execute any directive of the accused which does not comport with law” or with the lawyer’s obligations under standards of professional conduct. *Id.* Moreover, in those areas of strategic and tactical decision making that are committed to the informed judgment of counsel after consultation with the client, there is no obligation on counsel “to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to press those points.” *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983). Indeed, it would be an abdication of counsel’s professional responsibilities to acquiesce to a client’s ill-advised directions in these matters for the sake of expediency or to mollify a difficult client.

Previous versions of these standards often repeated verbatim applicable provisions of the Oregon Rules of Professional Conduct and predecessor rules of professional responsibility. The absence of specific reference to the Rules of Professional Conduct in the current version of these standards should not be taken as reflecting a position that they apply with any less force to defense counsel.

## **STANDARD 1.2 – EDUCATION, TRAINING AND EXPERIENCE OF DEFENSE COUNSEL**

- A. To provide quality representation, a lawyer must be familiar with the applicable substantive and procedural law, and its application in the particular jurisdiction where counsel provides representation. A lawyer has a continuing obligation to stay current with changes and developments in the law, and with changing best practices for providing quality representation in criminal and delinquency cases. Where appropriate, a lawyer should also be informed of the practices of the specific judge before whom a case is pending.**
- B. Prior to handling a criminal or delinquency matter, a lawyer should have sufficient experience or training to provide quality representation.**

Implementation:

1. In order to remain proficient in the law, court rules and practice applicable to criminal and delinquency cases, a lawyer should regularly monitor the work of Oregon and pertinent Federal appellate courts, and the Oregon State Legislature.
2. To stay current with developments in the law and practice of criminal and delinquency cases, a lawyer should maintain membership in state and national organizations that focus on education and training in the practice of criminal and delinquency cases and subscribe to listservs, consult available online resources, and attend continuing legal education programs devoted to the practice of criminal and delinquency cases.
3. A lawyer practicing criminal or juvenile delinquency law should complete at least 10 hours of continuing legal education training in criminal and delinquency law each year.
4. A lawyer practicing in criminal or juvenile delinquency law should become familiar with the basics of immigration law pertinent to the possible immigration consequences of a criminal conviction or an adjudication in a delinquency case for noncitizen clients. At least two hours of a lawyer's mandatory continuing legal education training requirements each year should involve training on such immigration consequences. Lawyers should also be familiar with other non-penal consequences of a criminal conviction or delinquency adjudication, such as those affecting driving privileges, public benefits, sex offender registration, residency restrictions, student financial aid, opportunities for military service, professional licensing, firearms possession, DNA sampling, HIV testing, among others.
5. Before undertaking representation in a criminal or delinquency case, a less experienced lawyer should obtain training in the relevant areas of practice and should consult with others in the field, including nonlawyers. A less experienced lawyer should observe and, when possible, serve as co-counsel to more experienced lawyers prior to accepting sole responsibility for a criminal or delinquency case. More experienced lawyers should mentor less experienced lawyers.
6. Lawyers in delinquency cases and, where relevant, in criminal cases, should develop a basic knowledge of child and adolescent development, including information concerning emotional, social and neurological development that could impact effective communication by the lawyer with clients and the defense of charges against the client. Lawyers in delinquency cases should have training in communicating with youth in a developmentally appropriate way.
7. Lawyers representing youth who are prosecuted in the adult criminal system should have the specialized training and experience of a juvenile defender in addition to the training and experience required to handle the most serious adult criminal cases.
8. A lawyer providing representation in criminal and juvenile delinquency cases should be familiar with key agencies and services typically involved in those cases, such as the Oregon Department of Corrections, local community corrections programs, the Oregon Youth Authority, the Department of Human Services, the county Juvenile Department, private treatment facilities

and programs, along with other services and programs available as dispositional alternatives to detention and custody.

Commentary:

The complexity and seriousness of criminal and juvenile delinquency cases require specialized training and expertise in a broad area of law and practical skills. Moreover, as the practice of law in these areas continues to develop, lawyers must devote a substantial amount of time to on-going training. From complex, ever-changing sentencing schemes to the increased role of scientific evidence and forensic experts, defense lawyers must master not only the skills of trial advocacy but also the complex legal and factual issues attendant to many cases. For instance, recent advances in neuroscience and the understanding of infant and adolescent brain development undermine traditional notions of culpability and blameworthiness for both juvenile and adult offenders, requiring defense lawyers to learn the pertinent scientific principles and present them as evidence in appropriate cases. Likewise, as computers, smartphones and other electronic devices become an integral part of everyday life for most youth and adults, counsel must understand and utilize their evidentiary potential.

As criminal and delinquency cases have become more serious and complex, the collateral consequences of convictions and adjudications have become more numerous and significant. Lawyers must now understand and explain the immigration consequences of a criminal conviction to noncitizen clients in order to fulfill the Sixth Amendment rights of those clients. *Padilla v. Kentucky*, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 (2010). Depending upon the particular circumstances of a client, other collateral consequences may be just as important as deportation, requiring a lawyer to understand and seek to mitigate the impact of a conviction on a client's employment, housing, public assistance, schooling and other fundamental life activities.

The increased complexity and seriousness of criminal and delinquency cases require lawyers to take advantage of membership organizations that provide not only seminars and other training but also access to blogs, listservs, videos, motions and memoranda, and other online resources that alert lawyers to the latest developments in a pertinent area of law, provide a forum to seek case-specific guidance, and promote a culture of zealous, client-centered representation. The days of the solo practitioner toiling alone are in the past. In Oregon, the Oregon Criminal Defense Lawyers Association, the Oregon State Bar, National Association of Criminal Defense Lawyers and the National Juvenile Defender Center help provide the tools essential to successful practice in these areas. While direct peer-to-peer consultation, mentoring or guidance remains important, membership in an organization focused on criminal and juvenile defense has become the norm for the best practice in Oregon.

**STANDARD 1.3 – OBLIGATIONS OF DEFENSE COUNSEL REGARDING WORKLOAD**

**Before agreeing to act as counsel or accept appointment by a court, a lawyer has an obligation to make sure that he or she has sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a criminal matter or a youth in a delinquency case. If it later appears that the lawyer is unable to offer quality representation in the case, the lawyer should move to withdraw.**

Implementation:

1. A lawyer, whether court-appointed or privately retained, should not accept workloads that, by reason of size or complexity, interfere with the ability of the lawyer to meet professional obligations to each client.
2. A lawyer should have access to sufficient support services and resources to allow for quality representation.

Commentary:

In 2007, the Oregon State Bar Board of Governors approved Formal Ethics Opinion No. 2007-178, which was based upon the American Bar Association Formal Ethic Opinion No. 06-441, entitled “Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation.” The OSB opinion, which makes clear that it speaks to both appointed and retained counsel, commands lawyers to control their workloads to enable them to discharge their ethical obligations “to provide each client with competent and diligent representation, keep each client reasonably informed about the status of his or her case, explain each matter to the extent necessary to permit the client to make informed decisions regarding the representation, and abide by the decisions that the client is entitled to make.” The opinion observes, quoting the ABA opinion, that for every client a lawyer is required to “keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; and communicate effectively on behalf of and with clients[.]” The opinion observes that a “lawyer who is unable to perform these duties may not undertake or continue with representation of a client.”

**STANDARD 2.1 – OBLIGATIONS OF DEFENSE COUNSEL AT INITIAL APPEARANCE**

**At the initial court appearance in a criminal or delinquency case, a lawyer should inform the client of the offenses alleged in the charging instrument or petition, assert pertinent statutory and constitutional rights of the client on the record and, where appropriate, attempt to secure the pretrial release of detained clients under the conditions most favorable and acceptable to the client.**

Implementation:

1. A lawyer should be familiar with the law regarding initial appearance, arraignment, and juvenile detention.
2. A lawyer should be familiar with the local practice regarding case docketing and processing so that the lawyer may inform the client regarding expected case events and the dates for upcoming court appearances.
3. A lawyer should be prepared to enter an appropriate assertion that preserves the client's rights and demands due process, whether that is a not guilty plea or a denial of the allegations in a delinquency petition, demand for preliminary hearing or request for some other further proceeding. A lawyer should make clear that the defendant reserves the following rights in the present and any other matter:
  - a. Right to remain silent under State and Federal Constitutions;
  - b. Right to counsel under State and Federal Constitutions;
  - c. Right to file challenges to the charging instrument or petition;
  - d. Right to file challenges to the evidence;
  - e. Right to file notices of affirmative defenses; and
  - f. Right to a speedy trial.
4. A lawyer should be prepared to object to the court's failure to comply with the law regarding the initial appearance process, such as the statute requiring an ability to confer confidentially with the client during a video arraignment.
5. If the client is in custody, a lawyer should seek release from custody or detention (See Standard 2.3).
6. A lawyer should obtain all relevant documents and orders that pertain to the client's initial appearance.
7. A lawyer may waive formal reading of the allegations and advice of rights by the court, providing the lawyer advises the client what rights are waived, the nature of the charges, and the potential consequences of relinquishing his rights.
8. If the adjudicatory judge is assigned at the initial appearance, the lawyer must be familiar with the law and local practice for filing motions to disqualify a judge, discuss this with the client, and be prepared to timely file appropriate documents challenging an assigned judge.

Commentary:

While substantive law has been largely standardized throughout the state, court procedural rules still vary significantly by county or judicial district. A lawyer should be familiar with the local practice codified in the Supplementary Local Rules (SLRs) but also preserved only as oral tradition (the local unwritten rules). Because Oregon allows for self-bail on posting security, the lawyer should be familiar with local sheriff office practices regarding posting security and when deposited moneys will be available to clients.

Jurisdictions vary on when a trial judge is actually assigned and, therefore, the time for filing motions for change of judge will vary. Some counties require all plea discussions to occur prior to entry of the not guilty plea, but will often set over plea entry to allow for discovery and negotiations. Some counties will stick closely to the time requirements in the Uniform Trial

Court Rules, but constitutional due process rights may trump a jurisdiction's procedural requirements or administrative rules. *State v. Owens*, 68 Or App 343 (1984).

## **STANDARD 2.2 – CLIENT CONTACT AND COMMUNICATION**

**A lawyer should conduct a client interview as soon as practicable after representation begins and thereafter establish a procedure to maintain regular contact with the client in order to explain the allegations and nature of the proceedings, meet the ongoing needs of the client, obtaining necessary information from the client, consult with the client about decisions affecting the course of the defense, and to respond to requests from the client for information or assistance concerning the case.**

### Implementation:

1. A lawyer should provide a clear explanation, in developmentally appropriate language, of the role of both the client and the lawyer, and demonstrate appropriate commitment to the client's expressed interests in the outcome of the proceedings. A lawyer should elicit the client's point of view and encourage the client's full participation in the defense of the case.
2. The initial interview should be in person in a private setting that allows for a confidential conversation. When the client is a youth, a lawyer should not allow parents or other people to participate in the initial meeting with the client, in order to maintain privileges and assure that the client knows the communication is confidential.
3. If the client is in custody and a release or detention hearing is pending, the lawyer should be familiar with the law regarding detention, the criteria for release and discuss with the client release factors and resources available to the client to obtain pretrial release.
4. At the initial meeting the lawyer should review the charges facing the client and be prepared to discuss the necessary elements of the charges, the procedure the client will be facing in subsequent court appearances, and inquire if the client has any immediate needs regarding securing evidence or obtaining release.
5. Prior to all meetings the lawyer should:
  - a. Be familiar with the elements of the charged offense(s) and the potential punishment;
  - b. Obtain copies of any relevant documents that are available, including any charging documents, recommendations and reports made by agencies concerning pretrial release, and law enforcement reports that might be available;
  - c. Be familiar with the legal procedure the client will encounter and be prepared to discuss the process with the client;
  - d. If a client is in custody, be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release, and in a juvenile proceeding be prepared to discuss the process of ongoing detention review;
6. During an initial interview with the client, a lawyer should:
  - a. Obtain information concerning:

- (1) The client's ties to the community, including the length of time he or she has lived at current and former addresses, family relationships, immigration status (if applicable), employment record and history;
- (2) The client's history of service in the military, if any;
- (3) The client's physical and mental health, educational and military services records;
- (3) The client's immediate medical needs;
- (5) The client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether he or she is on probation or parole and the client's past or present performance under supervision;
- (6) The ability of the client to meet any financial conditions of release;
- (7) The names of individuals or other sources that counsel can contact to verify the information provided by the client; and the client's permission to contact these individuals;

b. Provide to the client information including but not limited to:

- (1) An explanation of the procedures that will be followed in setting the conditions of pretrial release;
- (2) An explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;
- (3) An explanation of the lawyer-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the lawyer;
- (4) The charges and the potential penalties, as well as potential collateral consequences of any conviction and sentence;
- (5) A general procedural overview of the progression of the case, where possible;
- (6) Advice that communication with people other than the defense team is not privileged and, if the client is in custody, may be monitored.

7. A lawyer should use any contact with the client as an opportunity to gather timely information relevant to preparation of the defense. Such information may include, but is not limited to:

- a. The facts surrounding the charges against the client;
- b. Any evidence of improper police investigative practices or prosecutorial conduct that affects the client's rights;
- c. Any possible witnesses who should be located;
- d. Any evidence that should be preserved;
- e. Where appropriate, evidence of the client's competence to stand trial and/or mental

state at the time of the offense.

Commentary:

The purpose of the initial contact is to quickly ascertain and identify work that needs to be done to prepare for the defense, including documenting the status or condition of evidence that could be lost, such as injuries to the defendant or crime scene conditions; establishing a relationship with the client; informing the client of the charges against him or her and the possible consequences; and reviewing next steps such as preparing for a release hearing or preliminary hearing. The relationship between a criminal defendant or youth charged with delinquency and a lawyer will be directly affected by the quality of their communication, which starts with the initial interview where the lawyer can provide the client important information and obtain relevant case information from the client. There is a strong correlation between good lawyer/client communication and the lack of complaints from clients about poor representation or requests for substitute counsel. If this correlation is more than coincidence then it is likely that the key to successful representation is good communication that begins with a timely and thorough initial interview.

The duty to communicate is found in Oregon Rule of Professional Conduct 1.4 and forms a core duty that the lawyer owes the client. Aside from addressing the immediate needs of the client to secure release or preserve evidence, the initial interview (along with subsequent meetings) forms the source of another core duty, the duty to investigate. A review of information with the client may assist in determining who needs to be interviewed or what evidence may need expert evaluation.

Communication and contact with the client is an important source for the lawyer to assess the client's mental status to understand the proceedings. The lawyer should make note of concerns and consult appropriate experts regarding concerns over competency.

### **STANDARD 2.3 – RELEASE OF CLIENT**

- A. A lawyer has a duty to seek release from custody or detention of clients under the conditions most favorable and acceptable to the client.**
- B. Release should be sought at the earliest possible opportunity and if not successful a lawyer should continue to seek release at appropriate subsequent hearings.**

Implementation:

1. If the client is in custody or detention the lawyer should review the documents supporting probable cause and, if appropriate, challenge any finding of probable cause, and in all cases where detention continues the lawyer should move for release if appropriate or ask that bail be reduced to an amount the client can afford.
2. If the court will not consider release at initial appearance, the lawyer should request a release hearing and decision within the statutory time requirements. In delinquency proceedings the lawyer should be familiar with the law and procedures for detention hearings and the risk factors that the court is likely or required to consider. In criminal cases, at any release hearing the lawyer should be familiar with the statutory criteria for release and be prepared to address those release factors on the record.

3. In preparation for a release hearing the lawyer should discuss statutory release criteria with the client and be prepared to address the court regarding these factors including residence, employment, compliance with release conditions such as no contact with victims, and any release compliance monitoring.
4. If the client is subject to release on security, the lawyer should be familiar with the rules and requirements to post security, including procedures for client “self-bailing” with funds from an inmate account, posting a security interest in property, or third party posting requirements.

### **STANDARD 3 - INVESTIGATION**

**A lawyer has the duty to conduct an independent review of the case, regardless of the client’s admissions or statements to the lawyer of facts constituting guilt or the client’s stated desire to plead guilty or admit guilt. Where appropriate, the lawyer should engage in a full investigation, which should be conducted as promptly as possible and should include all information, research, and discovery necessary to assess the strengths and weaknesses of the case, to prepare the case for trial or hearing, and to best advise the client as to the possibility and consequences of conviction or adverse adjudication. The lawyer should not knowingly use illegal means to obtain evidence or instruct others to do so.**

#### **Implementation**

1. A lawyer should obtain copies of all charging documents and should examine them to determine the specific charges that have been brought against the client.
2. A lawyer should engage in research, including a review of all relevant statutes and case law, in order to determine:
  - a. The necessary elements of the charged offenses;
  - b. Any defects in the charging instrument, both constitutional and non-constitutional, including statute of limitations and double jeopardy;
  - c. Whether the court’s jurisdiction can be challenged;
  - d. Applicability of defenses, ordinary and affirmative, including defenses based on mental disease or defect, diminished capacity, or partial responsibility, and whether any notice of such defenses is required and specific timelines for giving notice; and
  - e. Potential consequences of conviction or adverse adjudication, including those relating to immigration and possible deportation.
3. A lawyer should conduct an in-depth interview with the client as described in Standard 2.2. The interview should be used to identify:
  - a. Additional sources of information concerning the incidents or events giving rise to the charges and to any defenses;

- b. Evidence concerning improper conduct or practices by law enforcement, juvenile authorities, mental health departments, or the prosecution, which may affect the client's rights or the admissibility of evidence;
- c. Information relevant to the court's jurisdiction;
- d. Information relevant to pretrial or prehearing release and possible pretrial or prehearing disposition; and
- e. Information relevant to sentencing or disposition and potential consequences of conviction or adverse adjudication.

4. A lawyer should consider whether to interview potential witnesses, whether adverse, neutral, or favorable, and when new evidence is revealed during the course of witness interviews, the lawyer should locate and assess its value to the client. Witness interviews should be conducted by an investigator or in the presence of a third person who will be available, if necessary, to testify as a defense witness at the trial or hearing. When speaking with third parties, the lawyer has a duty to comply with the Oregon Rules of Professional Conduct, including Rule 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 4.2 (Communication with Person Represented by Counsel), and 4.3 (Dealing with Unrepresented Persons). The lawyer also has a duty, where appropriate, to comply with statutory rights of victims, such as those embodied in ORS 135.970(2) and (3).

5. A lawyer should attempt to interview all law enforcement officers involved in the arrest and investigation of the case and should obtain all pertinent information in the possession of the prosecution, juvenile authorities, or law enforcement, including, where relevant, law enforcement personnel records and documentation of prior officer misconduct. In cases involving child witnesses or victims, the lawyer should seek records of counseling sessions with those children. The lawyer should pursue formal and informal discovery with authorities as described in Standard 4.1.

6. Where appropriate, a lawyer should inspect the scene of the alleged offense under circumstances (including weather, lighting conditions, and time of day) as similar as possible to those existing at the time of the alleged incident.

7. Where appropriate, a lawyer should obtain school, mental health, medical, drug and alcohol, immigration, and prior criminal offense and juvenile records of the client and witnesses.

#### Commentary:

A skilled and knowledgeable lawyer will be of little use to a client without a thorough understanding of the facts of a case. As explained in the Commentary to the *National Juvenile Defense Standards*:

Most cases are won on facts, not legal arguments, and it is investigation that uncovers the facts. The facts are counsel's most important asset, not only in litigating the case at trial, but in every other function counsel performs, including negotiating for reduced or dismissed charges, diversion, or a plea agreement, as well as influencing a favorable disposition.

An investigation is important even when the client has admitted culpability or expresses a desire to plead guilty. An investigation may yield evidence that can lead to suppression of key state evidence, negate or block the admissibility of state evidence, or limit the client's liability. Even if the investigation does not result in an acquittal or dismissal, it may yield evidence that can be useful in negotiating a more favorable plea agreement or mitigation of disposition.<sup>5</sup>

## **STANDARD 4.1 – DISCOVERY**

**A lawyer has the duty to pursue formal and informal discovery in a prompt fashion and to continue to pursue opportunities for discovery throughout the case.**

### **Implementation:**

1. A lawyer should be familiar with all applicable statutes, rules, and case law governing discovery, including those concerning the processes for filing motions to compel discovery or to preserve evidence, as well as those making sanctions available when the prosecution has engaged in discovery violations.
2. A lawyer should also be familiar with and observe the applicable statutes, rules and case law governing the obligation of the defense to provide discovery. A lawyer should file motions for protective orders or otherwise resist discovery where a lawful basis exists to shield information in the possession of the defense from disclosure.
3. A lawyer should make a prompt and comprehensive demand for discovery pursuant to applicable rules and constitutional provisions, and should continually seek all information to which the client is entitled, especially any exculpatory, impeaching, and mitigating evidence. Discovery should include, but is not limited to, the following:
  - a. Potentially exculpatory, impeaching, and mitigating information;
  - b. Law enforcement reports and notes, 911 recordings and transcripts, inter-officer transmissions, dispatch reports, and reports or notes of searches or seizures and the circumstances in which they were accomplished;

---

<sup>5</sup> National Juvenile Defender Center, *National Juvenile Defense Standards*, Sec. 4.1, at 68-69 (citations omitted).

- c. Written communications, including emails, between prosecution, law enforcement, and/or witnesses;
- d. Names and addresses of prosecution witnesses, their prior statements, their prior criminal records, and their relevant digital, electronic, and social media postings;
- e. Oral or written statements by the client, and the circumstances under which those statements were made;
- f. The client's prior criminal or juvenile record and evidence of any other misconduct that the prosecution may intend to use against the client;
- g. Copies of, or the opportunity to inspect, books, papers, documents, photographs, computer data, tangible objects, buildings or places, and other material relevant to the case;
- h. Results or reports of physical or mental examinations, and of scientific tests or experiments, and the data and documents on which they are based;
- i. Statements and reports of experts, and the data and documents on which they are based; and
- j. Statements of co-defendants.

4. A lawyer should consider filing motions seeking to preserve evidence where it is at risk of being destroyed or altered.

## **STANDARD 4.2 – THEORY OF THE CASE**

**A lawyer should develop and continually reassess a theory of the client's case that advances the client's goals and encompasses the realities of the client's situation.**

### **Implementation:**

1. A lawyer should use the theory of the case when evaluating strategic choices throughout the course of the representation.
2. A lawyer should allow the theory of the case to focus investigation and trial or hearing preparation, seeking out and developing facts and evidence that the theory makes material.
3. A lawyer should remain flexible enough to modify or abandon the theory if it does not serve the client.

### **Commentary:**

The theory of the case is a construct that can guide the preparation and presentation of a case. A theory of the case should explain the facts of the case in such a way that a judge or jury will understand why the client is entitled to a favorable verdict. As such, it is first and foremost a factual narrative that presents the client's story in straightforward common sense terms that

support a favorable verdict under the law applicable to the case. It must be informed by thorough investigation and preparation so that a lawyer will know which facts a judge or jury is likely to accept as proven. It must also account for what fact finders are likely to believe based upon their own life experiences. Finally, a theory of the case must account for the jury instructions and other law applicable to the case. Although a theory of the case should be developed early in the representation of a client and be largely built upon the client's version of events, a lawyer must be able to revisit and revise the theory, in consultation with the client, as investigation and preparation continue to develop the facts that a judge or jury are likely to accept as true at the conclusion of the trial.

## **STANDARD 5.1 – PRETRIAL MOTIONS AND NOTICES**

**A lawyer should research, prepare, file and argue appropriate pretrial motions and notices whenever there is reason to believe the client may be entitled to relief.**

### Implementation:

1. The decision to file a particular pretrial motion or notice should be made after thorough investigation, and after considering the applicable law in light of the circumstances of the case.
2. Among the issues the lawyer should consider addressing in pretrial motions are:
  - a. the pretrial custody of the accused;
  - b. the competency or fitness to proceed of the accused (see Standard 5.3);
  - c. the constitutionality of relevant statutes;
  - d. potential defects in the charging process or instrument;
  - e. the sufficiency of the charging document;
  - f. the severance of charges and/or co-defendants for trial;
  - g. change of venue;
  - h. the removal of a judicial officer from the case through requests for recusal or the filing of an affidavit of prejudice;
  - i. the discovery obligations of both the prosecution and the defense, including:
    - (1) motions for protective orders;
    - (2) *Brady v. Maryland* motions;
    - (3) motions to compel discovery;

j. violations of federal and/or state constitutional or statutory provisions, including:

- (1) illegal searches and/or seizures;
- (2) involuntary statements or confessions;
- (3) statements obtained in violation of the right to counsel or privilege against self-incrimination;
- (4) unreliable identification evidence;
- (5) speedy trial rights; and
- (6) double jeopardy protections;

k. requests for, and challenges to denial of, funding for access to reasonable and necessary resources and experts, such as:

- (1) interpreters;
- (2) mental health experts;
- (3) investigative services; and
- (4) forensic services;

l. the right to a continuance in order to adequately prepare and present a defense, or to respond to prosecution motions;

m. matters of trial evidence that may be appropriately litigated by means of a pretrial motion *in limine*, including:

- (1) the competency or admissibility of particular witnesses, including experts and children;
- (2) the use of prior convictions for impeachment purposes;
- (3) the use of prior or subsequent bad acts;
- (4) the use of reputation or other character evidence;
- (5) the use of evidence subject to “rape shield” protections;

n. notices of affirmative defenses and other required notices to present particular evidence;

o. the dismissal of charges on the basis of a civil compromise, best interests of a youth in delinquency cases, in the furtherance of justice, and the general equitable powers of the court.

3. Before deciding not to file a motion or to withdraw a motion already filed, a lawyer should carefully consider all facts in the case, applicable law, case strategy, and other relevant information, including:

- a. the burden of proof, and the potential advantages and disadvantages of having witnesses testify at pretrial hearings and to what extent a pretrial hearing reveals defense strategy to a client's detriment;
- b. whether a pretrial motion may be necessary to protect the client's rights against later claims of waiver, procedural default or failure to preserve an issue for later appeal;
- c. the effect the filing of a motion may have upon the client's speedy trial rights; and
- d. whether other objectives, in addition to the ultimate relief requested by a motion, may be served by the filing and litigation of a particular motion.

## **STANDARD 5.2 – FILING AND ARGUING PRETRIAL MOTIONS**

**A lawyer should prepare for a motion hearing just as he or she would prepare for trial, including preparing for the presentation of evidence, exhibits and witnesses.**

### Implementation:

1. Motions should be timely filed, comport with the formal requirements of the court, and succinctly inform the court of the authority relied upon.
2. When a hearing on a motion requires taking evidence, a lawyer's preparation should include:
  - a. investigation, discovery and research relevant to the claims advanced;
  - b. subpoenaing all helpful evidence and witnesses;
  - c. preparing witnesses to testify; and
  - d. fully understanding the applicable burdens of proof, evidentiary principles and court procedures, including the costs and benefits of having the client or other witnesses testify and be subject to cross examination.
3. A lawyer should consider the strategy of submitting proposed findings of fact and conclusions of law to the court at the conclusion of the hearing.

4. After an adverse ruling, a lawyer should consider seeking interlocutory relief, if available, taking necessary steps to perfect an appeal, and renewing the motion or objection during trial in order to preserve the matter for appeal.

### **STANDARD 5.3 – PRETRIAL DETERMINATION OF CLIENT’S FITNESS TO PROCEED**

**A lawyer must be able to recognize when a client may not be competent to stand trial and take appropriate action.**

Implementation:

1. A lawyer must learn to recognize when a client’s ability to aid and assist in the proceedings may be compromised due to mental health disorders, developmental immaturity, or developmental and/or intellectual disabilities.
2. A lawyer must assess whether the client’s level of functioning limits his or her ability to communicate effectively with counsel, as well as his or her ability to have a factual and rational understanding of the proceedings.
3. When a lawyer has reason to doubt the client’s competency to stand trial, the lawyer should gather information and consider filing a pretrial motion requesting a competency determination.
4. In deciding whether to request a competency determination, a lawyer must consider, among other things:
  - a. his or her obligations, under Oregon Rule of Professional Conduct 1.14, to maintain a normal attorney-client relationship, to the extent possible, with a client with diminished capacity; and
  - b. the likely consequences of a finding of incompetence, and whether there are other ways to resolve the case, such as dismissal upon obtaining services for the client or referral to other agencies.
5. If the lawyer decides to proceed with a competency hearing, he or she should secure the services of a qualified expert. When the client is a youth, such an expert should be versed in the emotional, physical, cognitive, and language impairments of children and adolescents; the forensic evaluation of youth; the competence standards and accepted criteria used in evaluating juvenile competence; and effective interventions or treatment for youth.
6. If a court finds an adult client incompetent to proceed, a lawyer should advocate for the least restrictive level of supervision and the least intrusive treatment available. If the client is a youth,

a lawyer should seek to resolve the delinquency case by having the petition converted to a dependency petition or through a motion to dismiss in the best interests of the youth.

7. If a court finds a client is competent to proceed, a lawyer should continue to raise the matter during the course of the proceedings if the lawyer has a good faith concern about the client's continuing competency to proceed, and in order to preserve the matter for appeal.

## **STANDARD 5.4 – CONTINUING OBLIGATIONS TO FILE OR RENEW PRETRIAL MOTIONS OR NOTICES**

**During trial or subsequent proceedings, a lawyer should be prepared to raise any issue which is appropriately raised pretrial but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Counsel should also be prepared to renew a pretrial motion if new supporting information is disclosed in later proceedings.**

### Commentary:

In many cases, the dispositive issue may concern some issue other than whether the client committed the alleged offense. Invariably these issues should be the subject of pretrial motions, supported by thorough factual investigation and legal research. The range of such issues is broad, as illustrated by the foregoing standard. The timing of motions is a strategic consideration and a function of court rule and, in many instances, local court practice. In every case, in order to determine whether to litigate a pretrial motion, a lawyer must be knowledgeable about current developments in the defense of criminal and delinquency cases and be skilled in presenting evidence and argument on complex legal issues.

The potential advantages of litigating pretrial motions are many. This point is perhaps best summarized by the commentary on this subject in the *National Juvenile Defense Standards*, which reads as follows:

Pre-trial motions hearings provide immediate and long-term benefits. Immediately, counsel has the opportunity to convince the judge that the case should be dismissed, or at the very least that certain evidence should be suppressed. Counsel also has the benefit of additional discovery through the state's responses to the motion prior to trial.

In the long-term, when motions generate a hearing, counsel can gain invaluable opportunities to pin down prosecution witnesses on the record and develop transcripts that could be used to impeach the witnesses with their prior inconsistent statements. Counsel has the opportunity to strengthen his or her relationship with the client through a demonstration of counsel's willingness to fight for the client. Because in many jurisdictions the vast majority of cases are resolved through a plea agreement, pre-trial motions practice may have an enormous impact on the kind of plea offer the prosecutor is willing to consider.

## **STANDARD 6.1 - EXPLORATION OF DISPOSITION WITHOUT TRIAL**

**A lawyer has the duty to explore with the client the possibility, advisability, and consequences of reaching a negotiated disposition of charges or a disposition without trial. A lawyer has the duty to be familiar with the laws, local practices, and consequences concerning dispositions without trial.**

### Implementation:

1. A lawyer should explore and consider mediation, civil compromise, diversion, Formal Accountability Agreements, having the case filed as a juvenile delinquency or dependency case, alternative dispositions including conditional postponement, motion to dismiss in the interest of justice, negotiated pleas or disposition agreements, and other non-trial dispositions.
2. A lawyer should explain to the client the strengths and weaknesses of the prosecution's case, the benefits and consequences of considering a non-trial disposition and discuss with the client any options that may be available to the client and the rights the client gives up by pursuing a non-trial disposition.
3. A lawyer should assist the client in weighing whether there are strategic advantages to be gained by taking a plea or whether the sentence or disposition results would likely be the same.
4. With the consent of the client, a lawyer should explore with the prosecutor and, in juvenile cases, the juvenile court counselor, when appropriate, available options to resolve the case without trial. The lawyer should obtain information about the position the prosecutor and juvenile court counselor will take as to non-plea dispositions and recommendations that will be made about sentencing or disposition. Throughout negotiation, a lawyer must zealously advocate for the expressed interests of the client, including advocating for some benefit for the client in exchange for a plea.

5. A lawyer cannot accept any negotiated settlement or agree to enter into any non-trial disposition without the client's express authorization.
6. A lawyer must keep the client fully informed of continued negotiations and convey to the client any offers made by the prosecution or recommendations by the juvenile court counselor for a negotiated settlement. The lawyer must assure that the client has adequate time to consider the plea and alternative options.
7. A lawyer should continue to take steps necessary to preserve the client's rights and advance the client's defenses even while engaging in settlement negotiations.
8. Before conducting negotiations, a lawyer should be familiar with:
  - a. the types, advantages and disadvantages, and applicable procedures and requirements of available pleas or admissions to juvenile court jurisdiction, including a plea or admission of guilty, no contest, a conditional plea or admission of guilty that reserves the right to appeal certain issues, and a plea or admission in which the client is not required to acknowledge guilt (*Alford* plea);
  - b. whether agreements between the client and the prosecution would be binding on the court or on prison, juvenile, parole and probation, and immigration authorities; and
  - c. the practices and policies of the particular prosecuting authorities, juvenile authorities, and judge that may affect the content and likely results of any negotiated settlement.
9. A lawyer should be aware of, advise the client of, and, where appropriate, seek to mitigate the following, where relevant:
  - a. rights that the client would waive when entering a plea or admission disposing of the case without trial;
  - b. the minimum and maximum term of incarceration that may be ordered, including whether the minimum disposition would be indeterminate, possible sentencing enhancements, probation or post-confinement supervision, alternative incarceration programs, and credit for pretrial detention;
  - c. the likely disposition given sentencing guidelines;
  - d. the minimum and maximum fines and assessments, and court costs that may be ordered, and the restitution that is being requested by the victim(s);
  - e. arguments to eliminate or reduce fines, assessments and court costs; challenges to liability for and the amount of restitution; the possibilities of civil action by the victim(s), and asset forfeiture; and the availability of work programs to pay restitution and perform community service;
  - f. consequences relating to previous offenses;

- g. the availability and possible conditions of, protective supervision, conditional postponement, probation, parole, suspended sentence, work release, conditional leave, and earned release time;
- h. the availability and possible conditions of deferred sentences, conditional discharges, alternative dispositions, and diversion agreements;
- i. for non-citizen juvenile clients, the possibility of temporary and permanent immigration relief through the available legislative or administrative immigration programs and Special Immigrant Juvenile Status,
- j. for non-citizen clients, the possibility of adverse immigration consequences;
- k. for non-citizen clients, the possibility of criminal consequences of illegal re-entry following conviction and deportation;
- l. the possibility of other consequences of conviction, such as:
  - i. requirements for sex offender registration, relief, and set-aside;
  - ii. DNA sampling, and AIDS and STD testing;
  - iii. loss of civil liberties such as voting and jury service privileges;
  - iv. affect on driver's or professional licenses and on firearms possession;
  - v. loss of public benefits;
  - vi. loss of housing, education, financial aid, career, employment, vocational, or military service opportunities; and
  - vii. risk of enhanced sentences for future convictions;
- m. the possible place and manner of confinement, placement, or commitment;
- n. the availability of pre- and post-adjudication diversion programs and treatment programs;
- o. standard sentences for similar offenses committed by offenders with similar backgrounds; and
- p. the confidentiality of juvenile records and the availability of expungement.

10. A lawyer should identify negotiation goals with the following in mind:

- a. concessions that the client might offer to the prosecution, including an agreement:
  - i. not to contest jurisdiction;
  - ii. not to dispute the merits of some or all of the charges;
  - iii. not to assert or litigate certain rights or issues;
  - iv. to fulfill conditions of restitution, rehabilitation, treatment, or community service; and
  - v. to provide assistance to law enforcement or juvenile authorities in investigating and prosecuting other alleged wrongful activity;
- b. benefits to the client, including an agreement:
  - i. that the prosecution will refile allegations in juvenile court and will not contest juvenile court jurisdiction;
  - ii. that the prosecution will not oppose release pending sentence, disposition, or appeal;
  - iii. that the client may reserve the right to contest certain issues;
  - iv. to dismiss or reduce charges immediately or upon completion of certain conditions;

- v. that the client will not be subject to further investigation for uncharged conduct;
- vi. that the client will receive, subject to the court's agreement, a specified set or range of sanctions;
- vii. that the prosecution will take, or refrain from taking, a specified position with respect to sanctions, and/or that the prosecution will not present certain information, whether at the time of sentencing, during preparation of a pre-sentence report, or in determining the client's date of release from confinement; and
- viii. that the client will receive, or that the prosecution will recommend, specific benefits concerning the place and manner of confinement, conditions of parole or probationary release, and the provision of pre- or post-adjudication treatment programs.

11. A lawyer has the duty to inform the client of the full content of any tentative negotiated settlement or non-trial disposition, and to explain to the client the advantages, disadvantages, and potential consequences of the settlement or disposition.

12. A lawyer should not recommend that the client enter a dispositional plea or admission unless appropriate investigation and evaluation of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced if the case were to go forward.

## **STANDARD 6.2 – ENTRY OF DISPOSITIONAL PLEA OR ADMISSION**

**A decision to enter a plea resolving the charges, or to admit the allegations, rests solely with the client. The lawyer must not unduly influence the decision to enter a plea and must ensure that the client's acceptance of the plea is voluntary and knowing, and reflects an intelligent understanding of the plea and the rights the client will forfeit.**

### Implementation:

1. A lawyer has the duty to explain to the client the advantages, disadvantages, and consequences of resolving the case by entering a dispositional plea or by admitting the allegations.

2. A lawyer has the duty to explain to the client the nature of the hearing at which the client will enter the plea or admission and the role that the client will play in the hearing, including participating in the colloquy to determine voluntary waiver of rights and answering other questions from the court and making a statement concerning the offense. The lawyer should be familiar with the Model Colloquy for juvenile waiver of the right to trial. The lawyer should explain to the client that the court may in some cases reject the plea.

3. At the hearing, a lawyer has the duty to assist the client and to ensure that :

- a. any plea petition is legible and accurate and clearly sets forth terms beneficial to the client;
  - b. the court, on the record, inquires, using any applicable model colloquy, into whether the client's decision is knowing, voluntary, and intelligent;
  - c. the court enters the plea or admission only after finding that the client's decision was knowing, voluntary, and intelligent; and
  - d. the judicial record is legible, clear, accurate and contains the full contents and conditions of the client's plea or admission.
4. If during the plea hearing, the client does not understand questions being asked by the court, the lawyer must request a recess to assist the client.

### **STANDARD 7.1 – GENERAL TRIAL PREPARATION**

**A. A trial or juvenile adjudicatory hearing (hereinafter referred to as a trial) is a complex event requiring preparation, knowledge of applicable law and procedure, and skill. A defense lawyer must be prepared on the law and facts, and competently plan a challenge to the state's case and, where appropriate, presentation of a defense case.**

**B. The decision to proceed to trial with or without a jury rests solely with the client. The lawyer should discuss the relevant strategic considerations of this decision with the client.**

**C. A lawyer should develop, in consultation with the client, an overall defense strategy for the conduct of the trial.**

#### **Implementation:**

1. A lawyer should ordinarily have the following materials available for use at trial:
  - a. Copies of all relevant documents filed in the case;
  - b. Relevant documents prepared by investigators;
  - c. Voir dire questions;
  - d. Outline or draft of opening statement;
  - e. Cross-examination plans for all possible prosecution witnesses;
  - f. Direct examination plans for all prospective defense witnesses;
  - g. Copies of defense subpoenas;
  - h. Prior statements of all prosecution witnesses (e.g., transcripts, police reports);

- i. Prior statements of all defense witnesses;
- j. Reports from experts;
- k. A list of all exhibits, and the witnesses through whom they will be introduced;
- l. Originals and copies of all documentary exhibits;
- m. Proposed jury instructions with supporting authority;
- n. Copies of all relevant statutes and cases;
- o. Evidence codes and relevant statutes and/or compilations of evidence rules and criminal or juvenile law most likely to be relevant to the case;
- p. Outline or draft of closing argument; and
- q. Trial memoranda outlining any complex legal issues or factual problems the court may need to decide during the trial.

2. A lawyer should be fully informed as to the rules of evidence, and the law relating to all stages of the trial process, and be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial. The lawyer should analyze potential prosecution evidence for admissibility problems and develop strategies for challenging inadmissible evidence. The lawyer should be prepared to address objections to defense evidence or testimony. The lawyer should be prepared to raise affirmative defenses. The lawyer should consider requesting that witnesses be excluded from the trial.

3. A lawyer should evaluate whether expert testimony is necessary and beneficial to the client. If so, the lawyer should seek an appropriate expert witness and prepare the witness to testify, including possible areas of cross examination.

4. A lawyer should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant) and, where appropriate, the lawyer should prepare motions and memoranda for such advance rulings.

5. Throughout the trial process a lawyer should endeavor to establish a proper record for appellate review. As part of this effort, a lawyer should request, whenever necessary, that all trial proceedings be recorded.

6. Where appropriate, a lawyer should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, a lawyer should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing.

7. A lawyer should plan with the client the most convenient system for conferring throughout the trial. Where necessary, a lawyer should seek a court order to have the client available for

conferences. A lawyer should where necessary secure the services of a competent interpreter/translator for the client during the course of all trial proceedings.

8. Throughout preparation and trial, a lawyer should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

Commentary:

Trial preparation and execution is both an intellectual and logistical exercise. A lawyer must prepare adequately and in a timely manner so that when the trial begins the lawyer has the necessary exhibits, witnesses, trial materials, and any other items necessary during the trial. A lawyer will be performing a number of tasks over the course of trial that must be coordinated so that an adequate defense is presented. A trial judge has a great deal of discretion in managing the courtroom and an unprepared attorney is likely to jeopardize a client's defense.

When appropriate to preserve an important legal issue or prevent inappropriate comment in opening statement, a lawyer should consider obtaining a pretrial ruling by filing a motion in limine to prevent comment on evidence that may not be ultimately admitted or to inform final analysis of the trial worthiness of a particular case or trial theory.

Expert witnesses present a unique challenge to lawyers. They are chosen for their knowledge base rather than because circumstances made them a percipient witness. The lawyer should evaluate and consider whether a particular expert is helpful to the defense case. Once selected the expert needs to be given all appropriate information to prepare to testify. Finally, the lawyer should prepare the witness for testimony and anticipate possible lines of cross examination. This preparation can include where appropriate a list of questions and it is advisable to have the expert commit to answers prior to calling them as a witness. The expert has his or her own duty as a witness to follow the oath and testify truthfully, and therefore the lawyer must determine what the witness will say prior to presenting the witness. If the witness is not helpful to the defense then the witness should not be called to the stand.

## **STANDARD 7.2 – VOIR DIRE AND JURY SELECTION**

**A. A lawyer should be prepared to question prospective jurors and to identify individual jurors whom the defense should challenge for cause or exclude by preemptory strikes.**

**B. A lawyer should carefully observe the prosecutor's questioning of jurors to inform defense challenges for cause and use of preemptory challenges, and to object if the prosecutor is attempting to exclude jurors for impermissible reasons.**

Implementation:

## *Preparation*

1. A lawyer should be familiar with the procedures by which a jury is selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.
2. A lawyer should be familiar with the local practices and the individual trial judge's procedures for selecting a jury, and should be alert to any potential legal challenges to these procedures.
3. Prior to jury selection, a lawyer should seek to obtain a prospective juror list.
4. A lawyer should develop voir dire questions in advance of trial, and tailor voir dire questions to the specific case. Among the purposes voir dire questions should be designed to serve are the following:
  - a. to elicit information about the attitudes of individual jurors, which will provide the basis for peremptory strikes and challenges for cause;
  - b. to convey to the panel certain legal principles which are critical to the defense case;
  - c. to preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;
  - d. to present the client and the defense case in a favorable light, without prematurely disclosing information about the defense case to the prosecutor; and
  - e. to establish a relationship with the jury.
5. A lawyer should be familiar with the law concerning mandatory and discretionary voir dire inquiries so as to be able to defend any request to ask particular questions of prospective jurors.
6. A lawyer should be familiar with the law concerning challenges for cause and peremptory strikes.
7. In a group voir dire, a lawyer should avoid asking questions that may elicit responses that are likely to prejudice other prospective jurors.
8. If the voir dire questions may elicit sensitive answers, a lawyer should request that questioning be conducted outside the presence of the remaining jurors.
9. A lawyer should challenge for cause all persons about whom a legitimate argument can be made for actual prejudice or bias if it is likely to benefit the client.
10. A lawyer should be familiar with the requirements for preserving appellate review of any defense challenges for cause that have been denied.
11. Where appropriate, the lawyer should consider whether to seek expert assistance in the jury selection process.

### Commentary:

Highlighting the importance of jury selection, some commentators maintain that trials are won or lost during jury selection. It is also among the most challenging stages of a jury trial, requiring knowledge, training and skill to accomplish successfully. It is the occasion, of course, for a lawyer to seek to remove potential jurors from the trial panel who may be biased against the client or who may not be favorably disposed to the defense case. And it is well recognized that a lawyer has a right to ascertain if a juror is prejudiced against the client, even if that requires broader latitude in time and scope by the judge than originally allowed. *State v Williams, 123 Or App 546 (1993)*. But jury selection is also an opportunity for a lawyer to establish a relationship with jurors, to convey legal principles essential to the defense, and to place the client and the defense case in a favorable light. To do so successfully, however, requires a thorough understanding of the law applicable to jury selection, a thoughtful and sensitive approach to interpersonal relations, and a well crafted theory of the defense. Without these components, a lawyer may very well do more harm than good during jury selection.

### **STANDARD 7.3 – OPENING STATEMENT**

**An opening statement is a lawyer’s first opportunity to present the defense case. The lawyer should be prepared to present a coherent statement of the defense theory based on evidence likely to be admitted at trial, and should raise and, if necessary, preserve for appeal any objections to the prosecutor’s opening statement.**

#### Best Practice:

1. Prior to delivering an opening statement, a lawyer should ask that the witnesses be excluded from the courtroom, unless a strategic reason exists for not doing so.
2. A lawyer’s objective in making an opening statement may include the following:
  - a. provide an overview of the defense case emphasizing the defense theme and theory of the case;
  - b. identify the weaknesses of the prosecution’s case;
  - c. emphasize the prosecution’s burden of proof;
  - d. summarize the testimony of witnesses, and the role of each in relationship to the entire case;
  - e. describe the exhibits which will be introduced and the role of each in relationship to the entire case;
  - f. clarify the jurors’ responsibilities;
  - g. state the ultimate inferences which the lawyer wishes the jury to draw; and
  - h. humanize the client.

3. A lawyer should listen attentively during the state's opening statement in order to raise objections and note potential promises made by the state that could be used in summation.
4. A lawyer should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement in the defense summation.
5. Whenever the prosecutor oversteps the bounds of a proper opening statement, a lawyer should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:
  - a. the significance of the prosecutor's error;
  - b. the possibility that an objection might enhance the significance of the information in the jury's mind;
  - c. whether there are any rulings made by the judge against objecting during the other attorney's opening argument.
6. A lawyer should consider giving an opening statement during a court trial if either the law or facts are sufficiently complex to justify it. In all cases, a lawyer should evaluate if in the particular circumstances giving an opening would help or hurt the client's case. If the consideration is neutral then the lawyer should give an opening.

Commentary:

Opening statement is the lawyer's opportunity to set forth the defense theory and preview the case for the jury. Judges will vary on their view of the permissible scope of opening statement. In general the purpose and rule of opening is for each side to preview their case and offer a summary of any evidence that they have a good faith belief will be admitted at trial. For this reason, a lawyer should consider whether evidence available to the state but that may have significant prejudice and may be inadmissible should be challenged prior to opening statements. (See 5.1 on pretrial motions) In the alternative, a lawyer should consider seeking a ruling that the prosecutor be precluded from discussing particular evidence that may or may not be admitted at trial.

Historically, opening statements could be strictly limited to a sterile and bland recitation of what witnesses might say. Objections on argumentative grounds were common and lawyers were restricted from making any conclusions. This has evolved and opening statements in the modern case may include discussions of the law or suggest conclusions that the jury could make. Further, by stipulation or with court permission opening statements can include the use of exhibits that are pre-admitted. Finally, in many cases effective use of computer graphics and slides may enhance the opening statement, including actual pieces of evidence such as recorded phone calls or videos. When these presentations are used by the state, the lawyer for the defendant should ask to preview it and challenge material that may not be received in evidence.

## **STANDARD 7.4 – CONFRONTING THE PROSECUTION'S CASE**

**The essence of the defense in most cases is confronting the prosecution's case. The lawyer should develop a theme and theory of the case that directs the manner of conducting this confrontation. Whether it is refuting, discrediting or diminishing the state's case, the theme and theory should determine the lawyer's course of action.**

Implementation:

1. A lawyer should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.
2. A lawyer should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.
3. In preparing for cross-examination, a lawyer should be familiar with the applicable law and procedures concerning cross-examination and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, a lawyer should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.
4. In preparing for cross-examination, a lawyer should:
  - a. consider the need to integrate cross-examination, the theory of the defense and closing argument;
  - b. consider whether cross-examination of each individual witness is likely to generate helpful information;
  - c. anticipate those witnesses the prosecutor might call in its case-in-chief or in rebuttal;
  - d. consider a cross-examination plan for each of the anticipated witnesses;
  - e. consider an impeachment plan for any witnesses who may be impeachable;
  - f. be alert to inconsistencies in a witness testimony;
  - g. be alert to possible variations in witness testimony;
  - h. review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
  - i. if available, review investigation reports of interviews and other information developed about the witnesses;
  - j. review relevant statutes and police procedural manuals and regulations for possible use in cross-examining police witnesses;
  - k. be alert to issues relating to witness credibility, including bias and motive for testifying.
5. A lawyer should be aware of the applicable law concerning competency of witnesses and admission of expert testimony in order to raise appropriate objections.
6. Before beginning cross-examination, a lawyer should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If the lawyer does not receive prior statements of prosecution witnesses until they have completed

direct examination, the lawyer should request, at a minimum, adequate time to review these documents before commencing cross-examination.

7. At the close of the prosecution's case and out of the presence of the jury, a lawyer should move for a judgment of acquittal on each count charged. The lawyer should request, when necessary, that the court immediately rule on the motion, in order that the lawyer may make an informed decision about whether to present a defense case.

#### Commentary:

The lawyer should be mindful of how cross-examination may affect the case and whether particular questions might "open the door" to otherwise inadmissible evidence. For example, where the defense attorney questioned the adequacy and thoroughness of the investigating officer's interview of defendant—an interview that was cut short by the defendant's invocation of the right to counsel—the prosecutor was allowed to respond by informing the jury that the detective was unable to conduct a more thorough inquiry because of that invocation. [\*State v. Guritz\*, 134 Or. App. 262 \(1995\)](#).

Cross-examination should be conducted purposefully to cast doubt on the state's evidence or discredit a state's witness, and in all cases should be consistent with the defense theory of the case. Simply reiterating a witness's direct examination is at best tedious and at worst strengthens the prosecution's case in the mind of the trier of fact.

In preparing any topic or questions for cross examination, a lawyer should prepare the legal basis for asking the question and anticipate objections to admissibility. If the court prohibits questioning on a particular topic, a lawyer should make an appropriate record to preserve the error through an offer of proof.

### **STANDARD 7.5 – PRESENTING THE DEFENSE CASE**

**A lawyer should be prepared to present evidence at trial where it will be advance a defense theory of the case that best serves the interest of the client.**

#### Implementation:

1. A lawyer should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, a lawyer should consider whether the client's interests are best served by not putting on a defense case, and instead rely on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.
2. A lawyer should discuss with the client all of the considerations relevant to the client's decision whether or not to testify.
3. A lawyer should be aware of the elements of any affirmative defense and know whether the client bears a burden of persuasion or a burden of production.

4. In preparing for presentation of a defense case, a lawyer should:
  - a. develop a plan for direct examination of each potential defense witness, and assure each witness' s attendance by subpoena if necessary;
  - b. determine the implications that the order of witnesses may have on the defense case;
  - c. consider the possible use of character witnesses;
  - d. consider the need for expert witnesses; and
  - e. consider whether to present a defense based on mental disease or defect or diminished capacity or partial responsibility, and provide notice of intent to present such evidence and consult with the client about the implications of an insanity defense.
5. In developing and presenting the defense case, a lawyer should consider the implications it may have for a rebuttal by the prosecutor.
7. A lawyer should prepare all witnesses for direct and possible cross-examination. Where appropriate, a lawyer should also advise witnesses of suitable courtroom dress and demeanor.
8. A lawyer should conduct redirect examination as appropriate.
9. At the close of the defense case, the lawyer should renew the motion for judgment of acquittal on each charged count.
10. A lawyer should be prepared to object to an improper state's rebuttal case, and offer surrebuttal witnesses if allowed.

Commentary:

The Oregon Rules of Professional Conduct properly affirm the constitutional requirement that the client decides whether to testify or not. The lawyer must consult with the client concerning the risks and benefits of testifying. Whether to present other defense evidence, however, is a strategic and tactical decision to be made by the lawyer in consultation with the client. A lawyer should carefully consider the most effective defense presentation that advances the client's cause, or whether the client is best served by not presenting evidence.

**STANDARD 7.6 – CLOSING ARGUMENT**

**A lawyer should be prepared to deliver a closing summation that presents the trier of fact with compelling reasons to render a verdict for the client based upon the evidence presented at trial and the law applicable to the case.**

Implementation:

1. A lawyer should be familiar with the substantive limits on both prosecution and defense summation.
2. A lawyer should be familiar with local rules and the individual judge's practice concerning time limits and objections during closing argument, and provisions for rebuttal argument by the prosecution.
3. A lawyer should prepare the outlines of the closing argument prior to the trial and refine the argument at the end of trial by reviewing the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:
  - a. highlighting weaknesses in the prosecution's case;
  - b. describing favorable inferences to be drawn from the evidence;
  - c. what the possible effects of the defense arguments are on the prosecutor's rebuttal argument; and
  - d. incorporating into the argument:
    - i. helpful testimony from direct and cross-examinations;
    - ii. verbatim instructions drawn from the jury charge; and
    - iii. responses to anticipated prosecution arguments.
4. Whenever the prosecutor exceeds the scope of permissible argument, the lawyer should object, request a mistrial, or seek a cautionary instructions unless tactical considerations suggest otherwise.
5. In a delinquency case, a lawyer should, where appropriate, ask the court, even if sufficient evidence is found to support jurisdiction, not to exercise jurisdiction and move to dismiss the petition (or defer finding jurisdiction until after the dispositional hearing) on the ground that jurisdiction is not in the best interests of the youth or society.

Commentary:

Because summation is argument, parties will be given broad latitude in drawing inferences and suggesting conclusions. The closing should be tailored to the audience, where legal doctrines may better be emphasized in arguments to a judge, while jurors may be more receptive to arguments focused on the facts. Even in bench trials, it is good practice to prepare jury instructions and use them in preparing the closing argument.

The most likely areas for improper argument by the prosecution are discussion of facts not in evidence and unconstitutional comments on the defendant's right not to testify and attempts to

impermissibly shift a burden of proof to the defense. A lawyer should be alert to such improper arguments and raise appropriate objections when they occur.

## **STANDARD 7.7 – JURY INSTRUCTIONS**

**A lawyer should ensure that instructions to the jury correctly state the law, and seek special instructions that provide support for the defense theory of the case.**

### Implementation:

1. A lawyer should be familiar with the local rules and individual judges' practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.
2. Where appropriate, a lawyer should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. Where possible, a lawyer should provide case law in support of the proposed instructions.
3. A lawyer should object to and argue against improper instructions proposed by the court or prosecution.
4. If the court refuses to adopt instructions requested by the lawyer, or gives instructions over the lawyer's objection, the lawyer should take all steps necessary to preserve the record for appeal.
5. During delivery of the charge, the lawyer should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.
6. If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, a lawyer should request that the judge state the proposed charge to the lawyer before it is delivered to the jury and take all steps necessary to preserve a record of objection to improper instructions.

### Commentary:

Preservation of jury instruction error can be critical to a defense based on the misapplication of the law. Therefore, a lawyer should carefully review all proposed jury instructions, including uniform jury instructions and others proposed by the court or prosecution, to ensure that they accurately state the applicable law. However, if a jury instruction error is not objected to properly, a client may be deemed to have waived any objection.

## **STANDARD 8.1 – OBLIGATIONS OF COUNSEL CONCERNING SENTENCING OR DISPOSITION**

**A lawyer must work with the client to develop a theory of sentencing or disposition and an individualized sentencing or disposition plan that is consistent with the client’s desired outcome. The lawyer must present this plan in court and zealously advocate on behalf of the client for such an outcome.**

### **Implementation:**

1. In every criminal or delinquency case, a lawyer should:

- (a) be knowledgeable about the applicable law governing the length and conditions of any applicable sentence or disposition, and the pertinent sentencing or dispositional procedures, and inform the client at the commencement of the case of the potential sentence(s) or disposition for the alleged offense(s);
- (b) be aware of the client’s relevant history and circumstances, including prior military service, physical and mental health needs, and educational needs and be sensitive to the client’s sexual orientation or gender identity to the extent this history or circumstance impacts sentencing or the disposition plan.
- (b) understand and advise the client concerning the availability of deferred sentences, conditional discharges, early termination of probation, informal dispositions, alternative dispositions including conditional postponement and diversion agreements (including for servicemember status);
- (c) understand and explain to the client the consequences and conditions that are likely to be imposed as probation requirements, or requirements of other dispositions, and the potential collateral consequences of any sentence or disposition in a case, including the effect of a conviction or adjudication on a sentence for any subsequent crime;
- (d) be knowledgeable about treatment or other programs, out-of-home placement possibilities for juveniles, including group homes, foster care, residential treatment programs and mental health treatment facilities, that may be required as part of disposition or that are available as an alternative to incarceration or out of home placement for youth, that could reduce the length of a client’s time in custody or in out-of-home placement;
- (e) be knowledgeable about the requirements of placements that receive Title IV-E of the Social Security Act funding through contracts with the Juvenile Departments or the Department of Human Services and be able to request “no reasonable efforts” findings from the juvenile court when it would benefit the client;

- (f) develop a plan in conjunction with the client, supported where appropriate by a written memorandum addressing pertinent legal and factual considerations, that seeks the least restrictive and burdensome sentence or disposition, which can reasonably be obtained based upon the facts and circumstances of the case and that is acceptable to the client ;
- (g) where appropriate obtain assessments or evaluations that support the client's plan;
- (h) investigate and prepare to present to a prosecutor, when engaged in plea negotiations, or to the court at sentencing or disposition, available mitigating evidence and other favorable information that might benefit the client at sentencing or disposition;
- (i) ensure that the court does not consider inaccurate information or immaterial information harmful to the client in determining the sentence or disposition to be imposed;
- (j) be aware of and prepare to address express or implicit bias that impacts sentencing or disposition, and
- (k) review the accuracy of any temporary or final sentencing or disposition orders or judgments of the court, and move the court to correct any errors that disadvantage the client.

2. In understanding the sentence or disposition applicable to a client's case, a lawyer should:

- a. be familiar with the law, and any applicable administrative rules, governing the length of sentence or disposition, including the Oregon Sentencing Guidelines, and laws that establish specific sentences for certain offenses or for repeat offenders, and be familiar with juvenile code and case law language that supports a less restrictive disposition that best meets the expressed needs of the youth;
- b. be knowledgeable about potential court-imposed financial obligations, including fines, fees and restitution, and where appropriate challenge the imposition of such obligations when not supported by the facts or law;
- c. be familiar with the operation of indeterminate dispositions, and the law governing credit for pretrial detention, earned time credit, time limits on post-trial and post disposition juvenile detention and out-of-home placement, eligibility for correctional programs and furloughs, and eligibility for and length of post-prison supervision or parole from juvenile dispositions;
- d. as warranted by the circumstances of a case, consult with experts concerning the collateral consequence of a conviction and sentence on a client's immigration status or other collateral consequences of concern to the client, e.g. civil disabilities, sex-offender registration, disqualification for types of employment, consequences for clients involved in the child welfare system, DNA and HIV

testing, military opportunities, availability of public assistance, school loans and housing, and enhanced sentences for future convictions;

- e. be familiar with statutes and relevant cases from state and federal appellate courts governing legal issues pertinent to sentencing or disposition, such as the circumstances in which consecutive or concurrent sentences may be imposed, or when offenses should merge for the purpose of conviction and sentencing;
- f. establish whether the client's conduct occurred before any changes to sentencing or dispositional provisions that increase the penalty or punishment to determine whether application of those provisions is contrary to statute or *ex post facto* prohibitions;
- g. in cases where prior convictions are alleged as the basis for the imposition of enhanced repeat offender sentencing, determine whether the prior convictions qualify as predicate offenses or are otherwise subject to challenge as constitutionally or statutorily infirm;
- h. determine whether any mandatory sentence would violate the state constitutional requirement that the penalty be proportioned to the offense; and
- i. advance other available legal arguments that support the least restrictive and burdensome sentence.

3. In understanding the applicable sentencing and dispositional hearing procedures, a lawyer should:

- a. determine the effect that plea negotiations may have on the sentencing discretion of the court;
- b. determine whether factors that might serve to enhance a particular sentence must be pleaded in a charging instrument and/or proven to a jury beyond a reasonable doubt;
- c. consult with the client concerning the strategic or tactical advantages of resolving factual sentencing matters before a jury, a judge or by stipulation;
- d. understand the availability of other evidentiary hearings to challenge inaccurate or misleading information that might harm the client, and to present evidence favorable to the client, and ascertain the applicable rules of evidence and burdens of proof at such a hearing;
- e. determine whether an official presentence report will be prepared for the court and, if so, take steps to ensure that mitigating evidence and other favorable information is included in the report, that inaccurate or misleading information

harmful to the client is deleted from it, and determine whether the client should participate in an interview with the report writer, advising the client concerning the interview and accompanying the client during any such interview;

- f. determine whether the prosecution intends to submit a sentencing or dispositional memorandum, how to obtain such a document prior to sentencing or disposition, and what steps should be followed to correct inaccurate or misleading statements of fact or law; and
- g. undertake other available avenues to present legal and factual information to a court or jury that might benefit the client, and challenge information harmful to the client.

4. In advocating for the least restrictive or burdensome sentence or disposition for a client, a lawyer should:

- a. inform the client of the applicable sentencing or dispositional requirements, options and alternatives, including liability for restitution and other court-ordered financial obligations, and the methods of collection;
- b. maintain regular contact with the client before the sentencing or dispositional hearing and keep the client informed of the steps being taken in preparation for sentencing or disposition, work with the client to develop a theory for the sentencing or disposition phase of the case;
- c. obtain from the client and others information such as the client's background and personal history, prior criminal record, employment history and skills, current or prior military service, education and current school issues, medical history and condition, mental health issues and mental health treatment history, current and historical substance abuse history, and treatment, what if any relationship there is between the client's crime(s) and the client's medical, mental health or substance abuse issues, and the client's financial status, and sources through which the information can be corroborated;
- d. determine with the client whether to obtain a psychiatric, psychological, educational, or neurological or other evaluation for sentencing or dispositional purposes;
- e. if the client is being evaluated or assessed, whether by the state or at the lawyer's request, provide the evaluator in advance with background information about the client and request that the evaluator address the client's emotional, educational, and other needs as well as alternative dispositions that will best meet those needs and society's needs for protection;

- f. prepare the client for any evaluations or interviews conducted for sentencing or disposition purposes;
- g. be familiar with and, where appropriate, challenge the validity and/or reliability any risk assessment tools;
- h. investigate any disputed information related to sentencing or disposition, including restitution claims;
- i. inform the client of the client's right to address the court at sentencing or disposition and, if the client chooses to do so, prepare the client to personally address the court, including advice of the possible consequences that admission of guilt may have on an appeal, retrial, or trial on other matters;
- j. ensure the client has adequate time prior to sentencing to examine any presentence or dispositional report, or other documents and evidence, that will be submitted to the court at sentencing or disposition;
- k. prepare a written disposition plan that the lawyer and the client agree will achieve the client's goals in a delinquency case and, in a criminal case, prepare a written sentencing memorandum where appropriate to address complex factual or legal issues concerning the sentence;
- l. be prepared to present documents, affidavits, letters and other information, including witnesses, that support a sentence or disposition favorable to the client;
- m. as supported by the facts and circumstances of the case and client, challenge any conditions of probation or post-prison supervision that are not reasonably related to the crime of conviction, the protection of the public or the reformation of the client;
- n. in a delinquency case, be prepared to present evidence on the reasonableness of Oregon Youth Authority, Juvenile Department or Department of Human Services efforts that could have been made concerning the disposition and, when supported by the evidence, request a "no reasonable efforts" finding by the court;
- o. in a delinquency case, after the court has found jurisdiction, move the court, when supported by the facts, to not exercise jurisdiction and dismiss the petition, amend the petition, or find jurisdiction on fewer than all charges, on the ground that jurisdiction is not in the best interests of the youth or society;
- p. when the court has the authority to do so, request specific orders or recommendations from the court concerning the place of confinement, parole

eligibility, mental health treatment or other treatment services, and permission for the client to surrender directly to the place of confinement;

- q. be familiar with the obligations of the court and district attorney regarding statutory or constitutional victims' rights and, where appropriate, ensure that the record reflects compliance with those obligations;
- r. take any other steps that are necessary to advocate fully for the sentence or disposition requested by the client and to protect the interests of the client; and,
- s. advise the client about the obligations and duration of sentence or disposition conditions imposed by the court, and the consequence of failure to comply with orders of the court. In a delinquency case, where appropriate counsel should confer with the client's parents regarding the disposition process to obtain their support for the client's proposed disposition.

Commentary:

In the vast majority of criminal and delinquency cases, there will be a sentencing or disposition hearing and it will be the most significant event in the case. An indispensable first step, in being a good advocate at this stage of a case, is educational so that the lawyer has a good working knowledge and access to resources on what is often an ever-changing array of available sentencing and dispositional options. A lawyer should plan for this stage of the case, at or near the beginning of representation. That planning will ordinarily require an in-depth interview of the client, and if appropriate, the client's parent or custodian, legal research concerning the applicable terms and conditions of sentencing or dispositional options, discussions with the client about his or her preferred option and a realistic portrayal of the various possibilities, and an investigation into factual matters, such as evidence of aggravating or mitigating factors, that may affect the outcome.

Sentencing and dispositional considerations have long been matters that should take place in the context of an overall plan for achieving the client's stated objectives for the case that works in concert with the handling of plea negotiations and the preparation and presentation of the case at trial. Several developments or trends, some pulling in opposite directions, make a coordinated case approach especially imperative.

First, in criminal cases, the potential role of juries in sentencing hearings weighs in favor of a thoughtful approach to the conduct of a trial if the same jury is reasonably likely to later consider some sentencing matters. Meanwhile, the continued viability of "mandatory minimum" laws in Oregon, which place considerably control over case outcomes in the hands of prosecutors, weighs in favor of an early and vigorous investigation of both the underlying allegations and any available mitigation evidence, in order for the lawyer to put the client in the best possible position for plea negotiations with the prosecutor.

In juvenile delinquency cases the court has broad discretion and will receive reports from the Juvenile Court Counselor and the DHS caseworker or OYA parole officer if DHS or OYA are involved. These reports can be cookie cutter and often view the delinquent from a social worker perspective that can lead to overreaching into the lives of the client and the client's family. Counsel for the youth should advocate for a client-driven disposition plan that is individualized and tailored to the offense and not overly expansive. A written client driven disposition plan is the only effective way of countering the written plans of government agents. A written disposition plan should always be requested as part of any evaluation. In complex cases, the assistance of a qualified social worker can be obtained to help develop the client-driven disposition plan.

The proliferation and significance of collateral consequences of both criminal and delinquency adjudications also require an informed, vigorous and coordinated approach to sentencing and disposition. It is now better understood that the non-penal consequences of a conviction or adjudication, such a deportation or the loss of employment, housing, public assistance or opportunities for service in the military, may be of greater significance to a client than the time he or she spends in custody or out of the home. Some of these consequences may be triggered by the offense of conviction or adjudication, while others may be triggered by the duration or conditions of sentencing or disposition. The lawyer is now obligated to understand these consequences and conduct the defense in order to avoid or mitigate their impact.

Since the last revision of these standards, there is increased interest by courts and community corrections officials in "smart sentencing," with an emphasis on evidence based practices that are known to be effective in reducing recidivism. Even without major legislative reforms that embrace this new focus, there are opportunities for clients to benefit from research about what sentencing or dispositional elements work best to protect the public. Lawyers handling criminal and delinquency cases, therefore, should be knowledgeable about the research and its possible application in their cases. To the extent that implementation of evidence based practices also relies upon the use of risk assessment tools, counsel should be aware of the tools used in reports considered by the court at sentencing or disposition, and be prepared to challenge the validity and reliability of them, both facially and as applied to a client, where appropriate.

Because sentencing and disposition are subject to frequent legislative attention and vigorous litigation in the trial and appellate courts, lawyers representing clients in both criminal and delinquency cases must stay current with the latest developments in the law and be prepared to undertake litigation on issues such as the retroactive application of changes in punishment, the validity of prior convictions that trigger sentence enhancements, the merger of convictions, and the proportionality of punishment.

Finally, lawyers representing youth should take special care to confer with clients in developmentally appropriate language about disposition planning. Although a lawyer must make clear to the client and the client's parents that the youth controls decisions concerning disposition

options, to the extent appropriate, and with the permission of the youth, a lawyer should explain the disposition process to parents and enlist their support of the youth's choices. The plan submitted to the court by the lawyer, which ordinarily should be in writing, should address the youth's strengths and particular medical, mental health, educational or other needs, and the use of available resources in the home, the community or elsewhere through which the client is most likely to succeed.

## **STANDARD 9.1 – CONSEQUENCES OF PLEA ON APPEAL**

**In addition to direct and collateral consequences, a lawyer should be familiar with and advise the client of the consequences of a plea of guilty, an admission to juvenile court jurisdiction, or a plea of no contest on the client's ability to successfully challenge the conviction, juvenile adjudication, sentence or disposition in a appellate proceedings.**

### Implementation:

1. A lawyer should be familiar with the effects of a guilty plea, admission to juvenile court jurisdiction, or a no contest plea on the various forms of appeal.
2. During discussions with the client regarding a possible admission, plea of guilty or no contest, a lawyer must inform the client of the consequences of such a plea on any potential appeals.
3. A lawyer should be familiar with the procedural requirements of the various types of pleas, including the conditional guilty plea, that affect the possibility of appeal.

### Commentary:

A plea of guilty or no contest severely limits the scope of a client's direct appeal. A defendant who has pleaded guilty or no contest must identify a "colorable claim of error" simply in order to file a notice of appeal. ORS 138.050. Even if the client satisfies that procedural hurdle, in cases in which the client pled guilty or pled no contest, the Court of Appeals is limited by statute to reviewing only the sentence imposed by the court. ORS 138.050; see *State v. Anderson*, 113 Or App 416, 419, 833 P2d 321 (1992) ("[A] disposition is legally defective and, therefore, exceeds the maximum allowable by law if it is not imposed consistently with the statutory requirements."). Although ORS 138.050 does not limit appeals in juvenile cases, and thus there is no requirement that "a colorable claim of error" be identified, as a practical matter the client's admission to facts constituting jurisdiction greatly limits the scope of appeal.

## **STANDARD 9.2 – PRESERVATION OF ISSUES FOR APPELLATE REVIEW**

**A lawyer should be familiar with the requirements for preserving issues for appellate review. A lawyer should discuss the various forms of appellate review with the client and apprise the client of which issues have been preserved for review.**

Implementation:

1. A lawyer must know the requirements for preserving issues for review on direct appeal and in federal habeas corpus proceedings.
2. A lawyer should review with the client those issues that have been preserved for appellate review, and the prospects for a successful appeal.

Commentary:

A trial lawyer faces the often-challenging task of zealously advocating for the best result for her client at trial while simultaneously preserving legal issues for later challenge on appeal in the event of conviction or adjudication. Some issues require only an objection from the lawyer sufficient to alert the court to the issue and the client's position in order to preserve the issue for appellate review. *State v. Wyatt*, 331 Or 335, 15 P3d 22 (2000).

However, other types of issues require additional steps to be taken. For example, if the trial court excludes evidence over the objection of the lawyer, the lawyer often must make an offer of proof to the court detailing what the evidence would have been, so that appellate courts can determine the merits of the legal issue and the harm of the exclusion. OEC 103(1)(b) ("Error may not be predicated upon a ruling which \* \* \* excludes evidence unless a substantial right of a party is affected" and "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."); *State v. Bowen*, 340 Or 487, 500, 135 P3d 272 (2006) ("[A]n offer of proof ordinarily is required to preserve error when a trial court excludes testimony."); see also *State v. Wirfs*, 250 Or App 269, 274, 281 P3d 616 (2012) (defendant not required to make an offer of proof "because the trial court and the prosecutor were aware of the substance of the testimony that defendant would elicit.").

Another example of a more complex preservation requirement involves arguments for or against proposed jury instructions. ORCP 59H, which applies to criminal trials through ORS 136.330(2), requires a party to state its objections to the giving of an instruction (or the failure to give an instruction) "with particularity" and to except after jury instructions have been delivered.

A lawyer's most important goal at trial is to obtain a favorable ruling for her client. Should that effort fail, the lawyer must insure that she has met the specific requirements for preserving the issue for appellate review, should the client decide to appeal the conviction, adjudication, sentence or disposition.

As a subset of the duty to keep the client informed, a lawyer should discuss with the client the various forms of appeal, including the right to a de novo rehearing by a judge of a juvenile adjudication by a referee and the specific issues presented in the client's case that could be pursued on appeal. The lawyer should advise the juvenile client that the time to file an appeal of an adjudication starts running from the time of the adjudication, not the disposition, and if necessary a separate appeal of the disposition can be filed. *State ex rel Juv Dept. v. J.H.-O.*, 223 OrApp 412 (2008).

### **STANDARD 9.3 -UNDERTAKING AN APPEAL**

**A lawyer must be knowledgeable about the various types of appeals and their application to the client's case, and should impart that information to the client. A lawyer should inquire whether a client wishes to pursue an appeal. When requested by the client, a lawyer should assure that a notice of appeal is filed, and that the client receives information about obtaining appellate counsel.**

#### Implementation:

1. Throughout the trial proceedings, but especially upon conviction, adjudication, sentencing and disposition, a lawyer should discuss with the client the various forms of appellate review and how they might benefit the client.
2. If the client chooses to pursue a re-hearing of a juvenile referee's order or an appeal, a lawyer should take appropriate steps to preserve the client's rights, including requesting a re-hearing, filing notice of appeal or referring the case to an appellate attorney or public defender organization to have the notice of appeal filed.
3. When the client pursues an appeal, a lawyer should cooperate in providing information to the appellate lawyer concerning the proceedings in the trial court. A trial lawyer must provide the appellate lawyer with all records from the trial case, the court's final judgment, and any other relevant or requested information.
4. If a lawyer is representing a client is financially eligible for appointed counsel, the lawyer shall determine whether the client wishes to pursue an appeal and, if so, transmit to the Office of Public Defense Services the information necessary to perfect an appeal, pursuant to ORS 137.020(6).
5. If the client decides to appeal, a lawyer should inform the client of the possibility of obtaining a stay pending appeal and file a motion in the trial court if the client wishes to pursue a stay.

#### Commentary:

If the client has been convicted despite the best efforts of a lawyer, a lawyer must discuss the various methods of appealing the conviction or adjudication and resulting sentence or disposition

that are available to the client, including rehearing, direct appeal, post-conviction relief, and a petition for federal habeas corpus. Each of those forms of appeal has unique applications and requirements, and the client should be informed of the potential benefits and disadvantages of all types of appeal. In particular, a lawyer should review filing deadlines and requirements to insure the client does not lose the opportunity to pursue an appeal.

A lawyer is constitutionally mandated to confer with the client about the right to appeal. *Roe v. Flores-Ortega*, 528 US 470, 480, 120 S Ct 1029, 145 L Ed 2d 985 (2000) (“We instead hold that counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.”). A lawyer should explain both the meaning and consequences of the court’s decision and provide the client with the lawyer’s professional judgment regarding whether there are meritorious grounds for appeal and the probable consequences of an appeal, both good and bad.

There may be circumstances in which a lawyer should file a notice of appeal on behalf of the client to preserve the client’s right to appeal in the face of a looming deadline, despite the fact that the lawyer will not eventually represent the client on appeal. The preferred course of action is to refer the case to the attorney or organization that will represent the client on appeal in time to allow that lawyer or entity to timely file notice of appeal. However, the primary concern is that the client’s right to appeal is preserved.

Communication between lawyers who represent the client at the various stages of a criminal or delinquency case (trial, direct appeal, post-conviction relief, etc.) is critical to the client’s success. That is particularly true of communication between a client’s trial lawyer and the lawyer helping the client file a petition for post-conviction or post-adjudication relief.

## **STANDARD 9.4 – POST SENTENCING AND DISPOSITION PROCEDURES**

**A lawyer should be familiar with procedures that are available to the client after disposition. A lawyer should explain those procedures to the client, discern the client’s interests and choices, and be prepared to zealously advocate for the client.**

### **Implementation:**

1. Upon entry of judgment, a lawyer should immediately review the judgment to ensure that it reflects the oral pronouncement of the sentence or disposition and is otherwise free of legal or

factual error. In a delinquency case, a lawyer should insure that the judgment includes the disposition probation plan, including any actions to be taken by parents, guardians, or custodians.

2. The lawyer must be knowledgeable concerning the application and procedural requirements of a motion for new trial or motion to correct the judgment.

3. The lawyer representing a youth in delinquency proceedings should be versed in relevant case law, statutes, court rules, and administrative procedures regarding the enforcement of disposition orders, as well as the methods of filing motions for post-disposition and post-adjudicatory relief, for excusal or relief from sex offender registration requirements, and/or to review, reopen, modify or set aside adjudicative and dispositional orders. For youth whose circumstances have changed; youth whose health, safety, and welfare is at risk; or youth not receiving services as directed by the court, a lawyer should file motions for early discharge or dismissal of probation or commitment, early release from detention, or modification of the court order. Where commitment is indeterminate and youth correctional authorities have discretion over whether and when to release a youth from secure custody, when the period of incarceration becomes excessive, the lawyer should advocate to terminate or limit the term of commitment, if desired by the youth.

Commentary:

In general, when the written judgment conflicts with the court's oral pronouncement of sentence at trial, the written judgment controls. See *State v. Swain/Goldsmith*, 267 Or 527, 530, 517 P2d 684 (1974); *State v. French*, 208 Or App 652, 655, 145 P3d 305, 307 (2006); *State v. Mossman*, 75 Or App 385, 388, 706 P2d 203 (1985). It is therefore imperative that the written judgment accurately reflects the favorable aspects of the sentence imposed by the court at the sentencing hearing.

Under ORCP 64 and ORS 136.535, a trial court may grant a motion for new trial if certain conditions are met, including irregularities in the proceedings, juror misconduct, or newly discovered evidence that could not have been discovered and produced at trial. Similarly, the trial court has the authority to correct an erroneous term in the judgment under ORS 138.083, even if the case is on appeal. The juvenile court may modify or set aside a jurisdictional order. ORS 419C.610. The lawyer should be knowledgeable about the availability and procedural requirements of these motions.

A lawyer should be familiar with the authority of a trial court to stay execution of the sentence, or part of a sentence, pending appeal, and seek such relief where appropriate.

**STANDARD 9.5- MAINTAIN REGULAR CONTACT WITH YOUTH FOLLOWING DISPOSITION**

**A. A lawyer for a youth in delinquency proceedings should stay in contact with the youth following disposition and continue representation while the youth remains under court or agency jurisdiction.**

**B. A lawyer should inform a youth of procedures available for requesting a discretionary review of, or reduction in, the sentence or disposition imposed by the trial court, including any time limitations that apply to such a request.**

Implementation:

1. The lawyer should reassure a youth that the lawyer will continue to advocate on the youth's behalf regarding post-disposition hearings, including probation reviews and probation or parole violation hearings, challenges to conditions of confinement, and other legal issues, especially when the youth is incarcerated. The lawyer should also provide advocacy to get the client's record expunged or to obtain relief from sex offender registration.

2. A lawyers for youth convicted as adults but who were under 18 years of age at the time of the offense should be familiar with and inform the client of the "second look" provisions of ORS 420A.203 and ORS 420A.206.

Commentary:

Post-disposition access to counsel is critical for youth under the continuing jurisdiction of the court or a state agency. Issues such as significant waiting lists for residential facilities, the failure to provide services ordered by the court, conditions of confinement, and enforcement of disposition requirements require the legal acumen and advocacy of counsel.

In addition, a lawyer should check in periodically with the youth and routinely ensure that the facility or agency is adhering to the court's directives and that the youth's needs are met and the client's health, welfare, and safety are protected.

Special attention is required to insure that secure facilities are providing educational, medical, and psychological services.

If the youth is committed to a state agency, a lawyer should maintain regular contact with the caseworker, juvenile court counselor, youth correctional facility staff or juvenile parole officer, advocate for the youth as necessary, and ask to be provided copies of all agency reports documenting the youth's progress. A lawyer should participate in case review meetings and administrative hearings. When appropriate, the lawyer should request court review to protect the client's right to treatment.

The lawyer may be the youth's only point of contact within the community when the youth is placed in a residential or correctional facility. The lawyer should advocate for adequate contact between the youth and his or her family and home visits when appropriate, if desired by the

youth.

DRAFT

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** April 25, 2014  
**Memo Date:** April 11, 2014  
**From:** Danielle Edwards, Director of Member Services  
**Re:** Committee Appointments

---

### Action Recommended

Consider appointments to the Legal Ethics, Uniform Civil Jury Instructions, and Unlawful Practice of Law Committees as requested by the committee officers and staff liaisons.

### Background

#### Legal Ethics Committee

Due to the resignation of one committee member the chair and staff liaison recommend the appointment of **Alexander Wylie** (014570). As the committee begins reviewing opinions on lawyer advertising Mr. Wylie's offers valuable experience as a private practitioner focusing on personal injury. He indicated LEC was his first choice preference for appointment on the volunteer survey.

**Recommendation:** Alexander Wylie, member, term expires 12/31/2014

#### Uniform Civil Jury Instructions Committee

Since the beginning of the year three committee members have resigned. To fill these vacant positions the committee officers and staff liaison recommend the appointment of **Jeremiah Vail Ross** (105980), **Jodie Ayura** (051918), and **Jennifer L. Coughlin** (065781). All three of these members completed the volunteer survey and confirmed their ability to commit the necessary time to fully participate on the committee.

**Recommendation:** Jennifer L. Coughlin, member, term expires 12/31/2014

Jodie B. Ayura, member, term expires 12/31/2015

Jeremiah V. Ross, member, term expires 12/31/2015

#### Unlawful Practice of Law Committee

Due to a resignation the committee needs one new member appointed. The committee officers and staff liaison recommend the appointment of **Erin K. Fitzgerald** (083243). Ms. Fitzgerald selected UPL as her first committee preference and is enthusiastic about serving.

**Recommendation:** Erin K. Fitzgerald, member, term expires 12/31/2014

Operating Principles  
for the  
Oregon State Bar and Board of Bar Examiners

1. BBX and OSB Roles and Responsibilities in Admissions

The Oregon Supreme Court has sole authority to determine who should be admitted to the practice of law in the State of Oregon. The Board of Bar Examiners (“BBX”) is appointed by the Court to examine applicants and recommend to the Court for admission to practice those applicants who meet the requirements prescribed by the law and the rules of the Court. To that end, the BBX is responsible for: developing and adopting a bar examination; determining the manner of examination, including what accommodations to provide applicants; grading bar examinations; setting standards for bar exam passage, and; evaluating applicants’ character and fitness to practice law.

The Oregon State Bar (“OSB”) is responsible for providing facilities, equipment and administrative support to the BBX and otherwise implementing admissions policies established by the BBX and the Court.

2. Employment: Admissions Director and Admissions Staff

The Admissions Department staff, including the Admissions Director, are employees of the OSB.

A. Hiring of the Admissions Director

In the event of a vacancy in the Admissions Director position, the OSB will prepare a job description in consultation with the BBX. The OSB will conduct the initial screening of applicants. The initial pool of candidates will be submitted to the BBX for consideration. The BBX and the OSB will conduct joint interviews of selected candidates and the BBX will recommend its choice for the position to the OSB Executive Director. The OSB Executive Director will make the final hiring decision, giving due consideration to the recommendation and input of the BBX. If the BBX objects to the Executive Director’s selection, recruitment will be reopened.

B. Supervision, Discipline, Firing or Reassignment of the Admissions Director

OSB Regulatory Counsel is responsible for the day-to-day supervision and annual performance evaluation of the Admissions Director. The BBX will provide input on its working relationship with the Admissions Director and any concerns that it may have. The OSB Executive Director will make personnel decisions regarding the Admissions Director, including but not limited to discipline, reassignment or employment termination, giving due consideration to the recommendations and input of the BBX.

### 3. Liability

#### A. OSB

As provided in OSB Bylaw 2.106 and subject to the limitations provided in the Oregon Tort Claims Act, the OSB will defend and indemnify the OSB officers, Board of Governors, individual BOG members and OSB employees, including Admissions Department staff, against and for any and all claims arising out of an alleged act or omission occurring in the performance of their duties.

#### B. State of Oregon Judicial Branch

Subject to the limitations provided in the Oregon Tort Claims Act, the State of Oregon Judicial Branch will defend and indemnify the BBX and its individual members against and for any and all claims arising out of an alleged act or omission occurring in the performance of their duties.

### 4. Budget

With the approval of the Oregon Supreme Court, the BBX may fix and collect fees to be paid by applicants for admission, which shall be paid into the treasury of the OSB. The BBX annual budget shall be prepared and BBX fiscal operation shall be managed in accordance with OSB policy, including cost containment measures that the OSB may implement for the OSB as a whole. The BBX annual budget shall be approved for submission to the Court by mutual agreement of the BBX and the BOG, after consideration of the policy goals and strategic plans (including, but not limited to, technology enhancements) of the BBX and the BOG.

### 5. Confidentiality

The OSB and BBX recognize that, pursuant to Oregon Supreme Court rule, the records, work product and proceedings of the BBX in carrying out its functions are confidential. The OSB will exercise reasonable care to prevent unauthorized disclosure of BBX records and information and will adhere to the rules of the Oregon Supreme Court regarding confidentiality.

////////////////////  
////////////////////  
////////////////////  
////////////////////  
////////////////////

6. These Operating Principles supersede and replace the 1989 Agreement between the Oregon State Bar and the Board of Bar Examiners.

Approved by:

\_\_\_\_\_  
Hon Thomas A. Balmer  
Chief Justice, Oregon Supreme Court

\_\_\_\_\_  
Date

\_\_\_\_\_  
Tom Kranovich  
President, Oregon State Bar

\_\_\_\_\_  
Date

\_\_\_\_\_  
Renee Starr  
Chair, Board of Bar Examiners

\_\_\_\_\_  
Date

**Oregon State Bar**  
**Special Open Session of the Board of Governors**  
**May 23, 2014**  
**Minutes**

The meeting was called to order by President Tom Kranovich at 3:00 p.m. on May 23, 2014. The meeting adjourned at 3:25 p.m. Members present from the Board of Governors were Jenifer Billman, Jim Chaney, Hunter Emerick, Ray Heysell, Matt Kehoe, Theresa Kohlhoff, John Mansfield, Caitlin Mitchel-Markley, Travis Prestwich, Josh Ross, Richard Spier, Simon Whang and Timothy Williams. Staff present were Sylvia Stevens, Helen Hirschbiel, Rod Wegener, Susan Grabe, Mariann Hyland, Dani Edwards, and Camille Greene.

**1. Call to Order**

Mr. Kranovich asked whether there were any changes to the agenda. Mr. Prestwich asked that agenda item #2: **Diversity Section and Disability Law Section Request** be removed from the agenda pending further review by the Public Affairs Committee.

**Motion:** Ms. moved, Mr. seconded, and the board voted unanimously to approve the agenda with the deletion of agenda item #2: **Diversity Section and Disability Law Section Request**.

**Motion:** The board voted unanimously to approve committee motion to remove agenda item #2: **Diversity Section and Disability Law Section Request**.

**2. Wells Fargo Signing Authorization**

Ms. Stevens asked the board to authorize Ms. Hirschbiel as a signer on the Wells Fargo account.

**Motion:** Mr. Spier moved, Mr. Heysell seconded, and the board voted unanimously to approve authorization of Ms. Hirschbiel's signature on the Wells Fargo account.

**3. Interim Financial Report**

Mr. Wegener presented an interim financial report; more detail will be presented in June after the next Budget & Finance Committee meeting.

**Oregon State Bar**  
**Special Closed Session of the Board of Governors**  
**May 23, 2014**  
**Minutes**

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

**1. Call to Order**

Mr. Kranovich called the meeting to order.

**2. Other Matters**

Approval of Revised OSB/BBX Operating Principles

Ms. Hierschbiel asked the board to decide whether to approve the attached proposed Operating Principles for the Oregon State Bar (“OSB”) and the Board of Bar Examiners (“BBX”) relating to attorney admissions. Mr. Spier recommended approval by the board.

**Motion:** On motion of Mr. Emerick, seconded by Mr. Prestwich, the board voted unanimously to approve the operating agreement as presented. **[Exhibit A]**

Operating Principles  
for the  
Oregon State Bar and Board of Bar Examiners

1. BBX and OSB Roles and Responsibilities in Admissions

The Oregon Supreme Court has sole authority to determine who should be admitted to the practice of law in the State of Oregon. The Board of Bar Examiners (“BBX”) is appointed by the Court to examine applicants and recommend to the Court for admission to practice those applicants who meet the requirements prescribed by the law and the rules of the Court. To that end, the BBX’s responsibilities include: developing and adopting a bar examination; determining the manner of examination, including what accommodations to provide applicants; grading bar examinations; setting standards for bar exam passage, and; evaluating applicants’ character and fitness to practice law.

The Oregon State Bar (“OSB”) is responsible for providing facilities, equipment and administrative support to the BBX and otherwise implementing admissions policies established by the BBX and the Court.

2. Employment: Admissions Director and Admissions Staff

The Admissions Department staff, including the Admissions Director, are employees of the OSB.

A. Hiring of the Admissions Director

In the event of a vacancy in the Admissions Director position, the OSB will prepare a job description in consultation with the BBX. The OSB will conduct the initial screening of applicants. The initial pool of candidates will be submitted to the BBX for consideration. The BBX and the OSB will conduct joint interviews of selected candidates and the BBX will recommend its choice for the position to the OSB Executive Director. The OSB Executive Director will make the final hiring decision, giving due consideration to the recommendation and input of the BBX and subject to the BBX’s not objecting to the final hiring decision. If the BBX objects to the Executive Director’s final hiring selection decision, recruitment will be reopened.

B. Supervision, Discipline, Firing or Reassignment of the Admissions Director

OSB Regulatory Counsel is responsible for the day-to-day supervision and annual performance evaluation of the Admissions Director. The BBX will provide input on its working relationship with the Admissions Director and any concerns that it may have. The OSB Executive Director will make personnel decisions regarding the Admissions Director, including but not limited to discipline, reassignment or employment termination, giving due consideration to the recommendations and input of the BBX.

### 3. Liability

#### A. OSB

As provided in OSB Bylaw 2.106 and subject to the limitations provided in the Oregon Tort Claims Act, the OSB will defend and indemnify the OSB officers, Board of Governors, individual BOG members and OSB employees, including Admissions Department staff, against and for any and all claims arising out of an alleged act or omission occurring in the performance of their duties.

#### B. State of Oregon Judicial Branch

Subject to the limitations provided in the Oregon Tort Claims Act, the State of Oregon Judicial Branch will defend and indemnify the BBX and its individual members against and for any and all claims arising out of an alleged act or omission occurring in the performance of their duties.

### 4. Budget

With the approval of the Oregon Supreme Court, the BBX may fix and collect fees to be paid by applicants for admission, which shall be paid into the treasury of the OSB. The BBX annual budget shall be prepared and BBX fiscal operation shall be managed in accordance with OSB policy, including cost containment measures that the OSB may implement for the OSB as a whole. The BBX annual budget shall be approved for submission to the Court by mutual agreement of the BBX and the BOG, after consideration of the policy goals and strategic plans (including, but not limited to, technology enhancements) of the BBX and the BOG.

### 5. Confidentiality

The OSB and BBX recognize that, pursuant to Oregon Supreme Court rule, the records, work product and proceedings of the BBX in carrying out its functions are confidential. The OSB will exercise reasonable care to prevent unauthorized disclosure of BBX records and information and will adhere to the rules of the Oregon Supreme Court regarding confidentiality.

6. These Operating Principles supersede and replace the 1989 Agreement between the Oregon State Bar and the Board of Bar Examiners.

Approved by:

\_\_\_\_\_  
Hon Thomas A. Balmer  
Chief Justice, Oregon Supreme Court

\_\_\_\_\_  
Date

\_\_\_\_\_  
Tom Kranovich  
President, Oregon State Bar

\_\_\_\_\_  
Date

\_\_\_\_\_  
Renee Starr  
Chair, Board of Bar Examiners

\_\_\_\_\_  
Date

DRAFT

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** June 26, 2014  
**From:** Amber Hollister, Deputy General Counsel  
**Re:** Amend Bylaw Section 24.6 on SLAC Records Retention

---

### Issue

The current bylaws require that the bar maintain closed State Lawyers Assistance Committee (SLAC) files permanently. OSB Bylaw Section 24.6. I recommend that we amend the bylaws to provide that closed files will be maintained for a ten year period.

### Options

1. Amend OSB Bylaw Section 24.6 to provide that closed SLAC files will be maintained for ten years.
2. Take no action.

### Discussion

Currently, OSB Bylaws provide that SLAC records must be “maintained permanently in locked storage at the Bar’s offices. After discussing this matter with bar staff and SLAC Chair Kim Lusk, I recommend that we amend the bylaw to provide that closed files will be maintained for ten years:

#### **Section 24.6 State Lawyers Assistance Committee Records**

The chairperson will maintain an intake log as a permanent record of SLAC. In it will be noted each referral to SLAC, the date of the referral, the name of the person making the referral, the name of the referred lawyer, action taken on the referral and the ultimate disposition of the referral. Written materials regarding a referral which does not result in a case being opened, will be kept with the intake log. The designee to whom a case is assigned will create a file and will maintain all reports, correspondence, records and other documents pertaining to the case. The designee is responsible for maintaining the confidentiality of the file and the information it contains while the file is in the designee’s possession. The file on a case will be closed when the referral is dismissed, on notice to Disciplinary Counsel of non-cooperation or as provided in Subsection 24.503(H) of the Bar’s Bylaws. Closed files will be maintained for ten years ~~permanently~~ in locked storage at the Bar’s offices. SLAC will notify the referring person of the general disposition of the referral, but not of its detailed findings or the remedial measures taken.

This proposed amendment balances the burden of maintaining highly confidential case materials (*i.e.* medical records, substance abuse evaluations, mental health records), with the need to have background information available to SLAC designees if a referred lawyer whose case is closed is re-referred to SLAC. From a practical perspective, if a lawyer is outside of SLAC's jurisdiction for a period of ten years, it is unlikely that the old file materials will be particularly useful to SLAC. Any medical records related to a case that was closed more than ten years prior would need to be updated. SLAC's authority is limited to monitoring a lawyer for a current impairment.

Further, it is highly unlikely that SLAC records would ever be discoverable by a third party. SLAC records are confidential and are not discoverable in any civil or disciplinary proceeding without the written consent of the referred lawyer, and are exempt from disclosure under the public records law. ORS 9.568.

Amending the SLAC records retention schedule for closed files to ten years would be consistent with the schedule for disciplinary complaints that are referred to Disciplinary Counsel by the Client Assistance Office but are dismissed before formal charges are filed.<sup>1</sup>

---

<sup>1</sup>SLAC may disclose records relating to a lawyer's noncooperation with SLAC or information obtained by the bar from any other source. ORS 9.568(4). If SLAC refers a lawyer to Disciplinary Counsel for noncooperation, any records forwarded to Disciplinary Counsel related to the noncooperation would be kept in accordance with discipline's retention schedule. If a lawyer is ultimately disciplined for noncooperation with SLAC, the current retention schedule provides the disciplinary file is permanently maintained.

---

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** June 26, 2014  
**From:** Amber Hollister, Deputy General Counsel  
**Re:** Amend Bylaw Section 8.101(b) on Public Records Fee Schedule

---

### Issue

The current bylaws require that the Board adopt the Bar's public records request fee schedule. OSB Bylaw Section 8.101(b). I recommend that we amend the bylaws to provide that the executive director may establish a fee schedule consistent with the bylaws.

### Options

1. Amend OSB Bylaw Section 8.101(b) to provide that the executive director will establish a fee schedule for public records requests.
2. Take no action.

### Discussion

OSB Bylaw Subsection 8.101 provides that the Board must approve the Bar's public records fee schedule. The costs associated with responding to public records requests frequently change. Because there is sufficient guidance provided by OSB Bylaw Section 8.1 regarding setting the fee schedule, the Board should delegate its authority to set the fee schedule to the executive director, as follows:

#### **Subsection 8.101 Public Record Requests and Bar Fees for Public Records Searches and Copies**

- (a) The executive director will assign appropriate staff to respond to requests for public records. The executive director will advise the board of any public records disputes that are taken by the requestor to the attorney general for further consideration.
- (b) The executive director will establish ~~propose and the board will adopt~~ a fee schedule for public records requests. The fee schedule will include a per-page charge for paper records and a schedule of charges for staff time in locating records; reviewing records to delete exempt material; supervising the review of original records; summarizing, compiling, and tailoring records to the request; and any related activity necessary to respond to requests for public records.
- (c) The fee schedule shall be reasonably calculated to reimburse the bar for the actual cost of making the records available. The charges for staff time shall be computed on the basis of the actual salary of the employee or employees engaged in responding to a particular public records request.

---

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** June 27, 2014  
**From:** Legal Ethics Committee  
**Re:** Updating OSB Formal Ethics Opinions 2005-02, 2005-03, 2005-07, 2005-51, 2005-58, 2005-79, 2005-100, 2005-112, 2005-115

---

### Issue

The Board of Governors must decide whether to adopt the proposed amendments to the formal ethics opinions.

### Options

1. Adopt the proposed amendments to the formal ethics opinions.
2. Decline to adopt the proposed amendments to the formal ethics opinions.

### Discussion

The Oregon Supreme Court has adopted numerous amendments to the Oregon Rules of Professional Conduct over the last couple of years. The Legal Ethics Committee is in the process of reviewing all of the formal ethics opinions to determine whether and how the opinions need to be amended to bring them into conformance with the new rules. The attached is the second batch of opinions that require amendments.

This second batch of amended opinions consists of purely housekeeping amendments. The amendments include swapping out the relevant prior rule with the amended rule and providing additional explanation of the new rule to the extent necessary. The committee also made some changes to the organization of the opinions for clarity. The committee made no changes to the original substantive positions taken in any of the attached opinions.

Staff recommends adopting the proposed amended opinions.

Attachments: OSB Formal Ethics Op Nos: 2005-02, 2005-03, 2005-07, 2005-51, 2005-58, 2005-79, 2005-100, 2005-112, 2005-115

**FORMAL OPINION NO. 2005-100**  
**Information About Legal Services:**  
**Initiating Contact with Lawyer Referral Service Clients**

**Facts:**

Lawyer *A* receives the name and address of Client *A* from the Oregon State Bar Lawyer Referral Service. Client *A* fails to contact Lawyer *A* and Lawyer *A* would like to initiate contact with Client *A*.

Lawyer *B* is initially consulted by Client *B*. When Client *B* fails to contact Lawyer *B* again after the initial consultation, Lawyer *B* would like to contact Client *B*.

**Questions:**

1. May Lawyer *A* initiate contact with Client *A*?
2. May Lawyer *B* initiate contact with Client *B*?

**Conclusions:**

1. Yes, qualified.
2. Yes, qualified.

**Discussion:**

Oregon RPC 7.1 provides:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Oregon RPC 7.3 provides, in pertinent part:

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

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

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

- (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the target of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer;
- (2) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(3) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words “Advertising Material” on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraph (a).

Because Lawyer A has no family, close personal, or prior professional relationship with Client A, Oregon RPC 7.3(a) prohibits Lawyer A from initiating personal or telephone contact with potential Client A. Lawyer A may, however, communicate with Client A in writing. As long as the requirements of Oregon RPC 7.1 and 7.3 are complied with, including the requirement that written communications be labeled “Advertising Material” pursuant to Oregon RPC 7.3(c), Lawyer A’s contact would be ethical.

The difference between Lawyer A’s situation and Lawyer B’s situation is that Client B has met with Lawyer B. This constitutes a *prior professional relationship* within the meaning of Oregon RPC 7.3(a)(2). In-person or telephone contact, as well as written contact, is permissible under Oregon RPC 7.3(a) unless one of the exceptions set forth in Oregon RPC 7.3(b) applies.

**Approved by Board of Governors, August 2005.**

---

COMMENT: For additional information on this general topic and other related sources, see THE ETHICAL OREGON LAWYER §§2.5–2.14, 2.23–2.26, 2.28, 2.31 (Oregon CLE 2006); and ABA Model Rules 7.1–7.3.

**FORMAL OPINION NO. 2005-100**  
**Information About Legal Services:**  
**Initiating Contact with Lawyer Referral Service Clients**

**Facts:**

Lawyer *A* receives the name and address of Client *A* from the Oregon State Bar Lawyer Referral Service. Client *A* fails to contact Lawyer *A* and Lawyer *A* would like to initiate contact with Client *A*.

Lawyer *B* is initially consulted by Client *B*. When Client *B* fails to contact Lawyer *B* again after the initial consultation, Lawyer *B* would like to contact Client *B*.

**Questions:**

1. May Lawyer *A* initiate contact with Client *A*?
2. May Lawyer *B* initiate contact with Client *B*?

**Conclusions:**

1. Yes, qualified.
2. Yes, qualified.

**Discussion:**

Oregon RPC 7.1 provides, ~~in pertinent part:~~

~~A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading(b)——An unsolicited communication about a lawyer or the lawyer's firm in which services are being offered must be clearly and conspicuously identified as an advertisement unless it is apparent from the context that it is an advertisement.~~

~~——(c)——An unsolicited communication about a lawyer or the lawyer's firm in which services are being offered must clearly identify the name and post office box or street address of the office of the lawyer or law firm whose services are being offered.~~

Oregon RPC 7.3 provides, in pertinent part:

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

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

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

——(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the ~~prospective client~~target of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer;

——(2) the ~~prospective client~~target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

——(3) the solicitation involves coercion, duress or harassment.

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

Because Lawyer A has no family, close personal, or prior professional relationship with Client A, Oregon RPC 7.3(a) prohibits Lawyer A from initiating personal or telephone contact with potential Client A. Lawyer A may, however, communicate with Client A in writing. ~~On the facts as presented, any communication by Lawyer A to potential Client A would not constitute an unsolicited communication, so would not trigger the requirements of Oregon RPC 7.1(b) Cf. OSB Formal Ethics Op No 2005-127.~~ As long as the ~~other~~ requirements of Oregon RPC 7.1<sup>+</sup> and

---

<sup>+</sup>~~—Oregon RPC 7.1 provides, in pertinent part:~~

~~——(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 to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law;~~

7.3 are complied with, including the requirement that written communications be labeled “~~Advertisement~~Advertising Material” pursuant to Oregon RPC 7.3(c), Lawyer A’s contact would be ethical.

---

~~—(6)— contains any endorsement or testimonial, unless the communication clearly and conspicuously states that any result that the endorsed lawyer or law firm may achieve on behalf of one client in one matter does not necessarily indicate that similar results can be obtained for other clients;~~

~~—(7)— states or implies that one or more persons depicted in the communication are lawyers who practice with the lawyer or the lawyer’s firm if they are not;~~

~~—(8)— states or implies that one or more persons depicted in the communication are current clients or former clients of the lawyer or the lawyer’s firm if they are not, unless the communication clearly and conspicuously discloses that the persons are actors or actresses;~~

~~—(9)— states or implies that one or more current or former clients of the lawyer or the lawyer’s firm have made statements about the lawyer or the lawyer’s firm, unless the making of such statements can be factually substantiated;~~

~~—(10)— contains any dramatization or recreation of events, such as an automobile accident, a courtroom speech or a negotiation session, unless the communication clearly and conspicuously discloses that a dramatization or recreation is being presented;~~

~~—(11)— is false or misleading in any manner not otherwise described above; or~~

~~—(12)— violates any other Rule of Professional Conduct or any statute or regulation applicable to solicitation, publicity or advertising by lawyers.~~

~~.....~~

~~—(d)— A lawyer may pay others for disseminating or assisting in the dissemination of communications about the lawyer or the lawyer’s firm only to the extent permitted by Rule 7.2.~~

~~—(e)— A lawyer may not engage in joint or group advertising involving more than one lawyer or law firm unless the advertising complies with Rules 7.1, 7.2, and 7.3 as to all involved lawyers or law firms. Notwithstanding this rule, a bona fide lawyer referral service need not identify the names and addresses of participating lawyers. A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.~~

The difference between Lawyer A's situation and Lawyer B's situation is that Client B has met with Lawyer B. This constitutes a *prior professional relationship* within the meaning of Oregon RPC 7.3(a)(2). In-person or telephone contact, as well as written contact, is permissible under Oregon RPC 7.3(a) unless one of the exceptions set forth in Oregon RPC 7.3(b) applies.

**Approved by Board of Governors, August 2005.**

---

COMMENT: For additional information on this general topic and other related sources, see THE ETHICAL OREGON LAWYER §§2.5–2.14, 2.23–2.26, 2.28, 2.31 (Oregon CLE 200~~63~~); and ABA Model Rules 7.1–7.3.

**FORMAL OPINION NO. 2005-112**

**Information About Legal Services:  
Distribution of Brochure by Welcoming Program and  
Participation in Health Club Services Program**

**Facts:**

Law Firm is marketing its services in part through distribution of its brochure by a welcoming program and in part through participation in a health club services program.

The welcoming program distributes materials from businesses to executives and professionals who are new to the community. The materials distributed include information about the community, a business card folder containing cards of sponsors, and a bound book containing profiles and illustrations of civic, professional, and business leaders in the community. Although Law Firm would be designated as a sponsor of the welcoming program, Law Firm would not have its business card included in the business card folder for distribution with those of other sponsors. Instead, Law Firm's participation would be limited to a one-page profile in the bound book, which includes profiles of health care professionals, banks, real estate companies, restaurants, hotels, and the like. Law Firm would be the only lawyer-participant in the program and would pay a fee to participate. The welcoming program is not operated primarily for the purpose of procuring legal work or other financial benefits for Law Firm.

As part of its membership services, a health club provides its members certain benefits from lawyers such as free initial consultations, free consultations regarding wills, and discounted fees on certain types of legal work. The health club views these services not only as beneficial to its existing members but also as an inducement to secure future members. Law Firm's participation in the health club's services program would be through being included on a list of merchants and professionals providing similar introductory discounts or through the use of a coupon entitling the recipient to one of the above-mentioned services at no cost. The health club would receive no financial reward for providing Law Firm's name to its members.

**Question:**

1. May Law Firm participate in the welcoming program?
2. May Law Firm participate as a member of the health club services program through which legal services are advertised?

**Conclusion:**

1. Yes.
2. Yes, qualified

## **Discussion:**

### 1. Welcoming Program

Oregon RPC 7.2(a) provides that “[s]ubject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.” Here, the materials provided under the welcoming program are printed, and therefore allowed under Oregon RPC 7.2(a).

Oregon RPC 7.1 provides:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

So long as the Law Firm profile included in the welcoming program is truthful and not misleading, Law Firm’s participation in the welcoming program would not violate RPC 7.1.

Oregon RPC 7.3 applies where the lawyer seeks to solicit professional employment. Here, as the welcoming program is not operated for the purposes of procuring legal work or other financial benefits, the requirements of RPC 7.3 are not applicable.

Assuming that the welcoming program’s role is merely publicizing the availability of the legal services, as opposed to recommending the Law Firm, Oregon RPC 7.2(b) would also permit such activity.

### 2. Health Club Services

The Health Club Services actively recommends Law Firm for its services. Oregon RPC 7.2 governs lawyer recommendations, and provides, in pertinent part:

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

- (1) pay the reasonable costs of advertisements or communications permitted by this rule;
- (2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service; and
- (3) pay for a law practice in accordance with Rule 1.17.

Under the health club services program, there is no fee or other compensation paid by Law Firm to the club for the advertising service. However, by the use of Law Firm’s name, by the existence of Law Firm’s prestige and goodwill in the community, by the fact of Law Firm’s

participation in the plan, and by Law Firm's offer of discounted legal services to club members, Law Firm is effectively providing the health club with a potentially valuable endorsement and with an exclusive benefit that the club may pass on to its members. The health club is placed in the position of being a third-party beneficiary when new members are persuaded to join due to the benefits offered by the availability of promotional discounts. A quantification of the value of the benefit to the club and a comparison of advertising costs to that benefit as measured against a standard of reasonableness should be analyzed. The value bestowed on the club by Law Firm must not exceed the reasonable cost of the advertising. If the value does not exceed the reasonable cost of the advertising, Oregon RPC 7.2 is not violated.

**Approved by Board of Governors, August 2005.**

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§2.5–2.8, 2.11, 2.13, 2.15–2.17, 2.27–2.28 (Oregon CLE 2003); and ABA Model Rules 7.1–7.2, 8.4(c). *See also* Washington Formal Ethics Op 141.

**FORMAL OPINION NO. 2005-115**

**Unauthorized Practice of Law:  
Third-Party Influence**

**Facts:**

Corporation, which is not authorized to practice law in Oregon, markets estate planning services in Oregon through sales representatives. When a customer purchases Corporation's services, Corporation agrees to evaluate the estate planning needs of the customer, select appropriate planning methods, draft the documents, and forward them to the customer's sales representative.

In the sales documents, customers authorize Corporation to obtain local counsel for the express and limited purposes of reviewing the documents to determine whether they comply with Oregon law and to assist in executing the documents. Corporation pays the lawyer for this work.

**Question:**

May an Oregon lawyer accept representation of Corporation's customers in these circumstances?

**Conclusion:**

No.

**Discussion:**

Oregon RPC 5.5(a) provides:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

See also Oregon RPC 8.4(a)(1), which makes it professional misconduct for a lawyer to violate the Rules of Professional Conduct "through the acts of another."

When Corporation not only provides forms but also personally consults with Customers, explains the documents, makes recommendations, and renders advice, the services performed by Corporation constitute the unauthorized practice of law. *Oregon State Bar v. Miller & Co.*, 235 Or 341, 343–344, 385 P2d 181 (1963). See also *Oregon State Bar v. Gilchrist*, 272 Or 552, 563–564, 538 P2d 913 (1975); *Oregon State Bar v. Taub*, 190 Or App 280, 78 P3d 114 (2003); *State Bar v. Security Escrows, Inc.*, 233 Or 80, 89, 377 P2d 334 (1962).

Lawyer may not represent Corporation's customers because to do so would be aiding a nonlawyer in the unauthorized practice of law in violation of Oregon RPC 5.5(a). Such conduct is not cured by a disclaimer and suggestion to seek separate counsel. *In re Phillips*, 338 Or 125, 107 P3d 615 (2005); *Oregon State Bar v. Miller, supra*, 235 Or at 344. See also OSB Formal Ethics [Op Nos 2005-101](#), [2005-87](#), [2005-20](#).<sup>1</sup>

The proposed arrangement also violates ~~Oregon RPC 7.2(e)(3),<sup>2</sup> [AHD1] which prohibits a lawyer from accepting referrals from an organization that places any "condition or restriction on the~~

---

<sup>1</sup> A lawyer who purports to advise the customer about the documents will have at least a waivable conflict under Oregon RPC 1.7(a)(2) and possibly a nonwaivable conflict under Oregon RPC 1.7(b)(3).

<sup>2</sup> ~~Oregon RPC 7.2(e) provides:~~

~~—(c)—A lawyer or a law firm may be recommended, employed or paid by, or cooperate with, a prepaid legal services plan, lawyer referral service, legal service organization or other similar plan, service or organization so long as:~~

~~—(1)—the operation of such plan, service or organization does not result in the lawyer or the lawyer's firm violating Rule 5.4, Rule 5.5, ORS 9.160, or ORS 9.500 through 9.520;~~

~~—(2)—the recipient of legal services, and not the plan, service or organization, is recognized as the client;~~

~~—(3)—no condition or restriction on the exercise of any participating lawyer's professional judgment on behalf of a client is imposed by the plan, service or organization;~~

~~—(4)—such plan, service or organization does not make communications that would violate Rule 7.3 if engaged in by the lawyer.~~

~~exercise of any participating lawyer's professional judgment on behalf of a client." Similarly, Oregon RPC 5.4(c) as Corporation expressly limits Lawyer's professional judgment in representing customers to whether documents comply with Oregon law.<sup>3</sup> ~~would also be violated.~~~~

**Approved by Board of Governors, August 2005.**

---

<sup>3</sup> Oregon RPC 5.4(c) provides:

(c) A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§2.27–2.28, 12.11 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §4 (2003); and ABA Model Rules 5.4(c), 5.5(a), 7.3, 8.4(a). *See also* Washington Formal Ethics Op Nos 18, 80, 84; Washington Informal Ethics Op Nos 899, 1471, 1505, 1568, 1747, 1879 (unpublished).

**FORMAL OPINION NO. 2005-2**  
**Information About Legal Services:**  
**Cross-Referrals, Office Sharing with Nonlawyer**

**Facts:**

Lawyer *A* proposes to enter into an agreement with Trust Company pursuant to which Lawyer *A* will endeavor to send Lawyer *A*'s clients to Trust Company when they need services of the type provided by Trust Company, in exchange for an agreement by Trust Company to recommend the use of Lawyer *A*'s services to its customers and to employ Lawyer *A* whenever practicable.

Lawyer *B* proposes to share office space with a CPA, but they propose no sharing or cross-referrals of clients, and they propose to keep their practices separate and independent.

**Questions:**

1. Is Lawyer *A*'s arrangement ethical?
2. Is Lawyer *B*'s arrangement ethical?

**Conclusions:**

1. No.
2. Yes.

**Discussion:**

Oregon RPC 7.2 provides in part:

- (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
- (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
  - (2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service; and
  - (3) pay for a law practice in accordance with Rule 1.17.

Oregon RPC 5.4(e) provides:

A lawyer shall not refer a client to a nonlawyer with the understanding that the lawyer will receive a fee, commission or anything of value in exchange for the referral, but a lawyer may accept gifts in the ordinary course of social or business hospitality.

Several other sections are also potentially applicable. Oregon RPC 8.4(a)(1) makes it professional misconduct for a lawyer to "violate the Rules of Professional Conduct, knowingly

assist or induce another to do so, or do so through the acts of another.” In other words, a lawyer cannot do indirectly what the lawyer cannot do directly.

That rule must be read in concert with Oregon RPC 7.3:

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

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

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

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

....

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

The quid pro quo nature of Lawyer A’s above-described arrangement would clearly violate these provisions. On the other hand, a mere office-sharing arrangement as proposed by Lawyer B would not.

**Approved by Board of Governors, August 2005.**

---

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§2.15, 2.27–2.28 (Oregon CLE 2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §10 (2003); and ABA Model Rule 5.4.

**FORMAL OPINION NO. 2005-2**  
**Information About Legal Services:**  
**Cross-Referrals, Office Sharing with Nonlawyer**

**Facts:**

Lawyer *A* proposes to enter into an agreement with Trust Company pursuant to which Lawyer *A* will endeavor to send Lawyer *A*'s clients to Trust Company when they need services of the type provided by Trust Company, in exchange for an agreement by Trust Company to recommend the use of Lawyer *A*'s services to its customers and to employ Lawyer *A* whenever practicable.

Lawyer *B* proposes to share office space with a CPA, but they propose no sharing or cross-referrals of clients, and they propose to keep their practices separate and independent.

**Questions:**

1. Is Lawyer *A*'s arrangement ethical?
2. Is Lawyer *B*'s arrangement ethical?

**Conclusions:**

1. No.
2. Yes.

**Discussion:**

Oregon RPC 7.2 provides in part:

~~(a) . . . A lawyer shall not otherwise compensate or give anything of value to a person or organization to promote, recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except as permitted by paragraph (c) or Rule 1.17.~~

~~(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may request or knowingly permit a person or organization to promote, recommend or secure employment by a client through any means that involves false or misleading communications about the lawyer or the lawyer's firm. If a lawyer learns that employment by a client has resulted from false or misleading communications about the lawyer or the lawyer's firm, the lawyer shall so inform the client.~~

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service; and

(3) pay for a law practice in accordance with Rule 1.17.

~~\_\_\_\_\_ (e) — A lawyer or law firm may be recommended, employed or paid by, or cooperate with, a prepaid legal services plan, lawyer referral service, legal service organization or other similar plan, service or organization so long as:~~

~~\_\_\_\_\_ (1) — the operation of such plan, service or organization does not result in the lawyer or the lawyer’s firm violating Rule 5.4, Rule 5.5, ORS 9.160, or ORS 9.500 through 9.520; and~~

~~\_\_\_\_\_ (2) — the recipient of legal services, and not the plan, service or organization, is recognized as the client; and~~

~~\_\_\_\_\_ (3) — no condition or restriction on the exercise of any participating lawyer’s professional judgment on behalf of a client is imposed by the plan, service or organization; and~~

~~\_\_\_\_\_ (4) — such plan, service or organization does not make communications that would violate Rule 7.3 if engaged in by the lawyer.~~

Oregon RPC 5.4(e) provides:

A lawyer shall not refer a client to a nonlawyer with the understanding that the lawyer will receive a fee, commission or anything of value in exchange for the referral, but a lawyer may accept gifts in the ordinary course of social or business hospitality.

Several other sections are also potentially applicable. Oregon RPC 8.4(a)(1) makes it professional misconduct for a lawyer to “violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” In other words, a lawyer cannot do indirectly what the lawyer cannot do directly.

That rule must be read in concert with Oregon RPC 7.3:

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

\_\_\_\_\_ (1) is a lawyer; or

\_\_\_\_\_ (2) has a family, close personal, or prior professional relationship with the lawyer.

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

\_\_\_\_\_ (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the ~~prospective client~~target of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer;

\_\_\_\_\_ (2) the ~~prospective client~~target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

\_\_\_\_\_ (3) the solicitation involves coercion, duress or harassment.

....

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

~~Accord Oregon RPC 7.1(d) (“A lawyer may pay others for disseminating or assisting in the dissemination of communications about the lawyer or the lawyer’s firm only to the extent permitted by Rule 7.2.”).~~

The quid pro quo nature of Lawyer A’s above-described arrangement would clearly violate these provisions. On the other hand, a mere office-sharing arrangement as proposed by Lawyer B would not.

**Approved by Board of Governors, August 2005.**

---

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§2.15, 2.27–2.28 (Oregon CLE 2003~~6~~); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §10 (2003); and ABA Model Rule 5.4. ~~See also Washington Formal Ethics Op No 30 (reaching same conclusion regarding sharing office space with nonlawyer).~~

**FORMAL OPINION NO. 2005-3**  
**Information About Legal Services:**  
**Disseminating Information Through the Media**  
**or Through Speeches**

**Facts:**

Lawyer is asked to do the following:

- (1) Write a column on legal matters for a local newspaper;
- (2) Answer legal questions sent in by readers of the newspaper;
- (3) Engage in the same types of conduct in a radio or television format; and
- (4) Speak to community groups, church groups, and the like on legal matters.

**Question:**

Is the above-described conduct consistent with rules of professional conduct on providing information on legal services?<sup>1</sup>

**Conclusion:**

Yes, qualified.

**Discussion:**

There is no suggestion in the foregoing facts that Lawyer or others acting on Lawyer's behalf intend to make any false or misleading communications about Lawyer or Lawyer's services within the meaning of Oregon RPC 7.1.<sup>2</sup> *See also* Oregon RPC 8.4(a)(3) (prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation").

There also is no suggestion that Lawyer is paying for the privilege of being permitted to engage in the foregoing activities or that Lawyer's legal services are being improperly advertised. *Cf.* Oregon RPC 7.2(b), 7.3(c).<sup>3</sup>

---

<sup>1</sup> This opinion assumes that no lawyer-client relationship is created by these activities. *Cf. In re Weidner*, 310 Or 757, 801 P2d 828 (1990).

<sup>2</sup> Oregon RPC 7.1 provides:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

<sup>3</sup> Oregon RPC 7.2(b) provides:

A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

**Approved by Board of Governors, August 2005.**

- 
- (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
  - (2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service; and
  - (3) pay for a law practice in accordance with Rule 1.17.

Oregon RPC 7.3(c) provides, in part:

Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words “Advertising Material” on the outside of the envelope, if any, and at the beginning and ending of any recorded or electronic communication, . . .

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§2.13–2.15, 2.26 (Oregon CLE 2006); 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING §§54–57 (3d ed 2001); and ABA Model Rules 7.1–7.3.

**FORMAL OPINION NO. 2005-3**  
**Information About Legal Services:**  
**Disseminating Information Through the Media**  
**or Through Speeches**

**Facts:**

Lawyer is asked to do the following:

- (1) Write a column on legal matters for a local newspaper;
- (2) Answer legal questions sent in by readers of the newspaper;
- (3) Engage in the same types of conduct in a radio or television format; and
- (4) Speak to community groups, church groups, and the like on legal matters.

**Question:**

Is the above-described conduct consistent with rules of professional conduct on providing information on legal services?<sup>1</sup>

**Conclusion:**

Yes, qualified.

**Discussion:**

There is no suggestion in the foregoing facts that Lawyer or others acting on Lawyer's behalf intend to make any false or misleading communications about Lawyer or Lawyer's services within the meaning of Oregon RPC 7.1(a)(1).<sup>2</sup> *See also* Oregon RPC 8.4(a)(3) (prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation").

There also is no suggestion that Lawyer is paying for the privilege of being permitted to engage in the foregoing activities or that Lawyer's legal services are being improperly advertised. *Cf.* Oregon RPC ~~7.1(b)~~, 7.2(ab), 7.3(c).<sup>3</sup>

---

<sup>1</sup> This opinion assumes that no lawyer-client relationship is created by these activities. *Cf. In re Weidner*, 310 Or 757, 801 P2d 828 (1990).

<sup>2</sup> Oregon RPC 7.1(a)(1) provides:

~~\_\_\_\_\_ (1) \_\_\_\_\_~~ A lawyer shall not make ~~or cause to be made any~~ a false or misleading communication about the lawyer or the lawyer's firm, ~~whether in person, in writing, electronically, by telephone or otherwise, if the communication . . . services. A communication is false or misleading if it~~ contains a material misrepresentation of fact or law, or omits a ~~statement of fact or law necessary to make the communication statement~~ considered as a whole not materially misleading.

<sup>3</sup> Oregon RPC 7.21(b) provides, ~~in part~~:

**Approved by Board of Governors, August 2005.**

---

~~An unsolicited communication about a lawyer or the lawyer's firm in which services are being offered must be clearly and conspicuously identified as an advertisement unless it is apparent from the context that it is an advertisement.~~

~~A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may~~

- ~~(1) pay the reasonable costs of advertisements or communications permitted by this Rule;~~
- ~~(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service; and~~
- ~~(3) pay for a law practice in accordance with Rule 1.17.~~

~~Oregon RPC 7.2(a) provides, in part:~~

~~A lawyer may pay the cost of advertisements permitted by these rules and may hire employees or independent contractors to assist as consultants or advisors in marketing a lawyer's or law firm's services. A lawyer shall not otherwise compensate or give anything of value to a person or organization to promote, recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment. . . .~~

**Oregon RPC 7.3(c) provides, in part:**

Every written, recorded or electronic communication from a lawyer soliciting professional employment from ~~anyone~~ a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" ~~in noticeable and clearly readable fashion~~ on the outside of the envelope, if any, and at the beginning and ending of any recorded or electronic communication. . . .

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§2.13–2.15, 2.26 (Oregon CLE 2003~~6~~); 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING §§54–57 (3d ed 2001); and ABA Model Rules 7.1–7.3. ~~Cf. Washington Formal Ethics Op No 141 (lawyer's appearance on TV).~~

**FORMAL OPINION NO. 2005-51**  
**Conflicts of Interest, Current Clients:**  
**Lawyer Membership in Trade Association**  
**Represented by Lawyer**

**Facts:**

Lawyer represents Trade Association. Trade Association asks Lawyer to become an associate member.

**Question:**

May Lawyer become an associate member?

**Conclusion:**

Yes, qualified.

**Discussion:**

Absent some reason to believe that Lawyer's joining Trade Association would violate any of the following rules, there is no reason why Lawyer may not join.

Lawyer should consider whether Lawyer's representation of Trade Association will be materially limited by his or her personal interest as an associate member. Oregon RPC 1.7(a)(2) provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

...

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. . . .

If Lawyer's personal interest is materially limited, Lawyer may continue to represent Trade Association only with Trade Association's informed consent, confirmed in writing as required by Oregon RPC 1.7(b).

Lawyer should also consider whether joining Trade Association would potentially allow Trade Association to direct or regulate his or professional judgment. Oregon RPC 5.4(c) provides:

A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

If Lawyer believes that his or her associate membership with Trade Association would direct or regulate his or her professional judgment, he or she should decline the membership.

Lawyer should also consider whether his or her associate membership confers a benefit upon Trade Organization in exchange for recommending Lawyer's services. Oregon RPC 7.2(b) provides

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service; and

(3) pay for a law practice in accordance with Rule 1.17.

If Lawyer's associate membership confers a benefit upon Trade Organization through his or her goodwill in exchange for recommending Lawyer's services, Lawyer would violate Oregon RPC 7.2(b).

**Approved by Board of Governors, August 2005.**

---

COMMENT: For more information on this general topic and related subjects, see THE ETHICAL OREGON LAWYER §§5.4–5.5, 5.11, 9.9–9.10 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§14 comment f, 121 comment d, 131, 135 (2003); and ABA Model Rules 5.4(c), 7.2(a).

**FORMAL OPINION NO. 2005-51**  
**Conflicts of Interest, Current Clients:**  
**Lawyer Membership in Trade Association**  
**Represented by Lawyer**

**Facts:**

Lawyer represents Trade Association. Trade Association asks Lawyer to become an associate member.

**Question:**

May Lawyer become an associate member?

**Conclusion:**

Yes, qualified.

**Discussion:**

~~Oregon RPC 7.2(a) provides:~~

~~— A lawyer may pay the cost of advertisements permitted by these rules and may hire employees or independent contractors to assist as consultants or advisors in marketing a lawyer's or law firm's services. A lawyer shall not otherwise compensate or give anything of value to a person or organization to promote, recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except as permitted by paragraph (c) or Rule 1.17.~~

~~Oregon RPC 5.4(c) provides:~~

~~— A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.~~

Absent some reason to believe that Lawyer's joining Trade Association would violate any of the following rules, there is no reason why Lawyer may not join.

Lawyer should consider whether Lawyer's representation of Trade Association will be materially limited by his or her personal interest as an associate member. Oregon RPC 1.7(a)(2) ~~is also relevant~~ provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

. . .

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. . . .

If Lawyer's personal interest is materially limited, Lawyer may continue to represent Trade Association only with Trade Association's informed consent, confirmed in writing as required by Oregon RPC 1.7(b).

~~Once a member of Trade Association, Lawyer must consider whether Lawyer's representation of Trade Association will be materially limited by his or her personal interest as a member. Oregon RPC 1.7(a)(2). If so, Lawyer may continue to represent Trade Association only with Trade Association's informed consent, confirmed in writing as required by Oregon RPC 1.7(b). Absent some reason to believe that Lawyer's joining Trade Association would violate any of the foregoing rules, there is no reason why Lawyer may not join.~~

Lawyer should also consider whether joining Trade Association would potentially allow Trade Association to direct or regulate his or professional judgment. Oregon RPC 5.4(c) provides:

A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

If Lawyer believes that his or her associate membership with Trade Association would direct or regulate his or her professional judgment, he or she should decline the membership.

Lawyer should also consider whether his or her associate membership confers a benefit upon Trade Organization in exchange for recommending Lawyer's services. Oregon RPC 7.2(b) provides

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service; and

(3) pay for a law practice in accordance with Rule 1.17.

If Lawyer's associate membership confers a benefit upon Trade Organization through his or her goodwill in exchange for recommending Lawyer's services, Lawyer would violate Oregon RPC 7.2(b).

**Approved by Board of Governors, August 2005.**

---

COMMENT: For more information on this general topic and related subjects, see THE ETHICAL OREGON LAWYER §§5.4–5.5, 5.11, 9.9–9.10 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§14 comment f, 121 comment d, 131, 135 (2003); and ABA Model Rules 5.4(c), 7.2(a).

**FORMAL OPINION NO. 2005-58**  
**Information About Legal Services:**  
**Publicizing Lawyer's Relationship to Independent Business**

**Facts:**

Lawyer is a member of Bank's board of directors. Bank's public relations firm wishes to publicize Bank by including photographs of board members in Bank's newspaper advertisements.

**Question:**

May Lawyer permit the use of Lawyer's photograph for this purpose?

**Conclusion:**

Yes.

**Discussion:**

Absent some reason to believe that the photographs would be used in a misleading or improper manner,<sup>1</sup> there is no reason Lawyer cannot permit his or her photograph to be used in Bank's advertisements. *Cf.* OSB Formal Ethics [Op No 2005-3](#).

**Approved by Board of Governors, August 2005.**

---

<sup>1</sup> Oregon RPC 7.1(a) provides:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

COMMENT: For additional information on this general topic and related subjects, see THE ETHICAL OREGON LAWYER §2.15 (Oregon CLE 2003); 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING §§54–57 (3d ed 2001); and ABA Model Rules 7.1–7.2.

**FORMAL OPINION NO. 2005-58**  
**Information About Legal Services:**  
**Publicizing Lawyer's Relationship to Independent Business**

**Facts:**

Lawyer is a member of Bank's board of directors. Bank's public relations firm wishes to publicize Bank by including photographs of board members in Bank's newspaper advertisements.

**Question:**

May Lawyer permit the use of Lawyer's photograph for this purpose?

**Conclusion:**

Yes, ~~qualified~~.

**Discussion:**

Absent some reason to believe that the photographs would be used in a misleading or improper manner,<sup>1</sup> there is no reason Lawyer cannot permit his or her photograph to be used in Bank's advertisements. Cf. OSB Formal Ethics [Op No 2005-3](#).

---

<sup>1</sup> Oregon RPC 7.1(a) provides:

~~A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading. — 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~~

Approved by Board of Governors, August 2005.

---

~~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 to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law;~~

~~—(6)—contains any endorsement or testimonial, unless the communication clearly and conspicuously states that any result that the endorsed lawyer or law firm may achieve on behalf of one client in one matter does not necessarily indicate that similar results can be obtained for other clients;~~

~~—(7)—states or implies that one or more persons depicted in the communication are lawyers who practice with the lawyer or the lawyer's firm if they are not. . . .~~

~~Oregon RPC 8.4(a)(3) prohibits “conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law.” Oregon RPC 8.4(a)(1) makes it professional misconduct for a lawyer to violate the rules “through the acts of another.”~~

~~Oregon RPC 7.2(a) provides:~~

~~A lawyer may pay the cost of advertisements permitted by these rules and may hire employees or independent contractors to assist as consultants or advisors in marketing a lawyer’s or law firm’s services. A lawyer shall not otherwise compensate or give anything of value to a person or organization to promote, recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except as permitted by paragraph (c) or Rule 1.17.~~

COMMENT: For additional information on this general topic and related subjects, see THE ETHICAL OREGON LAWYER §2.15 (Oregon CLE 2003); 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING §§54–57 (3d ed 2001); and ABA Model Rules 7.1–7.2.

**FORMAL OPINION NO. 2005-7**  
**Lawyer as State Legislator:**  
**Lobbying on a Client's Behalf**

**Facts:**

Lawyer, who is also a member of the state legislature, is asked by Client to seek legislation that would benefit Client. Client offers to pay Lawyer a fee for this work.

**Question:**

May Lawyer ethically perform the work requested for the fee offered?

**Conclusion:**

No.

**Discussion:**

The proposed conduct would constitute bribe-giving (ORS 162.015) and bribe-receiving (ORS 162.025), both of which are felonies. Pursuant to Oregon RPC 1.2(c) and 8.4(a)(1)–(2), Lawyer could not knowingly commit or assist in such illegal conduct.<sup>1</sup> *See also* Oregon RPC 8.4(a)(5) (lawyer may not “state or imply an ability to influence improperly a government agency or official . . .”).

---

<sup>1</sup> Oregon RPC 1.2(c) provides, in pertinent part, that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, . . .”

Oregon RPC 8.4(a) provides, in pertinent part, that 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;

. . . .

(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, . . .

In addition, Oregon RPC 1.11(d)(2) provides, in pertinent part:

[A] lawyer currently serving as a public officer or employee . . . shall not:

- (i) use the lawyer's public position to obtain, or attempt to obtain, special advantage in legislative matters for the lawyer or for a client.
- (ii) use the lawyer's public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client.
- (iii) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.
- (iv) either while in office or after leaving office use information the lawyer knows is confidential government information obtained while a public official to represent a private client.

Oregon RPC 1.11(c) provides, in pertinent part:

[T]he term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public.

Although ORS 244.120(1)(b) permits a legislator to disclose certain conflicts of interest and participate in the legislative process notwithstanding the conflict, nothing in ORS chapter 244 or in Oregon RPC 1.11 permits bribe-giving or bribe-taking. *Cf.* ORS 244.040.

**Approved by Board of Governors, August 2005.**

---

COMMENT: For additional information on this general topic and related subjects, see *In re McMahon*, 266 Or 376, 513 P2d 796 (1973) (deputy district attorney violated ethics rules by accepting gifts from bail bondsmen when it was obvious that offer was to influence his action as public official); THE ETHICAL OREGON LAWYER §§12.17, 14.4 (Oregon CLE 2006); and RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §133 (2003).

**FORMAL OPINION NO. 2005-7**  
**Lawyer as State Legislator:**  
**Lobbying on a Client's Behalf**

**Facts:**

Lawyer, who is also a member of the state legislature, is asked by Client to seek legislation that would benefit Client. Client offers to pay Lawyer a fee for this work.

**Question:**

May Lawyer ethically perform the work requested for the fee offered?

**Conclusion:**

No.

**Discussion:**

The proposed conduct would constitute bribe-giving (ORS 162.015) and bribe-receiving (ORS 162.025), both of which are felonies. Pursuant to Oregon RPC 1.2(c) and 8.4(a)(1)–(2), Lawyer could not knowingly commit or assist in such illegal conduct.<sup>1</sup> *See also* Oregon RPC ~~7.1~~8.4(a)(5) (lawyer may not “[state] or impl[y] an ability to influence improperly a government agency or official . . .”).

---

<sup>1</sup> Oregon RPC 1.2(c) provides, in pertinent part, that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent. . . .”

Oregon RPC 8.4(a) provides, in pertinent part, that 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;

. . . .

(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, . . .

In addition, Oregon RPC 1.11(d)(2) provides, in pertinent part:

[A] lawyer currently serving as a public officer or employee . . . ~~shall not shall~~  
~~not~~:

(i) use the lawyer's public position to obtain, or attempt to obtain, special advantage in legislative matters for the lawyer or for a client.

(ii) use the lawyer's public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client.

(iii) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

(iv) either while in office or after leaving office use information the lawyer knows is confidential government information obtained while a public official to represent a private client.

Oregon RPC 1.11(c) provides, in pertinent part:

[T]he term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public.

Although ORS 244.120(1)(b) permits a legislator to disclose certain conflicts of interest and participate in the legislative process notwithstanding the conflict, nothing in ORS chapter 244 or in Oregon RPC 1.11 permits bribe-giving or bribe-taking. *Cf.* ORS 244.040.

**Approved by Board of Governors, August 2005.**

---

COMMENT: For additional information on this general topic and related subjects, see *In re McMahon*, 266 Or 376, 513 P2d 796 (1973) (deputy district attorney violated ethics rules by accepting gifts from bail bondsmen when it was obvious that offer was to influence his action as public official); THE ETHICAL OREGON LAWYER §§12.17, 14.4 (Oregon CLE 2003~~6~~); and RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §133 (2003).

**FORMAL OPINION NO. 2005-79**  
**Information About Legal Services:**  
**Providing Legal Services to Church Members**  
**or on Behalf of Church-Related Causes**

**Facts:**

Lawyer is asked to enter into a prepaid legal services plan to be organized by Church, which Church would make available to its members. The plan will be in full compliance with the applicable statutes set forth in ORS 750.505–750.715.

Lawyer is also asked by Church to undertake various representations on behalf of non-Church members in support of issues of interest to Church (e.g., helping to assure that adequate housing and medical services are made available to elderly people). In performing the latter work, Lawyer may be asked to contact potential clients in person or by telephone.

**Questions:**

1. May Lawyer enter into a prepaid legal services plan paid for and organized by Church, where lawyer would represent members of Church?
2. May lawyer contact non-Church members as potential clients at the request of Church?

**Conclusions:**

1. Yes, qualified.
2. Yes, qualified.

**Discussion:**

1. Prepaid Legal Services Plan

Oregon RPC 7.2 provides, in relevant part:

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

\*\*\*\*\*

- (2) pay the usual charges of a legal service plan \* \* \* \*

In addition, Oregon RPC 7.3(d) provides:

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Lawyer should be mindful of other potential ethical issues that may arise from representing clients through a prepaid legal services plan. Oregon RPC 1.8(f) provides

- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
- (1) the client gives informed consent;
  - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
  - (3) information related to the representation of a client is protected as required by Rule 1.6.

Oregon RPC 5.4(c) further notes that Lawyer's professional judgment should not be directed or regulated by Church in his or her representation of clients. It provides

- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

As long as the requirements of Oregon RPC 1.8(f) and 5.4(c) are met, Lawyer may be paid by Church for representing clients other than Church.

Lawyer should also be careful not to assist a nonlawyer with the unlawful practice of law. Oregon RPC 5.5(a) provides:

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

ORS 9.160 provides that "a person may not practice law in this state, or represent that the person is qualified to practice law in this state, unless the person is an active member of the Oregon State Bar."

## 2. Contact of non-members of Church

Under Oregon RPC 7.3(a), in-person or live telephone solicitation of potential clients is generally prohibited. Oregon RPC 7.3(a) states

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

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

However, Oregon RPC 7.3(d) provides an exception to Oregon RPC 7.3(a). Oregon RPC 7.3(d) states

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

The language of Oregon RPC 7.3(d) generally appears to permit personal contacts in the types of representations at issue. The ability to engage in personal contact is limited, however, by Oregon RPC 7.3(b):

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

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

**Approved by Board of Governors, August 2005.**

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§2.13, 2.25–2.26, 2.28, 3.36 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §134 (2003); and ABA Model Rules 1.8(f), 5.4(c), 7.2, 7.3(b) and (d). *See also* Washington Informal Ethics Op Nos 1447, 1508 (unpublished).

**FORMAL OPINION NO. 2005-79**  
**Information About Legal Services:**  
**Providing Legal Services to Church Members**  
**or on Behalf of Church-Related Causes**

**Facts:**

Lawyer is asked to enter into a prepaid legal services plan to be organized by Church, which Church would make available to its members. The plan will be in full compliance with the applicable statutes set forth in ORS 750.505–750.715.

Lawyer is also asked by Church to undertake various representations on behalf of non-Church members in support of issues of interest to Church (e.g., helping to assure that adequate housing and medical services are made available to elderly people). In performing the latter work, Lawyer may be asked to contact potential clients in person or by telephone.

**Questions:**

1. —May Lawyer ~~proceed as proposed?~~ ~~enter into a prepaid legal services plan paid for and organized by Church, where lawyer would represent members of Church?~~
2. May lawyer contact non-Church members as potential clients at the request of Church?

**Conclusions:**

1. —Yes, qualified.
2. Yes, qualified.

**Discussion:**

1. Prepaid Legal Services Plan

Oregon RPC 7.2 provides, in relevant part:

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

\*\*\*\*\*

(2) pay the usual charges of a legal service plan \* \* \* \*

In addition, Under Oregon RPC 7.3(d), provides: ~~a lawyer may participate in a prepaid legal services plan operated by the Church for the benefit of Church's members.~~

Oregon RPC 7.3(d)2 provides:

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

~~———(a)—— A lawyer may pay the cost of advertisements permitted by these rules and may hire employees or independent contractors to assist as consultants or advisors in marketing a lawyer's or law firm's services. A lawyer shall not otherwise compensate or give anything of value to a person or organization to promote, recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except as permitted by paragraph (e) or Rule 1.17.~~

~~———(b)—— A lawyer shall not request or knowingly permit a person or organization to promote, recommend or secure employment by a client through any means that involves false or misleading communications about the lawyer or the lawyer's firm. If a lawyer learns that employment by a client has resulted from false or misleading communications about the lawyer or the lawyer's firm, the lawyer shall so inform the client.~~

~~———(c)—— A lawyer or law firm may be recommended, employed or paid by, or cooperate with, a prepaid legal services plan, lawyer referral service, legal service organization or other similar plan, service or organization so long as:~~

~~———(1)—— the operation of such plan, service or organization does not result in the lawyer or the lawyer's firm violating Rule 5.4, Rule 5.5, ORS 9.160, or ORS 9.500 through 9.520; and~~

~~———(2)—— the recipient of legal services, and not the plan, service or organization, is recognized as the client; and~~

~~———(3)—— no condition or restriction on the exercise of any participating lawyer's professional judgment on behalf of a client is imposed by the plan, service or organization; and~~

~~———(4)—— such plan, service or organization does not make communications that would violate Rule 7.3 if engaged in by the lawyer.~~

~~———Absent a violation of this rule, Lawyer may participate in a prepaid legal services plan for the benefit of Church's members.~~

~~———○Lawyer should be mindful of other potential ethical issues that may arise from representing clients through a prepaid legal services plan. Oregon RPC 1.8(f) provides~~

~~÷~~

~~———(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:~~

- ~~\_\_\_\_\_~~(1) the client gives informed consent;<sup>+</sup>
- ~~\_\_\_\_\_~~(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- ~~\_\_\_\_\_~~(3) information related to the representation of a client is protected as required by Rule 1.6.

~~\_\_\_\_\_~~Oregon RPC 5.4(c) further notes that Lawyer's professional judgment should not be directed or regulated by Church in his or her representation of clients. It provides

÷

- ~~\_\_\_\_\_~~(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

As long as the requirements of Oregon RPC 1.8(f) and 5.4(c) are met, Lawyer may be paid by Church for representing clients other than Church.

Lawyer should also be careful not to assist a nonlawyer with the unlawful practice of law. Oregon RPC 5.5(a) provides:

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

ORS 9.160 provides that "a person may not practice law in this state, or represent that the person is qualified to practice law in this state, unless the person is an active member of the Oregon State Bar."

## 2. Contact of non-members of Church

~~\_\_\_\_\_~~  
~~+~~Oregon RPC 1.0(b) and (g) provide:

~~\_\_\_\_\_~~(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

~~\_\_\_\_\_~~  
~~\_\_\_\_\_~~

~~\_\_\_\_\_~~(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

Under Oregon RPC 7.3(a), in-person or live telephone solicitation of potential clients is generally prohibited. Oregon RPC 7.3(a) states

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

(1) is a lawyer; or

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

~~—With respect to in-person or telephone solicitation of non-Church members (i.e., persons not within the prepaid legal services plan) However, Oregon RPC 7.3(d) provides an exception to Oregon RPC 7.3(a). Oregon RPC 7.3(d) states, in pertinent part:~~

~~—(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.~~

~~(d) — [A] lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.~~

The language of Oregon RPC 7.3(d) generally appears to permit personal contacts in the types of representations at issue. The ability to engage in personal contact is limited, however, by Oregon RPC 7.3(b):

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

(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the target of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(3) the solicitation involves coercion, duress or harassment.

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

~~(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the prospective client is such that the person could not exercise reasonable judgment in employing a lawyer;~~

~~(2) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or~~

~~(3) the solicitation involves coercion, duress or harassment.~~

**Approved by Board of Governors, August 2005.**

---

---

~~COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§2.13, 2.25–2.26, 2.28, 3.36 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §134 (2003); and ABA Model Rules 1.8(f), 5.4(c), 7.2, 7.3(b) and (d). *See also* Washington Informal Ethics Op Nos 1447, 1508 (unpublished).~~

**OREGON STATE BAR**  
**Client Security - 113**  
**For the Four Months Ending April 30, 2014**

Description	April 2014	YTD 2014	Budget 2014	% of Budget	April Prior Year	YTD Prior Year	Change v Pr Yr
<b>REVENUE</b>							
Interest	\$286	\$417	\$3,300	12.6%	\$238	\$897	-53.5%
Judgments	50	350	1,000	35.0%	100	9,352	-96.3%
Membership Fees	1,072	650,909	684,400	95.1%	1,080	646,785	0.6%
<b>TOTAL REVENUE</b>	<b>1,408</b>	<b>651,676</b>	<b>688,700</b>	<b>94.6%</b>	<b>1,418</b>	<b>657,034</b>	<b>-0.8%</b>
<b>EXPENSES</b>							
<b>SALARIES &amp; BENEFITS</b>							
Employee Salaries - Regular	2,263	10,219	30,800	33.2%	2,201	9,905	3.2%
Employee Taxes & Benefits - Reg	1,045	3,867	11,700	33.1%	862	3,552	8.9%
<b>TOTAL SALARIES &amp; BENEFITS</b>	<b>3,308</b>	<b>14,086</b>	<b>42,500</b>	<b>33.1%</b>	<b>3,063</b>	<b>13,456</b>	<b>4.7%</b>
<b>DIRECT PROGRAM</b>							
Claims		8,741	250,000	3.5%	23,525	235,180	-96.3%
Collection Fees		66	2,000	3.3%		4,452	-98.5%
Committees			250				
Travel & Expense		608	1,400	43.4%		125	386.4%
<b>TOTAL DIRECT PROGRAM EXPENSE</b>		<b>9,414</b>	<b>253,650</b>	<b>3.7%</b>	<b>23,525</b>	<b>239,757</b>	<b>-96.1%</b>
<b>GENERAL &amp; ADMINISTRATIVE</b>							
Office Supplies			150				
Photocopying		34	150	22.8%			
Postage		107	500	21.4%	16	169	-36.9%
Professional Dues			200		200	200	-100.0%
Telephone		25	150	16.4%		21	15.2%
Training & Education			600			425	-100.0%
Staff Travel & Expense			874				
<b>TOTAL G &amp; A</b>		<b>166</b>	<b>2,624</b>	<b>6.3%</b>	<b>216</b>	<b>816</b>	<b>-79.7%</b>
<b>TOTAL EXPENSE</b>	<b>3,308</b>	<b>23,666</b>	<b>298,774</b>	<b>7.9%</b>	<b>26,803</b>	<b>254,029</b>	<b>-90.7%</b>
<b>NET REVENUE (EXPENSE)</b>	<b>(1,900)</b>	<b>628,010</b>	<b>389,926</b>		<b>(25,386)</b>	<b>403,005</b>	<b>55.8%</b>
Indirect Cost Allocation	1,357	5,428	16,279		1,219	4,876	11.3%
<b>NET REV (EXP) AFTER ICA</b>	<b>(3,257)</b>	<b>622,582</b>	<b>373,647</b>		<b>(26,605)</b>	<b>398,129</b>	<b>56.4%</b>
Fund Balance beginning of year		50,801					
<b>Ending Fund Balance</b>		<b>673,383</b>					
<b>Staff - FTE count</b>		<b>.00</b>	<b>.00</b>			<b>.35</b>	

---

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** June 27, 2014  
**From:** Sylvia E. Stevens, Executive Director  
**Re:** Client Security Fund Awards Less than \$5,000

---

The Client Security Fund made the following awards at its May 10, 2014 meeting:

No. 2014-08 GOFF (Clark)	\$2,203.00
No. 2013-44 von BLUMENSTEIN (Littlefield/Sickles)	\$4,000.00
<b>TOTAL</b>	<b>\$6,203.00</b>

### **GOFF (Clark)**

Claimants hired Goff in late 2006 to pursue a construction defect claim. They paid him \$10,000 that they understood would cover all fees, costs and expenses for the litigation. Between October 2007 and November 2010, at Goff's request, they paid a total of \$2,203 for what he described as additional court fees, a second filing fee (following unsuccessful court-annexed arbitration), and witness expenses. The case was still pending when Goff was suspended in August 2012 (he resigned Form B in December 2012); they have requested the PLF to appoint counsel to bring the matter to conclusion, although it is not clear that will occur. Claimants sought an award of the entire \$12,203 paid to Goff. The CSF Committee concluded that the claimants received more than *de minimis* services for the purportedly flat fee of \$10,000, but the additional payments totaling \$2,203 were either unnecessary or unused, and also inconsistent with the parties' agreement.

### **von BLUMENSTEIN (Littlefield/Sickles)**

Claimants hired von Blumenstein in March 2013 to defend them against criminal charges involving animal cruelty. They entered into a flat fee agreement and paid \$1050 for the initial consultation and "pre-trial" activity. On April 9, 2013, claimants paid von Blumenstein another \$4,000, ostensibly for the trial phase. After pre-trial motions, von Blumenstein disappeared; claimants hired another lawyer to complete the matter. Despite von Blumenstein's contentions to the contrary, the committee found that no work was performed in exchange for the \$4,000 payment.

**From:** [Harbur Marilyn](#)  
**To:** [Camille Greene](#)  
**Cc:** [Sylvia Stevens](#)  
**Subject:** FW: ABA House of Delegates - 2014 Annual Meeting Sneak Preview  
**Date:** Thursday, May 22, 2014 3:04:05 PM

---

I am forwarding this link to the ABA HOD agenda to share with the OSB BOG. I and the other delegates can be available to discuss items, at least by phone, at the Pendleton meeting next month – or tomorrow if needed.

Marilyn Harbur

---

**From:** Division for Policy Administration [mailto:[adrienne.barney@americanbar.org](mailto:adrienne.barney@americanbar.org)]  
**Sent:** Thursday, May 22, 2014 2:22 PM  
**To:** Marilyn Jean Harbur  
**Subject:** ABA House of Delegates - 2014 Annual Meeting Sneak Preview

[American Bar Association](#)



### [Sneak Preview - 2014 Annual Meeting](#)

As part of its ongoing effort to improve communication, the Select Committee of the House has prepared the Sneak Preview, which includes information concerning issues that are being developed for presentation to the House of Delegates at the 2014 Annual Meeting in Boston, Massachusetts.

The Committee urges all Delegates to review this list for items of interest to their constituencies, and to act as the catalyst for further contact and action so that each entity will have ample opportunity for consideration and input.

Please note that: 1) this list is tentative in nature; 2) with the exception of state and local bar associations, the filing deadline for submission of Resolutions with Reports by Association entities and affiliated organizations was Tuesday, May 6, 2014.

The Committee expresses its appreciation to those who provided the information on which this report is based. We ask that you provide additional information on any new developments or issues to any member of the Committee or to Rochelle E. Evans at the American Bar Association. She can be reached at [Rochelle.Evans@americanbar.org](mailto:Rochelle.Evans@americanbar.org) or at 312/988-5157.

Respectfully submitted,

Palmer Gene Vance II, Chair  
Hon. Christel E. Marquardt, Vice Chair

Stephen J. Curley, Reporter  
Aurora Austriaco  
Hon. Bernice B. Donald  
Charles Eppolito III  
Marilyn J. Harbur  
Sheila Slocum Hollis  
Loren Kieve  
Amie C. Martinez  
Randolph J. May  
Hon. Leslie Miller  
Frank X. Neuner, Jr.  
James Patrick Nolan  
Robert D. Oster  
Michael Perez  
Gregory L. Ulrich  
Karol Corbin Walker

Your email address will only be used by the ABA. We do not sell or rent email addresses.

[Update your profile](#)- [Manage your email preferences](#) - [Unsubscribe](#)  
[Privacy Policy](#) - [Contact Us](#)

American Bar Association | 321 N Clark, Chicago, IL 60654-7598 | 800-285-2221 | 312-988-5522

\*\*\*\*\*CONFIDENTIALITY NOTICE\*\*\*\*\*

This e-mail may contain information that is privileged, confidential, or otherwise exempt from disclosure under applicable law. If you are not the addressee or it appears from the context or otherwise that you have received this e-mail in error, please advise me immediately by reply e-mail, keep the contents confidential, and immediately delete the message and any attachments from your system.

\*\*\*\*\*

AMERICAN BAR ASSOCIATION

Standing Committee on  
Professional Discipline

321 N. Clark Street  
Chicago, IL 60654-7598  
Phone: (312) 988-5319  
Fax: (312) 988-5280  
Website: [www.americanbar.org](http://www.americanbar.org)

2013 – 2014

**CHAIR**

Arnold R. Rosenfeld, Chair  
Sarrouf Law Firm  
115 Broad St  
Suite 4  
Boston, MA 02110-3057

**MEMBERS**

Hon. Leonardo Castro  
St. Paul, MN

Nancy L. Cohen  
Denver, CO

Dolores Dorsainvil  
Washington, DC

Linda A. Gosnell  
Lexington, KY

James A. Kawachika  
Honolulu, HI

Kellyn O. McGee  
Savannah, GA

Cleaveland D. Miller  
Baltimore, MD

Margaret D. Plane  
Salt Lake City, UT

June 17, 2014

Eugene C. Beckham  
Beckham & Beckham PA  
Suite 504  
1550 NE Miami Gardens Dr.  
Miami, FL 33179

Dick A. Semerdjian  
Schwartz Semerdjian Ballard & Cauley LLP  
101 W. Broadway, Ste 810  
San Diego, CA 92101

Robert Peck  
Center for Constitutional Litigation, PC  
777 6<sup>th</sup> Street, N.W.  
Suite 520  
Washington, DC 20001

**BOARD OF GOVERNORS  
LIAISON**

James S. Hill  
Bismarck, ND

**CENTER FOR PROFESSIONAL  
RESPONSIBILITY**

**DIRECTOR**

Arthur H. Garwin

**DEPUTY DIRECTOR**

Ellyn S. Rosen  
(312) 988-5311

**DEPUTY REGULATION COUNSEL**

Theresa Gronkiewicz  
(312) 988-5299

**NATIONAL LAWYER REGULATORY  
DATA BANK ATTORNEY**

Vita F. Levar  
(312) 988-5290

**REGULATION PARALEGAL**

Kimley Grant  
(312) 988-5319

**Re: TIPS Resolution 105B—Professionalism White Paper**

Dear Eugene, Dick and Robert:

As Chair of the ABA Standing Committee on Professional Discipline, thank you for seeking the Committee's support of TIPS' Resolution 105B that urges ABA endorsement of the "White Paper on Increasing the Professionalism of American Lawyers" written by the American Civil Trial Bar Roundtable ("Roundtable"). The Discipline Committee carefully reviewed the Resolution and White Paper. We applaud and share TIPS' interest in pursuing new avenues for addressing professionalism issues. Professionalism is an issue of great importance to the legal profession, and the Standing Committee on Professionalism is the primary entity that is charged with coordinating efforts in this area within the Association.

Based upon our review of the regulatory implications of Resolution 105B, I regret to inform you that the Discipline Committee will not be able to support it on the floor of the House of Delegates. After careful consideration and for the reasons outlined below, the Discipline Committee respectfully asks that TIPS withdraw Resolution 105B. I would be happy to discuss with you and the TIPS delegates, along with Counsel to the Discipline Committee, our concerns about this Resolution. The Committee will formally determine in early July 2014 whether to oppose it on the

floor of the House if it is not withdrawn. We wanted to provide you with an opportunity to discuss this matter before the Discipline Committee makes that decision.

As a matter of fairness, I also want to let you know that the Discipline Committee is notifying the other Standing Committees in the Center for Professional Responsibility (“Center”) and other interested Sections and entities with representation in the House of its position.

#### **A. Circumstances Surrounding Development of This White Paper Warrant No ABA Endorsement At This Time**

Procedurally, the Discipline Committee opposes having the ABA endorse this White Paper because the Center entities that possess the substantive expertise and that are charged by the ABA Constitution and Bylaws with addressing issues of professionalism, ethics, regulation and client protection neither participated in its drafting nor vetted the work product prior to TIPS filing Resolution 105B. The Discipline Committee members were very concerned about this lack of notice or efforts to seek early input from the Center Standing Committees. The Committee members believe that their earlier involvement could have helped alleviate the concerns with the Resolution and White Paper.

#### **B. Certain White Paper Recommendations Conflict with ABA Policy**

The Discipline Committee found that the Roundtable, through its White Paper, explicitly and implicitly favors making violations of professionalism codes, oaths and other aspirational standards enforceable. For example, Recommendation 2 specifically urges courts to incorporate civility oaths into court rules, directly following reference to how some states are already disciplining lawyers for such violations (whether or not their civility oaths have been incorporated into court rules). Interestingly, Recommendation 2 also seems to conflict with Recommendation 3, which calls for the handling of such matters outside of discipline (but via a process that bears the hallmarks of an enforcement process). In either case, the Committee notes that because of the inherently subjective nature of professionalism norms, there exists a notable risk of inconsistent, and thus inequitable, application and resolution of professionalism complaints across and within jurisdictions. This is not something that the Discipline Committee believes that the ABA should risk endorsing.

The White Paper that TIPS wants the ABA to endorse characterizes as “promising” the emergence of more regulatory leaning mechanisms including Florida’s. The Discipline Committee queries whether, given the admitted lack of data and newness of these programs described in the White Paper, that characterization by the Roundtable is premature and misplaced.

Most problematic is that the Roundtable’s positions on enforceability of professionalism norms and civility codes conflict with longstanding existing ABA policy<sup>1</sup>, which has repeatedly

---

<sup>1</sup> In August 1995, the House adopted a policy making clear the ABA position that such professionalism standards should be “aspirational goals”. It provides: “**Civility Standards.** Encourage bar associations and courts to adopt standards of civility, courtesy and conduct as aspirational goals to promote professionalism of lawyers and judges.” Also, in August 1988, a Resolution adopted by the House clearly distinguished between aspirational professionalism

emphasized the need for separation of aspirational ideals from disciplinary rules and processes.<sup>2</sup> The ABA debate about the enforceability of aspirational standards, like the Ethical Considerations of the former Model Code of Professional Responsibility<sup>3</sup>, has already taken place and was resolved in favor of not making them disciplinable. The Scope Section of the current Model Rules of Professional Conduct stresses that, while discipline is appropriate when a lawyer violates one of the prescriptive Model Rules, when a Model Rule is cast in terms of “may” or “should” the lawyer has discretion to exercise professional judgment and no disciplinary action should be undertaken when a lawyer “chooses not to act or acts within the bounds of such discretion.”

Further, Rule 9 of the ABA Model Rules for Lawyer Disciplinary Enforcement provides that it is a ground for discipline for a lawyer to violate or attempt to violate applicable rules of professional conduct or “any other rules regarding the professional conduct of lawyers.” Rule 9 must and was intended to be read consistently with the Scope Section of the Model Rules of Professional Conduct as well as longstanding ABA policy providing that aspirational guidelines or norms are not enforceable.

If TIPS believes that the time has come to revisit that debate, the Discipline Committee feels that endorsement of this White Paper is not the optimal or direct way in which to do that. It would put the ABA on record as supporting a move toward more enforceability of professionalism guidelines and civility oaths without what the Discipline Committee believes is necessary evidence, vetting and debate. The Committee’s position is that the preferred approach to seek reopening this debate, should the ABA want to do so, would be to circulate the White Paper broadly within the Association for response favoring or disfavoring its approach, conduct any additional necessary research, make any necessary amendments and then present a specific and well supported resolution setting forth the proposed policy position.

In this regard, the Discipline Committee is concerned about the paucity of evidence demonstrating the need for the Roundtable’s recommended escalation of how “unprofessional” or “uncivil” conduct should be treated. The fact that a small number of individual jurisdictions have disciplined lawyers for violating civility oaths does not, in the Committee’s opinion, warrant the ABA endorsing such a practice for all jurisdictions. The Roundtable concedes such

---

creeds and enforceable professional conduct rules, stating: “**Lawyer’s Creed of Professionalism.** Urge state and local bar associations to encourage their members to accept as a guide for their individual conduct, and to comply with, a lawyer’s creed of professionalism, but that nothing contained in such a creed shall be deemed to supersede or in any way amend the Model Rules of Professional Conduct or other disciplinary codes, alter existing standards of conduct, or become a basis for the imposition of civil liability of any kind.”

<sup>2</sup> Also, while not policy, the Chair’s Introduction to the Report of the ABA Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000”) states: “Thus we retained the basic architecture of the Model Rules. We also retained the primary disciplinary function of the rules, resisting the temptation to preach aspirationally about “best practices” or professionalism concepts. Valuable as the profession might find such guidance, it would not have—and should not be misperceived as having—a regulatory dimension.”

<sup>3</sup> The Preamble of the predecessor Model Code stated that the “Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations. [footnote omitted] The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.”

evidence is lacking at page 16 of the White Paper, which states that, "...the whole area of professionalism suffers from a lack of hard information on the frequency and types of unprofessional conduct occurring," and further in the first sentences of Recommendation 6. That text provides that: "Hard information on the frequency of unprofessional conduct, either nationally or in individual states, is difficult to obtain and not routinely collected. Nor have the effectiveness of individual initiatives such as professionalism codes been evaluated."

### **C. Other Concerns**

The Discipline Committee also notes that Recommendation 1 is really two separate recommendations, the first of which urges educating clients about professionalism and civility matters. That is laudable, but the Discipline Committee does not believe it is a reason for the ABA to endorse the entire White Paper.

The second proposal in Recommendation 1 states that "[c]urrent professionalism initiatives could be more effective if they have a central focus on supporting rule of law principles, the civil justice system, and the core values of the profession: honesty, integrity, civility, and service. A new focus on the importance of professionalism to the rule of law and the civil justice system could improve their effectiveness and should be encouraged." The Committee found this to be ambiguous and conflicts with statements earlier in the White Paper that indicate that professionalism initiatives already do focus on the "core values" of the profession, civility, service, and integrity. The Discipline Committee was also troubled that there was no showing by the Roundtable as to how its proposed "central focus" would improve the effectiveness of professionalism initiatives. Given the lack of data about the effectiveness of professionalism programs cited earlier in the paper, it is hard to understand how the Roundtable can credibly make this assertion.

Again, I am happy to schedule a teleconference with you and Discipline Committee Counsel to discuss our on this Resolution. Please contact Deputy Director Ellyn Rosen at [ellyn.rosen@americanbar.org](mailto:ellyn.rosen@americanbar.org) if you would like to do so, and she will arrange it.

Sincerely,



Arnold R. Rosenfeld

cc: Standing Committee on Professional Discipline  
Mary Ann Peter, Staff Director  
Tort Trial & Insurance Practice Section  
Arthur H. Garwin, Director  
Center for Professional Responsibility  
Ellyn S. Rosen, Deputy Director  
Center for Professional Responsibility

**AMERICAN CIVIL TRIAL BAR ROUNDTABLE**  
**A WHITE PAPER ON INCREASING THE PROFESSIONALISM OF AMERICAN LAWYERS**

Collaborative Points of Agreement by the National Legal Associations Concerned with Trial Practice and Known as the American Civil Trial Bar Roundtable<sup>\*</sup>

I. INTRODUCTION

The American Civil Trial Bar Roundtable has been in existence since 1997. There are 14 participating organizations. The Roundtable brings together the most significant law or bar related organizations and trial practitioners representing diverse viewpoints in the civil trial bar. Participants acknowledge lack of consensus on some issues, but express common belief in the importance of the civil trial system to the American justice system and the importance of a forum for the exchange of ideas.

The Roundtable occasionally issues White Papers on issues participating organizations find to be of significant importance to maintaining the American justice system, especially the civil trial system. The Roundtable issued a White Paper in 2000, revised in 2006, concerning the state of the civil justice system in the United States with recommendations for strengthening it.<sup>1</sup>

This White Paper builds on our earlier 2006 White Paper, which noted:

1. America's civil justice system is the envy of other nations in both the developed and undeveloped world.
2. The civil justice system operates best when each party is on as level a playing field as possible with regard to trial resources and litigants are represented by qualified and competent counsel.
3. A sophisticated economic system like that in place in the United States needs a reliable judicial system rendering fair and impartial justice.<sup>2</sup>

The 2006 White Paper also observed:

. . . the legal system and . . . civil trial practice in particular have come under rather sharp attack. Lack of respect and confidence seems to have developed in the public's mind for . . . trial practice and trial practitioners of all types. Much of the criticism appears without justification but nevertheless has taken hold . . . the perception of lack of civility of lawyers toward one another leading to "win at any cost" tactics and hardball ultimatums have reduced the public's esteem of lawyers generally and trial practitioners in particular . . . Roundtable organizations and legal organizations of all types should encourage their members to persuade

---

<sup>\*</sup> The assistance in the preparation of this white paper of the Nelson Mullins Riley Scarborough Center on Professionalism and Dean Emeritus John E. Montgomery at the University of South Carolina School of Law are acknowledged.

<sup>1</sup> American Civil Trial Bar Roundtable, A White Paper Concerning an Overview of the Civil Justice System (2000, revised Sept. 9, 2006).

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

partners and associates to help in the effort to restore a sense of professionalism in younger colleagues through mentoring and other programs that stress fair and ethical treatment of opposing counsel.<sup>3</sup>

The 2006 Civil Justice System White Paper raised two broad themes on which this White Paper will build:

1. The civil justice system, properly functioning, ensures that rule of law principles, the foundation of a democratic society, apply to every dispute.
2. Unprofessional conduct of lawyers undermines both the efficient, effective operation of the civil justice system and the standing of the legal profession, especially trial practitioners, in the eyes of broader society.

This White Paper addresses an important, related topic, increasing the professionalism of lawyers. Lack of professionalism not only decreases public confidence in the American civil justice system and impairs its effective operation, it undermines the legal profession itself. Finding ways to strengthen professionalism is essential.

## II. PURPOSE

The purpose of this White Paper is to suggest effective strategies for strengthening the professionalism of lawyers, building on the extensive initiatives of courts, bars, legal organizations and law schools. These initiatives, for the most part, have consisted of codes, standards, and oaths asserting the importance of professional conduct and establishing principles for lawyer conduct. Reflecting the aspirational nature of professionalism, these efforts have focused primarily on education, not enforcement, with the hope that education about professionalism will cause lawyers to avoid unprofessional behavior.<sup>4</sup>

This White Paper goes a step beyond existing efforts and proposes a more comprehensive approach to improving the professionalism of lawyers, and, in so doing, strengthening the American civil justice system.

## III. THE IMPORTANCE OF LAWYER PROFESSIONALISM TO THE AMERICAN CIVIL JUSTICE SYSTEM

There is no generally accepted definition of professionalism,<sup>5</sup> which complicates the task of improving it. While a precise definition remains elusive, broad agreement exists on professionalism's major components: competency, ethics, integrity, access to justice, respect for the rule of law, independent judgment, and civility are all generally accepted aspects of

---

<sup>3</sup> *Id.* at 5.

<sup>4</sup> Public education is a widely used strategy to convey information about a specific problem and ways to address it. It is probably the most cost-effective strategy for organizations to employ but alone is never completely effective.

<sup>5</sup> See Neil Hamilton, *Professionalism Clearly Defined*, 18 PROFESSIONAL LAWYER 4 (2008), for a particularly thoughtful approach. A few state codes have attempted a definition. The Oregon Bar Statement of Professionalism defines it as "the courage to care about and act for the benefit of our clients, our peers and the public good." See Oregon State Bar, Statement of Professionalism, available at [http://www.orbar.org/\\_docs/forms/Prof-ord.pdf](http://www.orbar.org/_docs/forms/Prof-ord.pdf) (last visited Aug. 6, 2013).

professionalism. Stated another way, professionalism encompasses the core values of the American legal profession and reflects the moral traditions of lawyering: the obligation to represent clients diligently, and the obligation to support the processes and institutions of the justices system.<sup>6</sup>

While the definition of professionalism is elusive, the effects of its absence are not. Despite the efforts of bars, courts, legal organizations, and law schools to improve professionalism, the common experience of the profession suggests that unprofessional conduct of lawyers remains unacceptably high.<sup>7</sup>

Lack of professionalism has a negative impact on the civil justice system, the legal profession, and even lawyers who cross acceptable behavioral lines. Ultimately, and of most significance, professionalism is of crucial importance to the rule of law and the civil justice system itself. Rule of law principles are universally agreed upon and include clear, publicized, fair laws, accountable government officials, access to justice provided by competent, honest, ethical attorneys and judges and an accessible, fair, impartial, efficient justice system, which resolves disputes based on legal principles and processes, not arbitrariness or the power or resources of any individual or entity.<sup>8</sup> All of the accepted elements of professionalism, from civility to integrity to ethics, access to justice and independence, have a direct impact on respect for the rule of law and the strength of the civil justice system.

Lawyers play a central role in assuring that rule of law principles apply. Without exaggeration, in every proceeding, lawyers have the obligation, through diligently representing clients, to assure that rule of law principles govern the resolution of their clients' disputes. This is one of the pillars of a democratic society.

Unprofessional conduct, whether uncivil behavior, improper exercise of independent judgment to needlessly prolong discovery, or lack of integrity, imposes unnecessary delays and costs and can result in loss of public confidence in both the legal profession and the civil justice system itself. Lawyers, by engaging in unprofessional conduct, are violating the profession's social contract with the public to maintain the framework of the justice system and placing the independence and self-governance privilege of the profession at risk.

Aside from these broader obligations of lawyers to the justice system, the public, and the profession itself, unprofessional conduct often undermines the lawyer's own self-interest as a member of a learned profession. Whatever the perceived, immediate benefit in any individual

---

<sup>6</sup> Virtually all professional codes and statements of professionalism reflect obligations both to clients and to the justice system. *See id.*

<sup>7</sup> One survey of Illinois lawyers reported that 92% of responding attorneys experienced "strategic incivility" at some point in their careers and 98% believed that a "win at all costs" mentality contributed to unprofessional behavior. *See SURVEY ON PROFESSIONALISM: A STUDY OF ILLINOIS LAWYERS* 11 (Dec. 2007) [hereinafter *SURVEY ON PROFESSIONALISM*].

<sup>8</sup> For a general and representative expression of rule of law principles, see *REPORT OF THE SECRETARY-GENERAL: THE RULE OF LAW AND TRANSITIONAL JUSTICE IN CONFLICT AND POST-CONFLICT SOCIETIES*, UNITED NATIONS (2004); *UNITED NATIONS RULE OF LAW, WHAT IS THE RULE OF LAW?*, [http://www.unrol.org/article.aspx?article\\_id=3](http://www.unrol.org/article.aspx?article_id=3) (last visited Aug. 6, 2013). John Adams included the principle in the Massachusetts constitution ("a government of laws and not men"). *MASSACHUSETTS CONST.*, Part the First, art. XXX (1780).

representation of uncivil conduct or “win at any cost” tactics, lawyers often ultimately suffer the considerable costs of their own unprofessional conduct. Loss of respect by other lawyers and judges, loss of referrals and even loss of clients are not insignificant consequences of unprofessional behavior.

#### IV. THE BACKGROUND OF CURRENT PROFESSIONALISM INITIATIVES

The roots of modern professionalism extend back two millennia to the Roman legal system. Advocates in that system were required to take an “oath of calumny” which obligated them to exhibit proper conduct, integrity and fair dealing.<sup>9</sup> Beginning in the thirteenth century, English lawyers had obligations similar to those expected of American lawyers today. Fair dealing, competency, loyalty, confidentiality, reasonable fees and public service all were obligations assumed by English advocates.<sup>10</sup> Those obligations have continued in the modern era through the English Inns of Court.

In nineteenth century America, David Dudley Field, the author of the Field Code, included in his model statute, adopted by about 15 states, basic ethical obligations for lawyers.<sup>11</sup> Two law professors, David Hoffman of Maryland and George Sharswood of Pennsylvania, proposed what in effect were codes of lawyer conduct in their treatises. Hoffman referred to his as “resolutions,” which urged lawyers to demonstrate loyalty, competency, gentlemanly behavior, civility and respect.<sup>12</sup>

The twentieth century was marked by continued efforts to codify and make mandatory ethical standards which themselves include some elements of professionalism.<sup>13</sup>

Modern efforts to improve the professionalism of lawyers extend back four decades. In the 1970’s Chief Justice Warren Burger, concerned about the state of the American legal profession, urged organized bars to take steps to increase professionalism. The ABA responded through the Stanley Commission Report, which urged a greater emphasis on lawyers’ public obligations to the profession and to society<sup>14</sup>. At the state level, the Conference of Chief Justices’ National Action Plan on Lawyer Conduct and Professionalism introduced the idea that professionalism is aspirational, encompassing broader standards than compliance with ethical rules.

---

<sup>9</sup> See generally JAMES A. BRUNDAGE, *THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS, CIVILIANS, AND COURTS* (2008), which discusses the influence of the Roman legal system on medieval lawyers.

<sup>10</sup> See Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385 (2004), for an exhaustive treatment of the historical development of lawyer conduct standards and the significant overlap of medieval English standards and modern lawyer conduct standards.

<sup>11</sup> *Id.* at 1425. The Field Code specified duties to maintain confidentiality, to respect courts, not to mislead courts, to do justice, to abstain from offensive personality, to not unduly prejudice parties or witnesses, to not incite passion or greed in litigation and to take cases on behalf of the poor and oppressed.

<sup>12</sup> *Id.* at 1427–28.

<sup>13</sup> Alabama enacted the first state bar code of ethics in 1887. It became a model for several state ethics codes and was the basis for the American Bar Association’s 1908 Canons of Ethics. Ethics codes, which do address some aspects of professionalism, are now in force in every state.

<sup>14</sup> “. . . IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (A.B.A. Commission on Professionalism 1986), *available at* [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/professional\\_responsibility/stanley\\_commission\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/stanley_commission_report.authcheckdam.pdf).

Professionalism is a much broader concept than legal ethics—professionalism includes not only civility among members of the bench and bar, but also competency, integrity, respect for the rule of law, participation in pro bono and community service and conduct by members of the legal profession that exceeds the minimum ethical requirements. Ethics are what a lawyer *must* obey. Principles of professionalism are what a lawyer *should* live by in conducting his or her affairs.<sup>15</sup>

In 2008, the ABA Standing Committee on Professionalism reexamined professionalism and issued its own White Paper.<sup>16</sup> It recommended steps to strengthen professionalism and, in doing so, promoting “. . . the fundamental traditions and core values of the legal profession . . . inculcating and enhancing professionalism among lawyers practicing in the 21<sup>st</sup> Century.”<sup>17</sup>

All these “foundational” reports and White Papers have had the laudatory effect of contributing to broad initiatives from every part of the profession—courts, bars, legal organizations and law schools—to establish professionalism codes, creeds and oaths, continuing education and legal education programs and, increasingly, mentoring to improve the professionalism of American lawyers.

Efforts of the profession to improve the professionalism of American lawyers are national in scope and comprehensive in content. A review of those professionalism initiatives follows.

## V. PROFESSIONALISM INITIATIVES

### 1. State Court Professionalism Commissions

Professionalism commissions, usually established by state supreme courts, are active in 12 states.<sup>18</sup> Most were established in the 1990s and early 2000s. Their common mission is to promote professionalism. Their activities include coordination with bars, courts and law schools, initiating and sponsoring professionalism initiatives, improving access to justice and

---

<sup>15</sup> Paula L. Hannaford, *A National Action Plan on Lawyer Conduct and Professionalism: A Role for the Judge in Improving Professionalism in the Legal System*, COURT REVIEW 2 (Fall 1999) (adopted January 21, 1999, by the Conference of Chief Justices), available at <http://aja.ncsc.dni.us/courtrv/cr36-3/CR%2036-3%20Hannaford.pdf>.

<sup>16</sup> RONALD C. MINKOFF, REVIVING A TRADITION OF SERVICE: REDEFINING LAWYER PROFESSIONALISM IN THE 21<sup>ST</sup> CENTURY (A.B.A. Standing Committee on Professionalism Report 2008), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/century.authcheckdam.pdf>.

<sup>17</sup> *Id.* at 1.

<sup>18</sup> For detail on specific commissions, see Nelson Mullins Riley & Scarborough Center on Professionalism at the University of South Carolina School of Law, <http://professionalism.law.sc.edu/> (last visited Aug. 7, 2013). The Supreme Court of Florida Commission is a representative example. In 1987 a Florida Bar task force found “steep decline” in the professionalism of Florida lawyers, in 1996 the Bar requested the Supreme Court create a Supreme Court of Florida Commission on Professionalism. Its objective is to increase the professionalism aspirations of all lawyers in Florida and ensure that the practice of law remains a high calling with lawyers invested in not only the service of individual clients but also service to the public good as well. See Supreme Court of Florida, No. SC 13-688, In re Code for Resolving Professionalism Complaints (June 6, 2013).

administering the justice system and providing guidance and assistance on professionalism initiatives.

Professionalism commissions have been very active in promoting professionalism and initiating professionalism initiatives. The commissions have well defined missions and responsibilities and, in most cases, permanent staff and budgets. Many professionalism initiatives in place today have their origins in these commissions. Statewide mentoring programs for new lawyers are a prime example.<sup>19</sup>

While all commissions are very active, the work of these organizations in Georgia, North Carolina, Colorado, Illinois, Florida, Ohio, and Texas are illustrative of the kinds of professionalism initiatives which commissions have advocated. Development of MCLE programs emphasizing professionalism, mentoring, regular convocations for the bench, bar, and law schools and special professionalism programs and courses are typical examples.<sup>20</sup>

## 2. State Bar Professionalism Committees

Almost half of the states and the District of Columbia have bar professionalism committees.<sup>21</sup> Four states have both court commissions and professionalism committees with complimentary missions.<sup>22</sup> A number of states have ethics and professional responsibility committees, which do not separately address professionalism,<sup>23</sup> although a few deal with both areas.<sup>24</sup>

Like commissions, state bar professionalism committees generally have specific responsibilities for promoting professionalism. One of their major responsibilities has been developing professionalism standards for their states. Specific activities of these committees include: promoting professionalism to the profession and the public, sponsoring programs to increase ethical, professional conduct, and educating newly admitted members of the bar on professionalism.<sup>25</sup>

---

<sup>19</sup> Statewide mentoring programs in Georgia, Ohio, and South Carolina, for example, originated from those states' supreme court professionalism commissions.

<sup>20</sup> Commissions are effective in promoting professionalism because they bring together all interests in the profession and have the support of their supreme courts.

<sup>21</sup> Twenty-six states have such commissions. For details, see the Nelson Mullins Professionalism website, *supra* note 18 and the ABA Center on Professional Responsibility website, [http://www.americanbar.org/groups/professional\\_responsibility.html](http://www.americanbar.org/groups/professional_responsibility.html) (last visited Aug. 7, 2013).

<sup>22</sup> Florida, Georgia, Maryland, New York. The Florida Bar professionalism committee specifically supports that state's supreme court professionalism commission. See Keith W. Rizzardi, *Defining Professionalism: I Know It When I See It*, 79 FLA. BAR J. 38, n.3 (2005).

<sup>23</sup> Twelve states have such bar committees. For details, see Nelson Mullins Professionalism website, *supra* note 18.

<sup>24</sup> Indiana and Maryland.

<sup>25</sup> In states without supreme court professionalism commissions, bar professionalism committees have responsibilities similar to commissions. In general, they have not been as involved as court commissions in mentoring and in sponsoring regular meetings of all parts of the profession on professionalism.

### 3. Bar Professionalism Codes, Creeds, Principles and Standards

Almost two thirds of state bars, the District of Columbia, scores of local bars and many federal district courts have adopted professionalism standards.<sup>26</sup> While they generally cover all aspects of professionalism, civility is the most widely addressed topic. While language varies, most standards, codes, or creeds emphasize the core values of the profession: honesty, integrity, civility, and service. Those values are also affirmed by Roundtable organizations. The accompanying charts included in the Appendix categorize these standards by topics covered. Appendix A summarizes by state the most common standards, the majority of which address civility. Appendix B includes standards on areas of professionalism other than civility.

### 4. Oaths

A significant number of states have some form of civility oath. In 12 states, the oaths are incorporated into the oath of admission prescribed by the state's supreme court and are included in a court rule, making them enforceable.<sup>27</sup> In other states, civility language makes reference to rules of professional conduct which prohibits any action which interferes with the administration of justice.<sup>28</sup>

### 5. Mandatory CLE Programs

Currently, 44 states have mandatory CLE requirements. Forty-three of the forty-four require some portion of hours (usually 1 or 2) be on ethics or professional responsibility.<sup>29</sup> Nineteen states allow either ethics or professionalism to fulfill that requirement.<sup>30</sup>

### 6. Mentoring Programs

The majority of states have some form of mentoring program for newly admitted attorneys. A number of these are mentor-match programs where, if requested, the bar assists in locating a mentor.<sup>31</sup> These programs are extremely limited in scope and the number of new lawyers who participate is hard to determine. Of much great impact are the 13 voluntary and 8 mandatory

---

<sup>26</sup> There are well over one hundred different professionalism codes, guidelines, standards, and creeds. Some states have both codes and creeds. Guidelines and codes tend to focus more on specific types of conduct, creeds on the central values of the profession. See Rizzardi, *supra* note 22, for a discussion of Florida's guidelines, ideals, and creed.

<sup>27</sup> For typical language, see the South Carolina oath, which states "to opposing parties and their counsel, I pledge fairness, integrity and civility, not only in court, but also in all written and oral communications." See <http://www.judicial.state.sc.us/courtReg/displayRule.cfm?ruleID=402&subRuleID=&ruleType=APP> (last visited Aug. 28, 2013). The Alaska oath states, "I will be candid, fair and courteous before the court and other attorneys." See <http://www.courts.alaska.gov/bar.htm#5> (last visited Aug. 5, 2013).

<sup>28</sup> Most states have disciplinary rules based on ABA Model Rules of Professional Conduct Rule 8.4(d), which provides it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

<sup>29</sup> Conversation with Mary Germack, Director, South Carolina Supreme Court Continuing Education Commission (Oct. 15, 2012).

<sup>30</sup> *Id.*

<sup>31</sup> A compilation and description of all state mentoring programs can be found at the websites in *supra* note 21.

mentoring programs, which operate on a statewide basis.<sup>32</sup> Georgia pioneered mandatory mentoring for all newly admitted lawyers and its program is about a decade old. Ohio has an extremely successful voluntary program with a large percentage of those eligible participating.<sup>33</sup> These programs have become models for other state programs. All these programs place significant emphasis on professionalism and the core values of the profession. There are also a large number of local bar mentoring programs, which often mirror the structure of state programs. Texas has a particularly strong system of local bar-based mentoring programs in most of the state's largest metropolitan areas.<sup>34</sup> Further, some national legal organizations provide mentoring or otherwise participate in mentoring. The American Inns of Court Model Mentoring Program, available for use by local inns, is an example.<sup>35</sup> Mentoring is rapidly growing in the legal profession. Many firms, in addition to bars, have strong mentoring programs. A recently formed national organization, the National Legal Mentoring Consortium, with representatives from bars, courts, law schools, law firms, and corporations, is working to facilitate effective mentoring practices throughout the profession.<sup>36</sup> Most mentoring programs are regularly evaluated and participants, both mentors and mentees, report they are highly effective in addressing problems of new lawyers.<sup>37</sup> These programs now provide mentoring to some 9,500 new lawyers each year, about 20 percent of all new lawyers annually admitted to practice.<sup>38</sup>

## 7. Law Schools

A decade ago, few law schools placed any emphasis on professionalism. That has started to change with the publication of influential studies on legal education<sup>39</sup> and pressures from legal employers to graduate students better prepared for practice. While a strong focus on professionalism can be found at only a few law schools,<sup>40</sup> most law schools are incorporating

---

<sup>32</sup> Voluntary and mandatory programs handle the vast majority of new lawyers participating in statewide mentoring, probably exceeding 95%. Mentor-Match programs have few participants.

<sup>33</sup> According to Lori Keating, Secretary of the Ohio Supreme Court Professionalism Commission, about two-thirds of eligible lawyers in Ohio participate (Interview, Aug. 1, 2012).

<sup>34</sup> State Bar of Texas, Texas Bar Transition to Practice Program, [http://www.texasbar.com/AM/Template.cfm?Section=Transition\\_to\\_Practice](http://www.texasbar.com/AM/Template.cfm?Section=Transition_to_Practice) (last visited Aug. 7, 2013).

<sup>35</sup> See <http://home.innsforcourt.org> (last visited Aug. 7, 2013).

<sup>36</sup> See <http://www.legalmentoring.org> (last visited Aug. 6, 2013).

<sup>37</sup> Good examples are the evaluation processes established at the start of statewide mentoring in Georgia, Ohio, and South Carolina. These evaluations, conducted during every mentoring cycle, indicate that around 90% of participants find mentoring to be valuable in learning the proper way to practice, introducing new lawyers to the “culture” of law practice and in increasing satisfaction with practice.

<sup>38</sup> Derived from ABA statistical information on the number of lawyers admitted annually and from state bar and court statistics on the number of participants in statewide mentoring programs. For the most comprehensive information on mentoring, see NALP FOUNDATION, *THE STATE OF MENTORING IN THE LEGAL PROFESSION* (2013).

<sup>39</sup> See WILLIAM M. SULLIVAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

<sup>40</sup> A comprehensive assessment of professionalism programs in American law schools can be found in Alison D. Kehner & Mary Ann Robinson, *Mission: Impossible, Mission: Accomplished or Mission: Underway? A Survey and Analysis of Current Trends in Professionalism Education in American Law Schools*, 38 U. DAYTON L. REV. 57 (2012). A consortium of law schools making up the National Institute for the Teaching of Ethics and Professionalism (NIFTP) has a particularly strong focus on professionalism. Member Schools are: Georgia State (Headquarters school), Mercer, Fordham, Indianan-Bloomington, St. Thomas and the University of South Carolina. The Halloran Center at St. Thomas focuses on professional identity formation. The Nelson Mullins Riley Scarborough Professionalism Center at the University of South Carolina specializes in mentoring. All member schools have specialized and innovative courses emphasizing professionalism.

professionalism in orientation programs, specific classes or clinics, lectures and other programs. A rapidly growing number of law schools have established mentoring programs,<sup>41</sup> special lectures on professionalism and awards. Schools in states with court professionalism commissions usually work with those commissions' on professionalism initiatives.<sup>42</sup>

Law schools, while perhaps slower than the rest of the profession to make professionalism a priority, are making an increasingly important contribution. First, they serve as valuable "laboratories" in trying and evaluating new ways to introduce professionalism. With some 200 ABA accredited law schools in the United States, the sheer number and diversity of their approaches to professionalism is indeed impressive. With time, some best practices to introducing professionalism to law students will emerge. Second, law schools are serving as important collectors and disseminators of information on professionalism initiatives both in legal education and in the profession.<sup>43</sup> It is far easier than a decade ago to access information on professionalism in the profession because some law schools are regularly collecting the information.<sup>44</sup> This is an important addition to the ABA Center for Professional Responsibility's valuable website<sup>45</sup> and makes information sharing much easier. Finally, law schools, are increasingly relying on lawyers, judges, and members of national legal organizations to lecture and participate in professionalism programs. This brings a measure of real world practice experience beyond the capabilities of most law schools.

#### 8. National Legal Organizations

Many national legal organizations, especially Roundtable members, place significant emphasis on professionalism generally or one of its major components. They have been leaders in the professionalism movement. As representative examples, the American Board of Trial Advocates has established a Code of Professionalism, Principles of Civility, Integrity and Professionalism and the educational publication "Civility Matters."<sup>46</sup> The Defense Research Institute, the voice of the defense bar supports excellence and fairness in the civil justice system.<sup>47</sup> DRI's Substance Law Committee on Professionalism and Ethics coordinates with the organization's other committees to make sure every DRI seminar has professionalism panels and supports work with law schools. The American Association for Justice promotes a fair and effective justice system

---

Also of note are programs at the University of Denver Sturm College of Law, which have a strong professionalism focus. Educating Tomorrow's Lawyers (ETL) collects information on law school courses which have a professionalism focus. See <http://educatingtomorrowlawyers.du.edu> (last visited Aug. 7, 2013), which is an initiative of the Institute for the Advancement of the American Legal System at the University of Denver Sturm College of Law.

<sup>41</sup> Of special note are the three-year mandatory mentoring programs for all students at St. Thomas Law School, the situational mentoring program at Cooley Law School and the combined legal profession class, mandatory mentoring and judicial observation program for the first year students at the University of South Carolina School of Law.

<sup>42</sup> Most supreme court commissions have law school representatives. The Georgia, Ohio, and South Carolina commissions are representative examples.

<sup>43</sup> See Educating Tomorrow's Lawyers website, *supra* note 40; Nelson Mullins Riley & Scarborough Center on Professionalism website, *supra* note 18.

<sup>44</sup> In part this reflects the establishment of centers and initiatives at several law schools which regularly collect and disseminate information about professionalism generally and programs involving professionalism.

<sup>45</sup> See ABA Center for Professional Responsibility, *supra* note 21.

<sup>46</sup> <https://www.abota.org/> (last visited Aug. 7, 2013).

<sup>47</sup> <http://www.dri.org/about> (last visited Aug. 7, 2013).

and access to justice.<sup>48</sup> The International Association of Defense Counsel supports enhanced skills and professionalism to serve clients, the civil justice system, and society.<sup>49</sup> The International Academy of Trial Lawyers, with both plaintiff and defense members and prosecutors and civil defense attorneys, supports law reform, facilitates the administration of justice, promotes the rule of law internationally and elevated standards of integrity, honor, and courtesy in the legal profession.<sup>50</sup> The Federal Bar Association, serving the needs of the federal public and private practitioner and the judiciary, supports the sound administration of justice and professional and ethical practice in the federal bar.<sup>51</sup> The Federation of Insurance and Corporate Counsel is “dedicated to pursuing professionalism . . . and a course of balanced justice.”<sup>52</sup> The Association of Defense Trial Attorney, “. . . champions the jury trial system as being essential to an American system of jurisprudence.”<sup>53</sup> The Association of Defense Counsel of Northern California “. . . promotes the administration of justice . . .” and enhancing “. . . the standards of civil defense practice.”<sup>54</sup> The American Inns of Court promotes professionalism, ethics, and integrity and has established a professionalism creed.<sup>55</sup> The American Bar Association through its many committees, sections, and divisions, places significance on professionalism. The Torts and Insurance Practice section, the Standing Committee on Professionalism, the Professionalism Consortium, the Young Lawyers Division and the Gambrell Professionalism Award are representative of the ABA’s work in the area of professionalism.<sup>56</sup>

The commitment of these organizations is representative of the work and purposes of many others. Collectively, national legal organizations demonstrate impressive commitment to professionalism. Through programs for their members, educational initiatives such as ABOTA’s “Civility Matters,” these organizations provide significant support for a strong civil trial system. For the most part, the efforts of these organizations are focused on their members and not on outreach to the profession generally. A few, for example, the ABA, ABOTA and the American Inns of Court, have programs more broadly directed at the profession. Several are actively engaged in law reform efforts.<sup>57</sup>

#### 9. Bar, Bar Counsel and Disciplinary Office Initiatives

A significant number of state bars and bar and disciplinary counsel offices conduct training, educational and rehabilitation programs with an emphasis on professionalism. They are far too numerous and diverse to categorize. The Texas Center for Legal Ethics, for example, offers

---

<sup>48</sup> <http://www.justice.org/cps/rde/xchg/justice/hs.xml/418.htm> (last visited Aug. 7, 2013).

<sup>49</sup> <http://www.iadclaw.org/about/association.aspx> (last visited Aug. 7, 2013).

<sup>50</sup> <http://www.iatl.net/i4a/pages/index.cfm?pageID=3511> (last visited Aug. 7, 2013).

<sup>51</sup> <http://www.fedbar.org/About-us/FBA-Mission.aspx> (last visited Aug. 19, 2013).

<sup>52</sup> <http://www.thefederation.org/process.cfm?pageid=1> (last visited Aug. 19, 2013).

<sup>53</sup> <http://www.adtalaw.com/shared/content/adtahistory.pdf> (last visited Aug. 19, 2013).

<sup>54</sup> <http://www.adcnc.org/about.asp> (last visited Aug 19, 2013).

<sup>55</sup> See *supra* note 35.

<sup>56</sup> Professionalism programs of the ABA can be accessed through its website. See <http://www.americanbar.org/aba.html> (last visited Aug. 7, 2013). One valuable recent ABA publication is *Essential Qualities of the Professional Lawyer* (Paul A. Haskins ed. 2013).

<sup>57</sup> The ABA is a prime example.

numerous courses, which emphasize ethics and professionalism.<sup>58</sup> Its course on professionalism is an excellent example.<sup>59</sup> Professionalism, especially civility, is also a common topic in many state “bridge the gap” programs for new lawyers. Disciplinary offices and bar counsel talk widely to lawyer groups and some states have “schools” for lawyers who have been warned or sanctioned for unprofessional conduct,<sup>60</sup> usually day-long remedial programs on specific topics.

#### 10. Other Significant Judicial and Bar Initiatives

Courts in Florida and Utah have created, by court order, new mechanisms designed to address unprofessional conduct. The Colorado Bar has established a similar process. These are innovative new approaches which hold promise.

The Utah Supreme Court has established a board of five counselors to “counsel and educate members of the Bar concerning the Court’s Standards of Professionalism and Civility.”<sup>61</sup> The purposes of the board are to counsel lawyers on professionalism issues in response to complaints by other lawyers and referrals from judges, to provide counseling upon request from lawyers about their obligations under the standards, provide CLE on the standards and publish advice and information on the board’s work. The board will respond to complaints, inquiries, and referrals from lawyers and judges but not from the public. Complaints may be resolved by face-to-face meetings or by written advisory opinions, which may also be provided to the attorneys, supervisors, or employers.

In June 2013, the Florida Supreme Court issued an order establishing a Code for Resolving Professionalism Complaints, based on a proposal from the Supreme Court of Florida Professionalism Commission.<sup>62</sup> The new Florida Code prohibits members of the Florida Bar from engaging in “unprofessional conduct,” defined as “substantial or repeated violations of the Florida Bar Oath of Admission, the Florida Bar Creed of Professionalism, the Florida Bar Ideals and Goals of Professionalism, the Rules Regulating the Florida Bar and the decisions of the Florida Supreme Court.”<sup>63</sup>

The Code provides that complaints be directed either to the Attorney Consumer Assistance and Intake Program or a local district professionalism panel. If the complaint involves violation of a disciplinary rule, it will be handled by normal disciplinary procedures. If the complaint involves unprofessional conduct, which does not constitute a disciplinary rule violation, it will be handled either by the attorney intake process or a local district panel. Any person, including non-lawyers, may initiate a complaint. The Florida Bar may also initiate complaints on its own initiative.<sup>64</sup>

---

<sup>58</sup> <http://www.legalethicstexas.com/courses/online-courses/Justice-James-A--Baker-Guide-to-the-basics-of--%281%29.aspx> (last visited Aug. 7, 2013).

<sup>59</sup> <http://www.legalethicstexas.com/Courses/Live-Courses/Justice-James-A-Baker-Guide-to-the-Basics-of-Law-P.aspx> (last visited Aug. 7, 2013).

<sup>60</sup> South Carolina is typical of many states which offer remedial courses through the office of the Supreme Court Disciplinary Counsel.

<sup>61</sup> The text of the Utah Supreme Court Standard Order No. 7, which was effective April 1, 2008, and revised in 2012, is at <http://www.utcourts.gov/resources/rules/urap/suptctso.htm> (last visited Aug. 7, 2013)

<sup>62</sup> See Supreme Court of Florida Code for Resolving Professionalism Complaints, *supra* note 18.

<sup>63</sup> *Id.* at 6.

<sup>64</sup> *Id.* at 8.

Complaints may be resolved informally, such as by providing remedial guidance. There are also procedures for review by the Grievance Committee and a number of possible actions such as letters of advice and recommendations for diversion to a practice and professionalism enhancement program.<sup>65</sup>

The Colorado Bar has established the Peer Professionalism Assistance Group which offers assistance on professionalism issues. Judges and lawyers can refer attorneys to the group for such matters as lack of cooperation in scheduling, refusing to communicate, personal attacks and rude, contentious communications. Matters are addressed and resolved through mentoring, counseling, and other informal means. Complaints are addressed by single members or by panels.<sup>66</sup>

The approaches of the Utah and Florida supreme courts and the Colorado Bar are new avenues to strengthening professionalism beyond the philosophy of education on professionalism followed universally by bars, courts, legal organizations, and law schools. For the first time, two courts and a state bar have established processes for raising professionalism complaints not involving separate violations of court or professional responsibility rules and having them resolved. The Utah and Colorado processes also allow for guidance, similar to obtaining ethics advisory opinions. By creating these newer procedures there will also be the opportunity to collect information on the number of unprofessional conduct cases arising in the three states, a metric so far, unavailable elsewhere.<sup>67</sup>

#### 11. The Use of Judicial Sanctions and Disciplinary Actions for Unprofessional Conduct

Judicial sanctions for unprofessional conduct are uncommon, except in limited circumstances involving particularly egregious conduct.<sup>68</sup> They are not appropriate for broad application. Professionalism is universally considered to be aspirational, a level of practice which every lawyer should aspire to achieve, not something mandated because of ethical requirements.<sup>69</sup> Many bar professionalism codes and standards specifically state that professionalism codes and standards are not to be used as the basis of disciplinary actions. Trial judges are also sometimes reluctant to take valuable court time to resolve disputes between lawyers which often have little

---

<sup>65</sup> *Id.* at 9.

<sup>66</sup> <http://www.cobar.org/index.cfm/ID20950> (last visited Aug 19, 2013).

<sup>67</sup> Both Utah and Colorado have some experience with their respective programs. Over the past few years, the Utah Professionalism Board has dealt with approximately 50 complaints. Most involved civility issues, both inadvertent and “tactical.” The Utah process has been particularly helpful for new lawyers unsure about how to deal with a particular situation. The Colorado program has experienced a comparable volume of complaints, again with most dealing with civility. Colorado has a much larger group (15 versus 5 in Utah) to deal with complaints and consequently, a group of panelists with more diverse practice experience. Both programs engage in outreach programs to educate lawyers about using the programs. (Interview with Robert Clark, Chair, Utah Supreme Court Professionalism Board, Aug. 18, 2013, and John Baker, Director, Colorado Mentoring Program and member, Colorado Bar Peer Professionalism Assistance Group, Aug. 19, 2013).

<sup>68</sup> The majority of cases involve discovery abuse. *See e.g.* – For egregious examples of sanctionable conduct in discovery, see *State v. Mumford*, 731 A.2d 831 (Del. Super. 1999) (repeated use of obscenities by client during deposition, which lawyer made no attempt to control); *Mullaney v. Aude*, 730 A.2d 759 (Md. Ct. Spec. App. 1999) (male lawyer addressed female opposing counsel as “bimbo” and “babe” during deposition). *See Eric D. Miller, Lawyers Gone Wild: Are Depositions Still a “Civil Procedure,”* 42 CONN. L. REV. 1527 (2010), for a comprehensive discussion.

<sup>69</sup> *See Hannaford, supra* note 15.

to do with the merits of the case. In the words of the Supreme Court of Florida, “professionalism involves principles, character, critical and reflective judgment, along with an understanding of ourselves and others working in and under stressful circumstances.”<sup>70</sup> Establishing clear standards on which sanctions for unprofessional conduct could be based, in the areas of reflective judgment or self-understanding, for example, is not feasible and could raise free speech concerns. Accordingly, initiatives to strengthen professionalism in its broad scope have focused on educating lawyers about the various aspects of professionalism and its importance to the profession.

Judicial sanctions are not a broadly applicable or effective means to improve professionalism beyond their current use for clearly egregious behavior. Professionalism is not a lawyering trait amenable to clear standards enforceable by sanctions.<sup>71</sup> Further, expanded use of sanctions cuts against the fundamental aspirational basis of professionalism.

There are however, limited areas where disciplinary actions for very specific types of unprofessional conduct have been based on court rules. Civility, an important part of professionalism, is part of the oath of admission in several states and falls within court rules.<sup>72</sup> Based on court rules requiring civility and on administration of the justice system, several states have imposed disciplinary sanctions such as public reprimands or suspensions for egregious uncivil conduct.<sup>73</sup>

## VI. OBSERVATIONS ON CURRENT INITIATIVES TO STRENGTHEN PROFESSIONALISM

Efforts to strengthen the professionalism of American lawyers through broad education efforts are truly impressive. Virtually the entire legal profession has implemented a broad range of professionalism initiatives. Chief Justice Warren Burger’s call to improve professionalism has been embraced by the profession.

---

<sup>70</sup> See *supra* note 18, at 2.

<sup>71</sup> For example, in *PNS Stores, INC. v. Rivera*, 379 S.W. 3d 267-77 (Tex. 2012), the Supreme Court of Texas stated the Lawyer’s Creed was intended to encourage lawyers to be mindful that abusive tactics—ranging from hostility to obstructionism—do not serve justice. *Id.* at 276. The court continued that the Lawyer’s Creed serves as an important reminder that the conduct of lawyers “should be characterized at all times by honesty, candor, and fairness.” *Id.* (citing the Lawyer’s Creed) However, the court also stated that the Lawyer’s Creed is aspirational. *Id.* “It does not create new duties and obligations enforceable by the courts beyond those existing as a result of (1) the courts’ inherent powers and (2) the rules already in existence.” *Id.* at 276-77”

<sup>72</sup> South Carolina had three significant disciplinary cases involving violation of its civility oath in 2011 alone. See *In re White III*, 707 S.E.2d 411 (S.C. 2011) (sanctions for letter suggesting opposing counsel had “no brains” and questioning if “he has a soul”; argument he was acting on client wishes rejected); *In re Anonymous Member of South Carolina Bar*, 709 S.E.2d 633 (S.C. 2011) (derogatory remarks in email to opposing counsel suggesting counsel’s daughter involved with drugs, which had no relation to legal matter at issue); *In re Lovelace*, 716 S.E.2d 919 (S.C. 2011) (attorney threatened and slapped a witness during deposition). The first recorded South Carolina case sanctioning a lawyer for uncivil conduct was decided in 1850. See *The State v. B.F. Hunt*, 355 S.C. L. (4 Strob.) 322, 1850 WL 2817 (1850). See also *In re Abbott*, 925 A.2d 482 (Del. 2007) (violation of attorney oath by accusing another lawyer of fabrication; civility not incorporated in court rule); cf. *Peters v. Pine Meadow Ranch Home Ass’n*, 151 P.3d 962 (Utah 2007) (uncivil language in brief). Michigan has no oath but has sanctioned lawyers for incivility through its professional responsibility rules. *Grievance Adm’r v. Fiezer*, 719 N.W.2d 123 (Mich. 2006). For a review of civility cases involving written documents, see Judith D. Fischer, *Incivility in Lawyers Writing: Judicial Handling of Rambo Run Amok*, 50 WASHBURN L.J. 365 (2011). A very useful discussion of civility cases is Donald A. Winder, *Enforcing Civility in an Uncivilized World* (unpublished paper, available from the author, at Winder and Counsel PC, Salt Lake City Utah, updated July 17, 2013).

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

Two critical questions remain: have these initiatives been effective in increasing the professionalism of practicing attorneys and what more can and should be done? Insight into those questions comes from the Supreme Court of Florida's rule creating a structure for resolving professionalism complaints, a rule adopted after Florida already had a professionalism code, a professionalism creed and a civility oath in place. The Court observed, "Although it is impossible to determine with scientific certainty the true or exact status of professionalism today, the passive academic approach to such problems has probably had a positive impact toward improving professionalism or at least maintaining the status quo by preventing a further decline . . ." <sup>74</sup> This observation of the Florida Supreme Court is worth elaboration because it is probably representative of reactions to professionalism initiatives across the profession.

First, since professionalism is considered to be aspirational, the overriding strategy behind professionalism initiatives has been educational. Standards, codes, CLE programs, lectures and articles, the core of most professionalism initiatives, all are aimed at informing lawyers of the various aspects of professionalism and proper responses to specific practice situations. Less frequently, some states have adopted oaths and make reference to central professional values. Remedial measures such as disciplinary actions have been used only in limited circumstances where court rules prohibit certain kinds of unprofessional conduct, for example, incivility. Second, despite the comprehensiveness of professionalism education initiatives, there has been no real measurement of their effect. No doubt, all these educational efforts have had some success in improving professionalism but the extent of the improvement is uncertain. The common experience of many in the profession and a few surveys suggest that unprofessional conduct remains at unacceptably high levels. <sup>75</sup> It is hard to say whether some, any or all the professionalism initiatives have had major impact because of insufficient data collection. As a profession, we have been responsible for adopting a broad range of initiatives designed to strengthen professionalism but have not followed up with measuring their effectiveness. Third, most professionalism initiatives do not explicitly state a central purpose or focus on why professionalism is important. Some also do not set out the central values of the profession such as integrity, civility, ethics and a commitment to service. This is in contrast to the values often referred to in the missions of many national legal organizations. <sup>76</sup> That one of the most important purposes of professionalism is to support the rule of law and the civil justice system also is rarely referenced in most initiatives. As a consequence, lawyers are not reminded sufficiently of the core values of the profession or the importance of professionalism to the operation of the justice system.

Finally, of all the professionalism initiatives in place, mentoring is the one approach that clearly makes a positive difference. States with both mandatory and voluntary statewide programs such as Georgia, South Carolina, Utah, and Ohio have conducted extensive evaluations of their programs. They have found that mentoring works well in introducing lawyers to the important

---

<sup>74</sup> See Supreme Court of Florida Code for Resolving Professionalism Complaints, *supra* note 18, at 2.

<sup>75</sup> See SURVEY ON PROFESSIONALISM, *supra* note 7. An early study on the frequency of unprofessional conduct is Wayne D. Brazil, *Views from the Front Lines*, 1980 AM. B. FOUND. RES. J. 217 (1980).

<sup>76</sup> See *supra* notes 46-57 and accompanying text.

values of the profession, helps them develop proper habits and increases their satisfaction with practice.<sup>77</sup>

At one level, mentoring of course is an educational process, usually in one-on-one or small group settings. As such, it is consistent with the broad education strategy of professionalism initiatives generally. Yet mentoring is different because it relies on close interpersonal contact and building a relationship of trust with another experienced, professional lawyer. This process is effective in conveying the importance of professionalism and establishing a norm of professional conduct.<sup>78</sup>

The central goal in the profession's commitment to increase professionalism should be to instill a norm of professional conduct in lawyers. The Conference of Chief Justices National Action Plan stated as much over two decades ago.<sup>79</sup> Current initiatives, while laudatory in both scope and content, do work but only to a point. There remain a group of lawyers, unknown in size but probably significant, for whom professionalism is not a practice norm or at least not an important factor in how they practice. Nor is it likely that current initiatives will persuade them otherwise. Establishing a more broadly accepted professionalism norm requires both an understanding of existing behavior and barriers to changing unprofessional conduct. For some lawyers lack of professionalism may be attributable to lack of knowledge about the importance of professionalism or what it requires in a particular practice setting. For this group, the current education approach should work. There are, however, other barriers to change which are more difficult to overcome. Some lawyers may respond unprofessionally because of their belief that these clients expect "hardball" tactics. Addressing this may be not so much a lawyer education issue but a client education issue. Lawyers should educate their clients about what is professional in a representation and exercise their independent judgment about how to address their client's needs.<sup>80</sup> Both national legal organizations and bars should urge lawyers to better educate their clients on the importance of civility and consider adding a client education component to professionalism codes and creeds. This could specifically address the assertions of many lawyers that they are only doing what their clients demand. Finally, there are lawyers who believe "win at any cost" tactics benefit them financially or produce better results for their clients, no matter what the costs to others or to the civil trial system itself. For them, unprofessional conduct is perhaps nothing more than a strategy of winning embraced in the notion of zealous advocacy. Of course, it is not. Such lawyers in effect are treating the civil justice system as a "free good" allowing the use of any "legal" or "ethical" tactic without regard to the costs or consequences to others or to the civil trial system itself. They are certainly not fulfilling their professional obligations to the justice system.

---

<sup>77</sup> See *supra* note 37.

<sup>78</sup> See THE STATE OF MENTORING IN THE LEGAL PROFESSION, *supra* note 38, at 127.

<sup>79</sup> See Hannaford, *supra* note 15.

<sup>80</sup> Some state bar professionalism codes and creeds actually suggest this. See, for example, the Arizona Lawyer's Creed which instructs attorneys to inform clients of the importance of civility ("I will advise my client that civility and courtesy are not equated with weakness."), *available at* <http://www.azbar.org/membership/admissions/lawyer'screedofprofessionalism> (last visited Aug. 22, 2013). See also Denis T. Rice, *Incivility In Litigation: Causes and Possible Cures* 10 (unpublished paper prepared for ABA Tort Trial and Insurance Practice Session 2013 Annual Meeting, Aug. 13, 2013, San Francisco, CA) ("A lawyer should educate his or her client to appreciate that incivility will not benefit the client's interest. Not only do hardball battles over discovery drive up the fees, but it rarely improves the client's litigation posture. The client should understand that credibility with counsel and the court is a highly valuable asset").

The challenge here is to strengthen the professionalism of the great majority of American lawyers who already practice with professionalism and pursue a more effective strategy to change the behaviors of the group who do not. How ideas, innovations and values become norms which are widely adopted has been exhaustively studied. It is well established that the ideas and innovations of small groups become the norms of the great majority through a process social scientists refer to as diffusion.<sup>81</sup> Education can introduce an idea broadly but people are far more likely to actually adopt it and make it a norm when others they know and trust embrace the idea and provide personal evidence of its importance. Peer-to-peer communication and the influence of peer networks are crucial to the process. This process is known to work in professional groups like physicians in the adoption of new practice standards.<sup>82</sup> The process of diffusion is also remarkably similar to what goes on in a mentoring environment where an experienced professional who practices with professionalism as a norm transmits an approach to practice based on the central values of the profession. Related to this is the common observation that lawyers are less likely to act improperly to other lawyers they know and handle matters with repeatedly. It is far easier to be uncivil to a lawyer in a single matter than one likely to be seen again. The growth of the profession and handling more matters through exchange of paper and email has reduced personal contact and the opportunity for the diffusion process to have as great an effect.<sup>83</sup>

This is to suggest that if we as a profession want to strengthen professionalism further and reach lawyers who do not see or are indifferent to its importance, we must think beyond the current education strategy. To be sure, the education strategy common in the professionalism movement works and must be continued. It should, however, be more focused and tied more directly to the importance of professionalism to the rule of law and the effective operation of the civil justice system. The professionalism panels created by the Florida and Utah supreme courts and the Colorado Bar are a promising middle ground to resolve professionalism complaints informally using something similar to a mediation process.

Mentoring offers significant promise in furthering professionalism. It does require individual commitment to the intensive task of transmitting to others appropriate practice norms. Yet thousands of lawyers are already engaged in state, local, firm and law school mentoring program around the country. A broader commitment to mentoring in the profession would certainly be in keeping with other professionalism obligations such as service to the profession. Increasing transmittal of the importance of professionalism both to individual lawyers and even to clients, has the potential beyond current initiatives to strengthen professionalism and could reach a broader audience than education initiatives alone. Obviously, mentoring can have the greatest long-term benefit if it is focused on new lawyers.

Finally, the whole area of professionalism suffers from a lack of hard information on the frequency and types of unprofessional conduct occurring. Ways to bridge this information gap are clearly important.

---

<sup>81</sup> The standard work is EVERETT M. ROGERS, *DIFFUSION OF INNOVATIONS* (5th ed. 2003). There are more than 6,000 research studies and field tests of this process.

<sup>82</sup> See Soumerai et al., *Effect of local medical opinion leaders on quality of care for acute myocardial infarction: A randomized controlled trial*, 279 J. AM. MED. ASS'N 1358 (1998).

<sup>83</sup> For a discussion, see Rice, *supra* note 79, at 2–3.

## VII. POINTS OF AGREEMENT AND RECOMMENDATIONS

Professionalism of lawyers is essential to the effective operation of the civil justice system, which in turn is crucial to the rule of law and a democratic society. Strengthening the civil justice system has long been a priority of the Civil Trial Bar Roundtable. The following recommendations to strengthen professionalism will contribute to a strong civil trial system, which operates with fairness, effectiveness, and efficiency:

1. The professionalism movement so far has concentrated on educating lawyers about the various aspects of professionalism. It needs more focus. Current professionalism initiatives could be more effective if they have a central focus on supporting rule of law principles, the civil justice system, and the core values of the profession: honesty, integrity, civility, and service. While current initiatives are impressive in scope and have drawn the active involvement of bars, courts, legal organizations, and law schools, few articulate a central purpose of professionalism or the central values of the profession. A new focus on the importance of professionalism to the rule of law and the civil justice system could improve their effectiveness and should be encouraged. Also, a new emphasis on lawyers educating their clients should be added to professionalism codes and creeds. This, coupled with other efforts to better educate clients on the importance of civility, could improve professionalism.
2. Civility oaths based on rules of court have been adopted in several states. Courts are using violations of these oaths as the basis of disciplinary sanctions and lawyers consequently can see the limits of appropriate conduct. Efforts to incorporate civility oaths into court rules should be encouraged in those states which have not yet adopted them.
3. New initiatives by the Florida and Utah supreme courts and the Colorado Bar to establish professionalism boards to resolve professionalism complaints informally appear promising. They are important first steps in creating a mechanism to address professionalism issues which fall outside the scope of disciplinary rules. If these approaches prove successful, their adoption by other bars and state supreme courts should be encouraged and supported.
4. Mentoring can take many forms and is rapidly increasing in the legal profession. It is demonstrably effective in transmitting the “culture” of a professional approach to law practice. It also is known to be one of the most effective ways in establishing new behavioral norms where education alone won’t succeed. Mentoring can be most effective in impressing on new lawyers the importance of professionalism. Its increased use in the legal profession should be strongly encouraged and supported.
5. Supreme court professionalism commissions have been the most active organizations in the profession in dealing with professionalism by bringing together all stakeholders. They operate in only about 25% of the states. Their creation in every state should be encouraged.

6. Hard information on the frequency of unprofessional conduct, either nationally or in individual states, is difficult to obtain and not routinely collected. Nor have the effectiveness of individual initiatives such as professionalism codes been evaluated. The only exception here is mentoring which is evaluated in most states on an ongoing basis. More comprehensive gathering of data on professionalism and the effectiveness of various initiatives should be encouraged. As a part of this process, the Civil Trial Bar Roundtable supports the development of a “professionalism directory” for each state. This directory would be a qualitative state-by-state measure of the breadth of each state’s professionalism efforts. Possibilities for inclusion are the existence of supreme court commissions, bar committees, professionalism standards, civility oaths, bar and disciplinary counsel programs, mentoring, CLE programs on professionalism, access to justice initiatives, working with law schools and data gathering. This is not an inclusive list. The Roundtable supports such an effort and is willing to participate in a meaningful way in its development.
  
7. The Civil Trial Bar Roundtable, through local groups of its national organizations, encourages active involvement with as many law schools as possible. The experience of individuals in member organizations could be invaluable in assisting law schools to strengthen their professionalism programs. This is a time of declining enrollments and tight resources for law schools. They could benefit from the active participation of Roundtable organizations and their members in increasing the professionalism and skills of law students.

**AMERICAN BAR ASSOCIATION  
TORT TRIAL AND INSURANCE PRACTICE SECTION  
COMMISSION ON THE AMERICAN JURY PROJECT**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

RESOLVED, That the American Bar Association endorses the 2014 American Civil Trial Bar Roundtable's *A White Paper on Increasing the Professionalism of American Lawyers* and urges lawyers and legal organizations to implement its recommendations.

## **REPORT**

This resolution seeks American Bar Association endorsement of a White Paper it and some of its constituent entities helped develop as part the American Civil Trial Bar Roundtable. The White Paper urges all lawyers and legal organizations to support a more comprehensive approach to strengthening the professionalism of lawyers while building on the extensive existing professionalism initiatives of courts, bars, legal organizations and law schools. The American Civil Trial Bar Roundtable, in conjunction with the work of the American Inns of Court Foundation, has prepared this extensive White Paper outlining a number of strategies to be utilized in the further education and promotion of lawyer professionalism. That White Paper constitutes is appended to this report.

For decades, the American Civil Trial Bar Roundtable has brought together leaders of the major civil trial bar organizations and the ABA to work together in the continuation and preservation of the civil trial justice system. Its goal is to provide its member organizations with a forum to foster and encourage frank and open discussion and dialogue on the status of the U.S. civil justice so as to seek improvements in that system that all stakeholders can support. The American Bar Association is represented at the American Civil Trial Bar Roundtable by the American Bar Association (as a whole), the Section of Litigation, the Tort Trial and Insurance Practice Section, and the Commission on the American Jury Project. In addition, other national trial legal organizations that are members and have endorsed this White Paper include the American Association for Justice, American Board of Trial Advocates, Association of Defense Trial Attorneys, American Board of Professional Liability Attorneys, Academy of Rail Labor Attorneys, Defense Research Institute, Federal Bar Association, Federation of Defense and Corporate Counsel, International Association of Defense Counsel, International Academy of Trial Lawyers, International Society of Barristers, and National Crime Victim Bar Association. Although the American Inns of Court Foundation has approved the White Paper, it does not normally take public positions on issues that might come before the Roundtable. The Roundtable takes no position unless all members of the Roundtable endorse the proposal.

## **BACKGROUND**

The Tort Trial and Insurance Practice Section has long promoted professionalism through resolutions approved by the American Bar Association House of Delegates. In 1988 the House adopted Resolution 116A, sponsored by TIPS, which recommended state and local bar associations encourage members to accept as a guide for the individual conduct a lawyer's creed of professionalism. In 1991 the House adopted Resolution 104, sponsored by TIPS, recommending a discussion of professional by law school faculties. The Tort Trial and Insurance Practice Section is represented in the American Civil Trial Bar Roundtable.

The Commission on the American Jury Project also cosponsors this resolution, recognizing the importance of professionalism to a properly functioning jury system.

A persistent impression that professionalism, and civility in particular, have declined and continue to wane within the profession prompted the drafting of the White Paper. A recent poll

found that more than two-thirds of all lawyers believe civility continues to ebb among lawyers and 80 percent of judges have witnessed attorney conduct within their courtrooms that lacked civility.<sup>1</sup> One commentator found that many lawyers view civility as “anachronistic or incompatible with the modern day practice of law.”<sup>2</sup> Nonetheless, courts generally “believe and defend the idea that maintaining a bar that promotes civility and collegiality is in the public interest and greatly advances judicial efficiency: better ‘to secure the just, speedy[,] and inexpensive determination of every action and proceeding,’ as Rule 1 demands.” *Sahyers v. Prugh, Holliday & Karatinos, P.L.*, 560 F.3d 1241, 1244 n.5 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 415 (2010).

The American Bar Association has consistently taken a stand that professionalism is a necessary component of a lawyer’s job as an officer of the court and requires the exercise of civility. Operating in a professional manner is necessary to making the justice system work for all. The Association’s efforts on professionalism include a number of resolutions approved by the House of Delegates. For example, the House of Delegates renewed the Association’s commitment to civility in 2011 and also approved a 1995 resolution encouraging bar associations and courts to adopt standards of civility, courtesy and conduct as aspirational goals to promote professionalism of lawyers and judges. The Association’s efforts have not gone unnoticed. The ethical implications of uncivil conduct has received increasing attention in the states, with some states adopting enforceable civility codes.<sup>3</sup>

The adoption of this White Paper continues those efforts to advance civility and professionalism by calling attention to a number of existing programs and initiatives that may be adopted in other venues.

## **EXPLANATION OF THE RESOLUTION**

The White Paper this resolution endorses details salutary strategies for strengthening the professionalism of lawyers by moving beyond aspirational approaches to more concrete steps. The paper recognizes that unprofessional conduct adversely affects the quest for justice, as well as public respect and confidence in both the legal profession and the civil justice system itself. Appalling conduct includes uncivil behavior, dilatory tactics, and lack of integrity, all of which imposes unnecessary delays and costs and can result in loss of public confidence in both the legal profession and the civil justice system itself.

Among the many strategies utilized in different states and described in the White Paper are: state court professionalism commissions, state bar professionalism committees, bar professionalism

---

<sup>1</sup> Nancy Levit & Douglas O. Linder, *The Happy Lawyer: Making a Good Life in the Law* 59 (2010).

<sup>2</sup> Bronson D. Bills, *To Be or Not to Be: Civility and the Young Lawyer*, 5 Conn. Pub. Int. L.J. 31, 35-36 (2005).

<sup>3</sup> See G.M. Filisko, *You’re Out of Order! Dealing with the Costs of Incivility in the Legal Profession*, ABA J., January 2013, at 32, 35; G.M. Filisko, *Be Nice More States Are Treating Incivility As A Possible Ethics Violation*, ABA J., April 2012, at 26. See also, e.g., Amelia Craig Cramer *et. al.*, *Civility for Arizona Lawyers: Essential, Endangered, Enforceable*, 6 Phoenix L. Rev. 465 (2013).

codes, creeds, principles and standards promoting honesty, integrity, civility, and service, civility oaths, mandatory CLE programs on ethics or professionalism, mentoring programs, law school programs and courses on professionalism, programs sponsored by national legal organizations, bar and bar/disciplinary counsel professionalism initiatives, and other efforts. The White Paper provides descriptions of these programs for potential replication.

## GENERAL INFORMATION FORM

Submitting Entities: Tort Trial & Insurance Practice Section; Commission on the American Jury Project

Submitted By Eugene G. Beckham, Chair

### 1. SUMMARY OF RESOLUTION

The Resolution endorses a White Paper prepared under the auspices of the American Civil Trial Bar Roundtable, of which the American Bar Association is a member, that recognizes concrete strategies to advance the professionalism of lawyers in order to the strengthen the American civil justice system and describes the extensive existing initiatives of courts, bars, legal organizations and law schools.

### 2. APPROVAL BY SUBMITTING ENTITY

February 9, 2014

### 3. HAS THIS OR A SIMILAR RESOLUTION BEEN SUBMITTED TO THE HOUSE OR BOARD PREVIOUSLY?

No

### 4. WHAT EXISTING ASSOCIATION POLICIES ARE RELEVANT TO THIS RESOLUTION AND HOW WOULD THEY BE AFFECTED BY ITS ADOPTION.

1988 Resolution 116A and 1991 Resolution 104. Neither would be affected in its current applications.

### 5. WHAT URGENCY EXISTS WHICH REQUIRES ACTION AT THIS MEETING OF THE HOUSE?

The need to combat the decline in professionalism and civility that has affected the profession advises in favor of immediate action. Moreover, this meeting of the House is the first opportunity since approval of the White Paper by the American Civil Trial Bar Roundtable and its constituent members for adoption by the House.

### 6. STATUS OF LEGISLATION (IF APPLICABLE)

N/A

### 7. BRIEF EXPLANATION OF PLANS FOR IMPLEMENTATION OF THE POLICY, IF ADOPTED BY THE HOUSE OF DELEGATES

The Tort Trial & Insurance Practice, with the Resolution co-sponsors, will promote the strategies outlined in the report.

**8. COST TO THE ASSOCIATION (BOTH DIRECT AND INDIRECT COSTS)**

No cost

**9. DISCLOSURE OF INTEREST (IF APPLICABLE)**

N/A

**10. REFERRALS**

This Resolution has been sent to other ABA entities requesting support or co-sponsorship:

Section of Litigation  
Standing Committee on Bar Activities and Services  
Standing Committee on Ethics and Professional Responsibility  
Standing Committee on Lawyers' Professional Liability  
Standing Committee on Professional Discipline  
Standing Committee on Professionalism

**11. CONTACT NAME AND ADDRESS INFORMATION (PRIOR TO THE MEETING)**

Dick A Semerdjian  
Schwartz Semerdjian Ballard & Cauley LLP  
101 W. Broadway, Ste 810  
San Diego, CA 92101  
Phone: 619/699-8326  
FAX: 619/236-8827  
das@ssbclaw.com

or

TIPS Delegate Robert Peck  
Center for Constitutional Litigation, PC  
777 6<sup>th</sup> Street, N.W.  
Suite 520  
Washington, DC 20001  
Phone: 202-944-2874  
Fax: 202-965-0920  
Email: robert.peck@cclfirm.com

**12. CONTACT NAME AND ADDRESS INFORMATION (WHO WILL PRESENT THE REPORT TO THE HOUSE)**

TIPS Delegate Robert Peck  
Center for Constitutional Litigation, PC

777 6<sup>th</sup> Street, N.W.  
Suite 520  
Washington, DC 20001  
Phone: 202-944-2874  
Fax: 202-965-0920  
Email: [robert.peck@cclfirm.com](mailto:robert.peck@cclfirm.com)

## EXECUTIVE SUMMARY

This resolution calls for the American Bar Association to endorse the 2014 White Paper produced by the American Civil Trial Bar Roundtable, which describes strategies and initiatives to enhance professionalism in order to support the rule of law, the civil justice system, and core values of the profession, including honesty, integrity, civility, and service. Through endorsement, the American Bar Association will aid in dissemination of descriptions of programs and other efforts designed to enhance professionalism within the legal profession at a time when many believe that laudable attribute is in decline. The co-sponsors are unaware of any minority views or opposition.

## MEMORANDUM

TO: Oregon State Bar Board of Governors  
cc: Oregon Supreme Court  
Oregon State Bar Bulletin

FROM: John A. Bogdanski, Douglas K. Newell Faculty Scholar and  
Professor of Law, Lewis and Clark Law School  
  
Gersham Goldstein, Of Counsel, Stoel Rives LLP

DATE: May 1, 2014

RE: Uniform Bar Examination

To introduce ourselves, Gersham Goldstein has been a member of the Oregon State Bar for more than 50 years. During that time he has both practiced and taught law. Jack Bogdanski has taught law school in Oregon for nearly 30 years, and has lectured in bar review courses for nearly 20 years. Prior to teaching, he practiced law in Portland.

Based on those experiences, and on much reflection about the nature and function of the bar examination, we oppose adoption of the Uniform Bar Examination in Oregon, for several reasons. These are our personal views, and not necessarily those of Lewis & Clark Law School or Stoel Rives LLP.

*1. Federal Income Tax belongs on the bar exam.* A basic familiarity with the federal income tax is part of an attorney's minimum competence. The income tax is involved in virtually every aspect of human endeavor; from birth to death, from marriage to divorce, from timber cutting to buying a car or truck, from receiving payments for personal injuries to receiving gifts or inheritances. There are tax issues inherent in contracts, leases, real estate transactions, and mortgages. Oregon lawyers should be aware of this at least well enough for them to spot the issues and get help if necessary.

Make no mistake: Removing Federal Income Tax from the exam will lead to fewer students taking the course in law school, and to more Oregon lawyers committing malpractice for failing to recognize tax issues.

Most other states do not test on this subject, but that does not validate the omission. Oregon has always been a leader in ensuring tax competence among its professionals. For example, its state licensing of commercial tax return preparers should be seen as a model for other states. Lawyers are exempt from such licensing – all the more reason for them to be required to demonstrate minimum competence about taxation.

2. *Commercial Paper and Payment Systems do not belong on the bar exam.* Oregon removed this portion of the UCC from the exam agenda many years ago, and for good reason. It is an esoteric area of practice that extremely few lawyers ever encounter.

3. *The Uniform Bar Exam will hurt Oregon law schools.* The “portability” of the exam is being touted as an advantage, but the most likely effect is that more Oregon law graduates will be unable to obtain employment in Oregon. Candidates from other states will be able to compete for jobs in Oregon, even without showing any true commitment to this state by taking the exam here. Yes, Oregon law graduates will be able to compete for jobs in other states, but the overwhelming evidence is that most of them want to remain here. Employment for new lawyers is a zero-sum game.

4. *The Uniform Bar Exam surrenders all judgment about the elements of lawyer competence to a private company in a distant state.* If the uniform exam is adopted here, the Oregon bar examiners and judiciary will have lost their last vestiges of control over what is tested, and how it is tested. Already there is too much delegation of exam-writing to faceless experts with little transparency and (at best) limited, indirect accountability. Answer keys are copyrighted, even for the essay questions, and grading has become secretive. Most importantly, the exam will drift too far from the influence of the Oregon Supreme Court.

5. *The Oregon bar exam already devotes too little attention to essay writing on substantive law, and the Uniform Bar Exam will perpetuate this flaw.* Currently the exam (not counting the multiple-choice professional responsibility portion) is one half multiple-choice, one quarter demonstrating “practical skills,” and a mere one quarter writing essays on substantive law. That is far too little writing on substantive law. The quality of writing in briefs to Oregon courts cannot be benefiting.

If any change is to be undertaken, Oregon should be requiring more writing on substantive law, not the same inadequate level that it currently employs. This is a race to the bottom that we should not aspire to win.

In sum, the purpose of the Oregon bar exam is not administrative convenience, nor is it to promote interstate mobility of practice. Its purpose is to protect the public. Removing tax law, fully privatizing topic selection and question-writing, perpetuating inadequate essay testing of substantive law – all are counter to this purpose. For that reason, we strongly urge the board and the Court not to adopt the Uniform Bar Exam, at least not in its current format.

We would be happy to discuss this matter with any interested party. Jack Bogdanski can be reached at 503-768-6653 or at [bojack@lclark.edu](mailto:bojack@lclark.edu). Gersham Goldstein can be reached at 503-294-520 or [ggoldstein@stoel.com](mailto:ggoldstein@stoel.com).

Thank you for the opportunity to express our views on this important topic.



June 10, 2014

Tom Kranovich, OSB President  
Travis Prestwich, Chair, OSB Public Affairs Committee  
Oregon State Bar  
P.O. Box 231935  
Tigard, OR 97281-1935

Dear President Kranovich and Chair Prestwich:

I am writing to request the Oregon State Bar's support for funding of Oregon's public defense system. While Oregon's public defense system continues to be celebrated as a national model for the delivery of public defense services and many improvements have been made over the last several decades,<sup>1</sup> challenges remain at both trial and appellate levels.

As demonstrated in the Oregon State Bar's 2012 economic survey<sup>2</sup>, public defense lawyers make substantially less than other Oregon lawyers. Lawyers handling criminal and juvenile appellate cases at the Office of Public Defense Services (OPDS) continue to handle caseloads that are above national standards, but receive salaries that are up to 18 percent below their counterparts at the Department of Justice, and almost all OPDS employees receive compensation below what is offered for similar work in other state agencies. It would take approximately \$1.6 million dollars to correct this problem in the coming biennium. At the trial level, it will require approximately \$21 million to bring providers to within five percent of prosecutor salaries, while also reducing caseloads to meet Oregon and national standards.

While lawyers have been doing this work out of a sense of deep commitment for many years, providers in many jurisdictions indicate that the next generation is not prepared to assume this work. Most students leave law school with student loan debt in excess of \$100,000.<sup>3</sup> As experienced lawyers phase into the next chapter of their lives, it is critical that public defense providers have the ability to offer competitive wages and reasonable

---

<sup>1</sup> Oregon meets many of the American Bar Association's Ten Principles of a Public Defense Delivery System. See "ABA Ten Principles of a Public Defense Delivery System," (2002), at: [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.athcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.athcheckdam.pdf). Additionally, OPDS ensures that funds are available to secure expert witnesses when reasonable and necessary to the defense, works closely with the Oregon State Bar to efficiently and effectively address complaints regarding public defense providers, and collaborates with other organizations to offer both defense-oriented and multi-disciplinary trainings.

<sup>2</sup> See Page 16 of the OSB 2012 Economic Survey: [https://www.osbar.org/\\_docs/resources/Econsurveys/12EconomicSurvey.pdf](https://www.osbar.org/_docs/resources/Econsurveys/12EconomicSurvey.pdf)

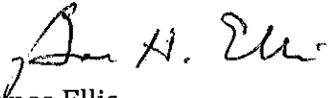
<sup>3</sup> See U.S. News and World Report: <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/grad-debt-rankings/page+5>

caseloads in order to attract and retain new talent. Reaching some degree of parity for public defense lawyers is now critical.

Over the last several decades, the Oregon State Bar has been a consistent champion for public defense funding. Public defense providers across the state would sincerely appreciate the Oregon State Bar's continued support for the improve funding for public defense services.

Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "Barnes Ellis". The signature is fluid and cursive, with the first name "Barnes" being more prominent than the last name "Ellis".

Barnes Ellis

Public Defense Services Commission

Cc: Sylvia Stevens, Executive Director, Oregon State Bar  
Susan Grabe, Director of Public Affairs, Oregon State Bar

**From:** Edwin Peterson [<mailto:epeterso@willamette.edu>]  
**Sent:** Wednesday, May 07, 2014 9:30 PM  
**To:** Paul Nickell  
**Subject:** Nickell: Bulletin May 2014

Paul, I don't really care if this is published as a letter to the editor. I want to share my thoughts regarding the May 2014 Bulletin.

The May 2014 issue of the Bulletin may well be the best ever! Melody Finnemore's *A Golden Century* article on the 100-year-old Oregon Supreme Court building was superb. It was fun to read and appropriately recounted the joy and awe of working in this venerable building.

Add to that the well-written *Grace Under Pressure* by Jeff Howes (a prosecutor) and John Connors (a criminal defense lawyer) concerning the need for professionalism in criminal trials. Bar president Tom Kranovich's President's Message on *Building Bridges, Making Friends* with opposing counsel and you have three home runs.

The other articles were well-written and interesting, as well. The only downer was the necessary Discipline reports recounting the sad experiences of five experienced lawyers--average years in the Oregon bar, 19.4--who violated the Rules of Professional Conduct.

Thank you for enriching my day.

Edwin J Peterson  
Distinguished Jurist in Residence  
Willamette University College of Law  
245 Winter St SE  
Salem, Or 97301  
503 375 5399 (O)  
503 378 1472 (H)  
503 508 1151 (Cell)  
[epeterso@willamette.edu](mailto:epeterso@willamette.edu)

# Oregon State Bar

## Board Retreat – November 22, 2013

### Overview

---

Board and staff members of the Oregon State Bar met at the Brasada Ranch in Powell Butte, Oregon to discuss and address critical issues facing the organization.

The retreat focused on several key issues that would be important to translate into more specific plans for implementation. In particular, the group focused in on several key questions:

- Understanding the best practices for boards of governors, and how the Bar can incorporate some of those practices more completely.
- Identifying critical questions that need to be addressed, and taking on a couple of those issues immediately.
- Identifying next steps for follow-through.

Some of the key conclusions that emerged in the discussion include:

- Strategic planning is an important investment that should be considered in the coming year.
- Reaching out and engaging our constituents to understand what they need and expect from the Bar is important.

All staff participated in the retreat: *board and staff members names who were present*

Marc Smiley of Solid Ground Consulting facilitated the retreat.

### Reviewing the List of Critical Issues

---

*The group discussed the critical issues facing the Bar, and the important questions that should be addressed by the Board of Governors. Starting from a preliminary list developed in advance of the retreat, the group expanded and prioritized the list.*

#### **Missing from the List**

- Access to Justice
  - ◆ How to support adequate funding for courts and legal aid.
  - ◆ Diversity/inclusion – beyond just “valuing,” to including promoting diversity/inclusion.
  - ◆ Important to recognize the under-represented nature of women in the legal profession.
- Identify and value key partnerships.
- The House of Delegates role, structure, and function needs to be clarified related to the Board of Governors.
- Under lawyer recognition, more information is needed. It’s worth highlighting the current structure for lawyer regulation
- Trends – globalization issues – international lawyers practicing law in OR.

## Priorities

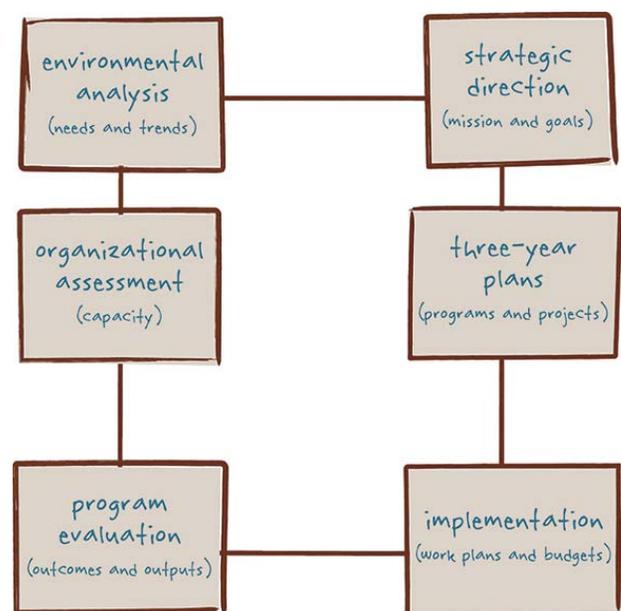
- Financial health of the organization, and the appropriate level of member fees.
- House of Delegates (HOD) – better understand its priorities and ensure it understand the issues of the BoG.
- Understand the needs and expectations of our constituents – gather information from surveys, other sources.
- The structure of BoG – circular information flows, and avoiding fiefdoms.
- Connecting finances, new lawyers trends, and other future trends – all related in understanding how many lawyers we can expect to be paying dues and accessing our services.
- Connections with law schools continue to be a priority.
- Access to Justice – need to continue to reflect the perspectives and needs of the public. This includes ensuring that this program has adequate funding.
- Lawyer regulation – engagement of membership and our long-term financial health both tie in to understanding our role in this area.
- New members/future trends are inseparable. We can expect a reduced number of lawyers in the coming decade, and the retirement of many current lawyers.

## Best Practices of Governance

Marc Smiley presented information about best practices and overall effectiveness of boards. A discussion highlighted the issues that we most critical to the OR State Bar.

**Strategic planning** – need to get the benefits that would accrue with a good investment in strategic planning.

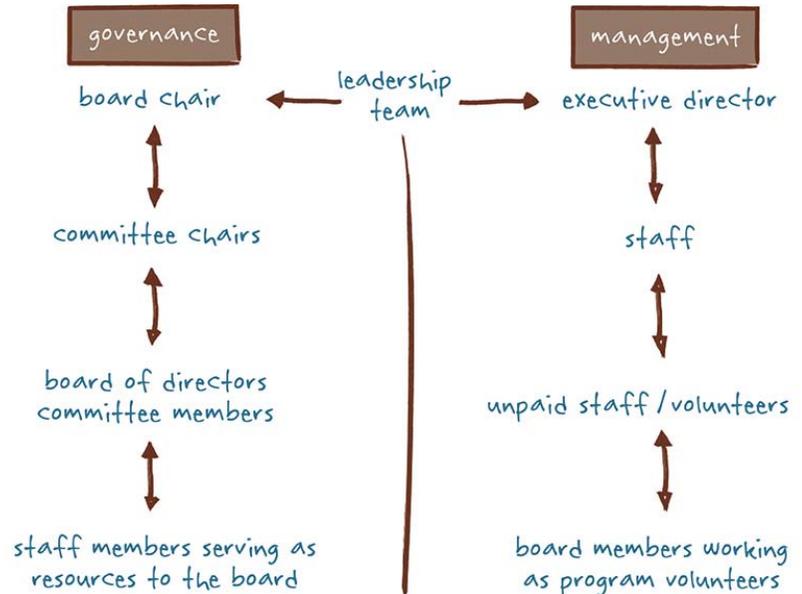
- We are fundamentally a risk averse group – doing long-term planning will provide a better balance to a general reluctance.
- There can be a lack of continuity with regular rotation of leadership. A plan could help with greater continuity.
- The current plan is old – it needs to be refreshed.
- We want to have a process that has strong buy-in by all of the leaders of the BoG, as well as other stakeholders.
- We must start with a clear understanding of the mandates and constraints of our work. Strategic choices emanate from those



fundamentals.

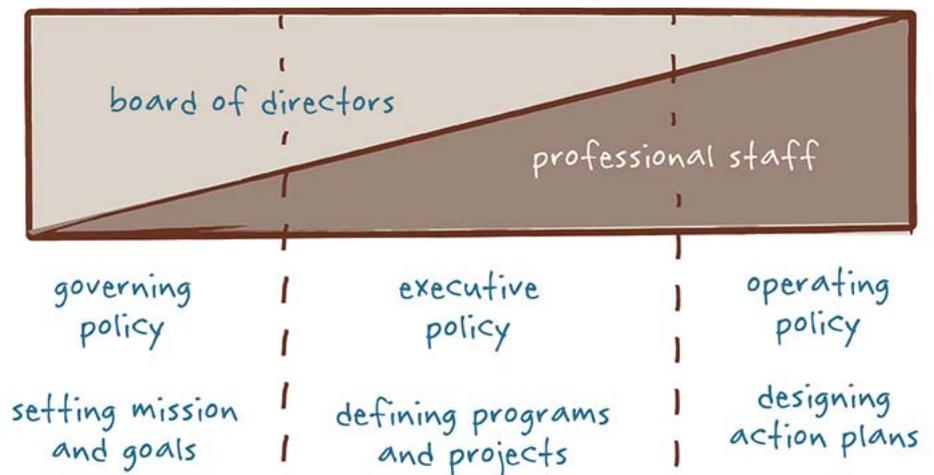
**Lines of Authority** – the clarification of the BoG’s role in governance and the staff’s leadership role in management/programs.

While the staff is at times on the governance side (mostly providing support to the board members/committees) and the board is at times on the management side (mostly providing support as unpaid staff/volunteers), the distinction of the two separate roles is critical.



- Authority must come with responsibility. Combining the two creates true accountability. Separating them creates scapegoats.
- Board members can be on either side of the diagram, but need to behave with different orientations and roles within that particular function.
- Making sure the chair and the executive director are clear on this diagram, and that they manage their respective teams accordingly, is essential.

**Board Meeting Effectiveness** – while most of the meetings of the BoG are important business-focused detailed discussions, this efficient process is always a challenge when deeper discussion is needed. Finding a way to balance the detailed work (fiduciary) with the long-term work (strategic and generative) is important. Retreats are ideal for this longer discussion, but it’s also possible to incorporate these conversations into existing meetings. And of course, it’s always possible and desirable to make the most of the meetings we have.



- Spending half of the meeting on a given topic, and the rest of the meeting on the remaining items provides room for deeper discussion.
- Clarifying the differences between action, input, and information items on the board agenda can be very helpful in clarifying the intent (and role) of a given discussion.

- An annual retreat is always a key investment for an organization, allowing for deep discussion about strategy, vision, and growing the capabilities of the board (training).

## **Key Take-Aways**

---

*Based on the retreat discussion, the group identified key actions they feel might be appropriate for the organization going forward.*

### **Strategic Planning**

1. Information gathering will be critical. Getting data on program evaluation, surveys, choices people have – all of that will be helpful. Understanding key trends and their impact is especially important.
2. Separate polling of the House of Delegates (HoD) might be warranted. Their input and alignment will be important to the plan's long-term success. We're especially interested in understanding any impediments they might see in our plans.
3. Need to clarify the degree of service we want. A high-service bar might be warranted, but we need to know what members want/think.
4. Taking a hard look at the status quo to decide "what if . . .?" will help with our planning efforts. Need to distinguish what is mandatory vs. discretionary.
5. A program review and other education about what we're doing, what we're doing well, and what gaps might exist should be part of the process.

### **Engagement**

1. Using the planning process to increase engagement is critical.
2. Limited involvement of the BoG in the engagement work is okay.
3. May want to find a way for nay-sayers to have input.
4. Overall, we need to listen honestly and completely to feedback.
5. Reinforce section participation in the process and discussion.

### **Other**

1. Make people aware of what we offer, including volunteer opportunities.
2. Explore technology options for participation, starting with CLE.
3. Consider more localized service in our program exploration.

NOVEMBER 22, 2013

# Changing Models for Effective Boards

TRAINING FOR  
OREGON STATE BAR



516 SE Morrison, #400, Portland, Oregon 97214  
503-249-0000 | [www.solidgroundconsulting.com](http://www.solidgroundconsulting.com)



# Models of Nonprofit Boards

Honorary

Fundraising

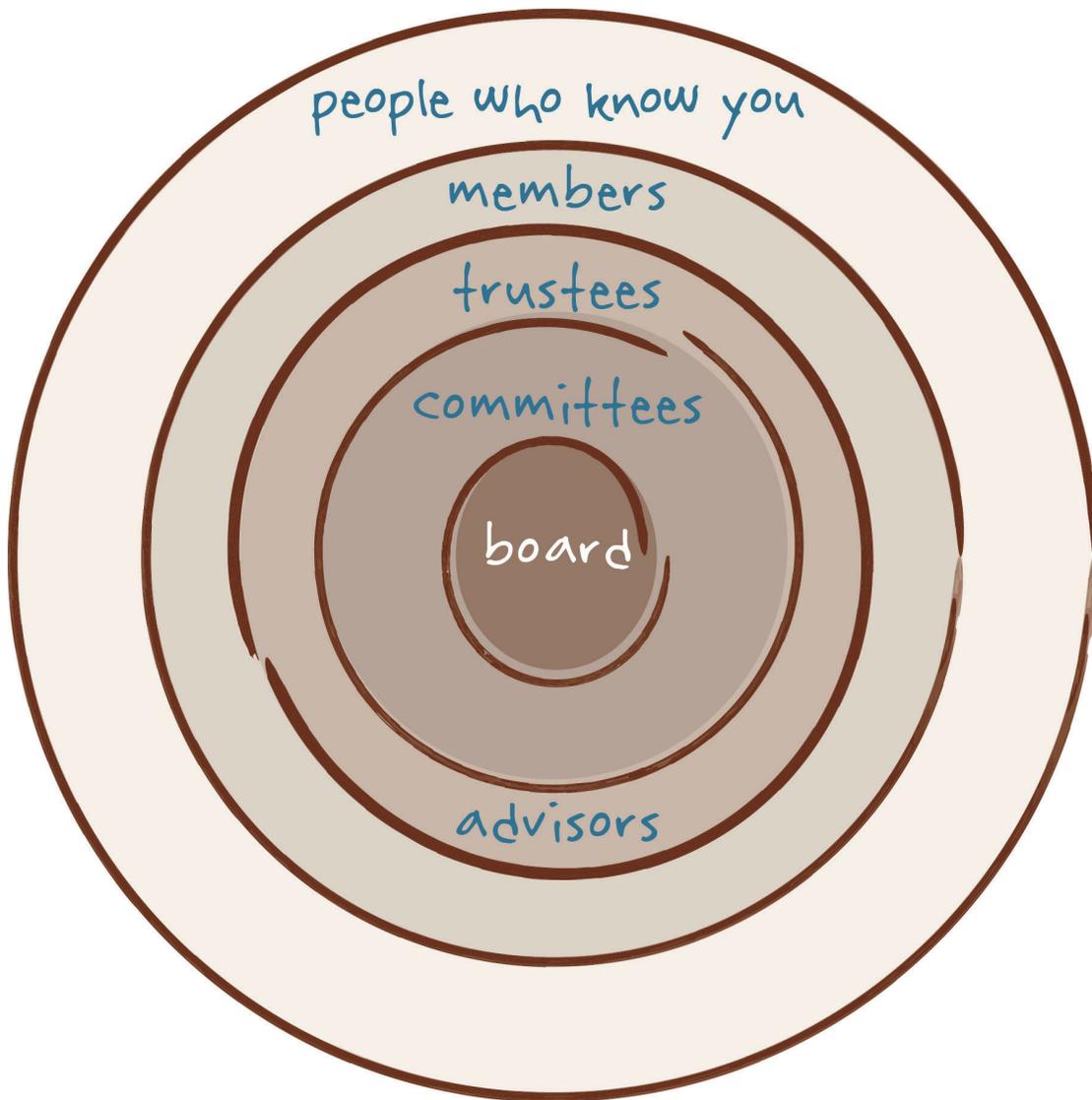
Policy Oversight

Policy Leadership

Program Management

Program Implementation

# Building a Leadership Structure



## Overview of Board Duties

1. The board engages in strategic planning.
2. The board determines the organization's mission and purpose.
3. The board approves and monitors the organization's programs and services.
4. The board ensures effective financial management.
5. The board ensures sound risk management policies.
6. The board selects and orients new board members.
7. The board organizes itself so that it operates efficiently.
8. The board selects and supports the executive director and reviews his/her performance.
9. The board understands the relationship between board and staff.
10. The board raises money.
11. The board enhances the organization's public image.

## The Prudent Directors' Check List

1. Make sure your organization's mission is clear, and that the mission is followed.
2. Attend all, or nearly all, meetings of the board or committees of which you are a member.
3. Review by-laws annually to determine that they conform to law and that they incorporate all amendments which have been made through prior resolutions.
4. Make sure by-laws are followed and enforced; use consents to corporate action in lieu of meetings; all directors must sign.
5. Maintain a current membership list for your board and nonprofit organization members.
6. Request that the organization distribute important written materials in advance of board meetings at which action is to be taken.
7. Insist on advance notice to all directors of any major item of business to be acted upon at the next meeting.
8. Read, analyze, and understand financial statements, budget proposals, and other reports; raise at least one question with respect to each financial document at any meeting called for the purpose of reviewing financial documents; expect solid, business-like answers from your organization.
9. Question all reports demonstrating inconsistencies, material errors, or other evidence of sloppy work.
10. Seek expert counsel—legal, accounting, and otherwise—to supplement board member understanding and experience when dealing with complex issues.
11. Thoroughly review all minutes prepared by the secretary to insure that critical matters, including resolutions and discussions of complicated and controversial topics, have been covered.
12. Adopt a written conflict of interest policy that conforms with state law.
13. Question staff to determine that the IRS is kept advised of all material and substantial changes in the organization.
14. Have the most current articles and bylaws of the organization reviewed by competent counsel to ensure that they take full advantage of state law concerning indemnification and protection of board members.

# Governance vs. Management

The job of the board of directors for a nonprofit organization is simple: **it is responsible for everything**. This includes both governance and management of the organization. Even if it delegates certain responsibilities to the staff or other professionals, it is responsible for ensuring that the resources of the organization are being effectively applied to meet its mission.

Many nonprofits have the luxury to hire staff to help fulfill parts of these responsibilities. Depending on the size of the staff, the board will delegate key functions that are best suited to the full-time attention provided by professionals. It will retain the functions that are reserved for its fundamental fiduciary responsibility, and for which it is best suited. These functions can be divided between the **governing functions** reserved for the board, and the **management functions** often delegated to staff.

The **governing functions** are those that provide the essential direction, resources and structure needed to meet specific needs in the community. These include:

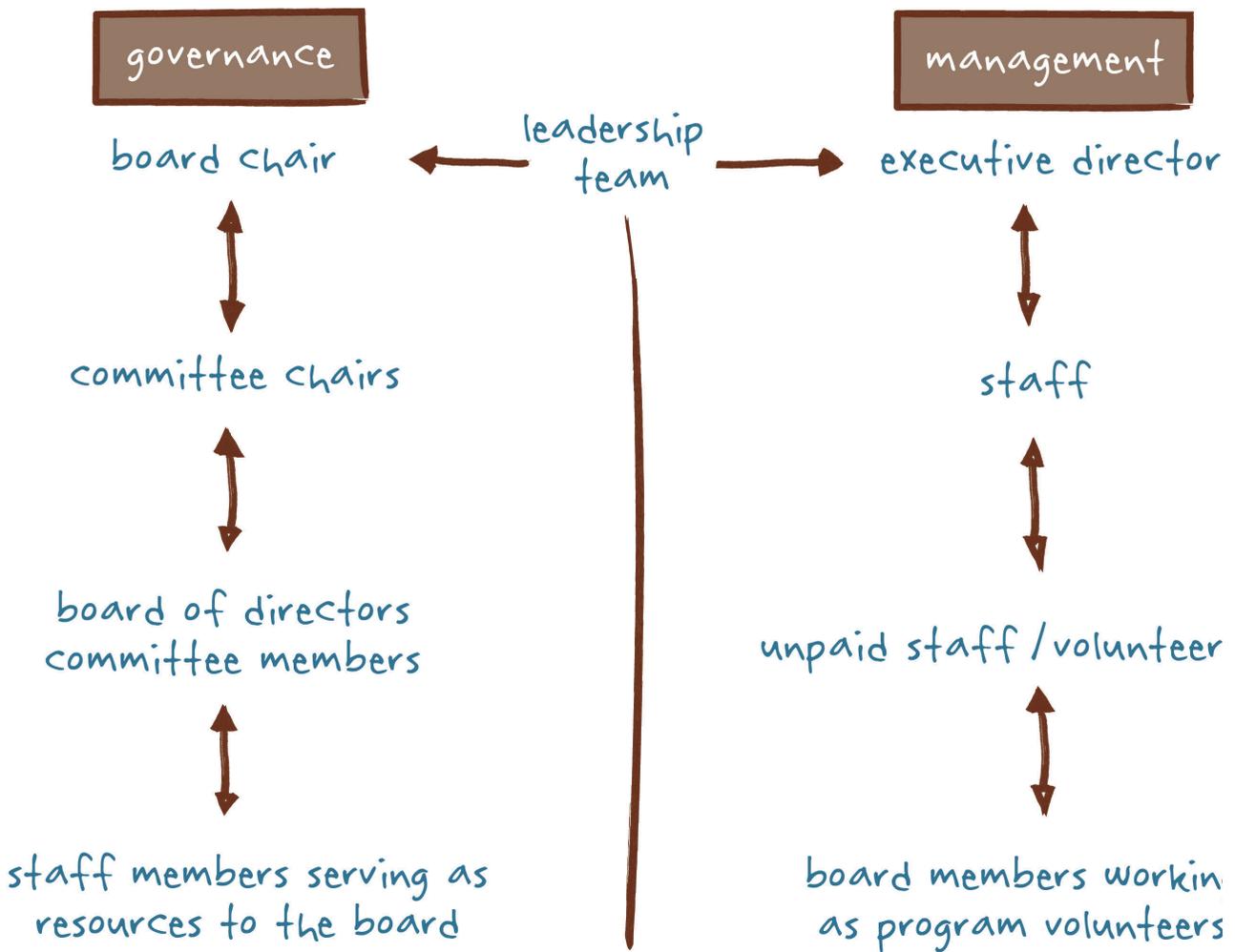
- **Strategic Direction** – setting a direction for the organization that reflects community needs.
- **Financial Accountability** – managing financial resources that ensure honesty and cost-effectiveness.
- **Leadership Development** – developing the human resources that lead the organization today and in the future.
- **Resource Development** – developing financial resources that support program activities.

The **management functions** are those that provide the program activities and support to accomplish the goals of the organization. These usually include:

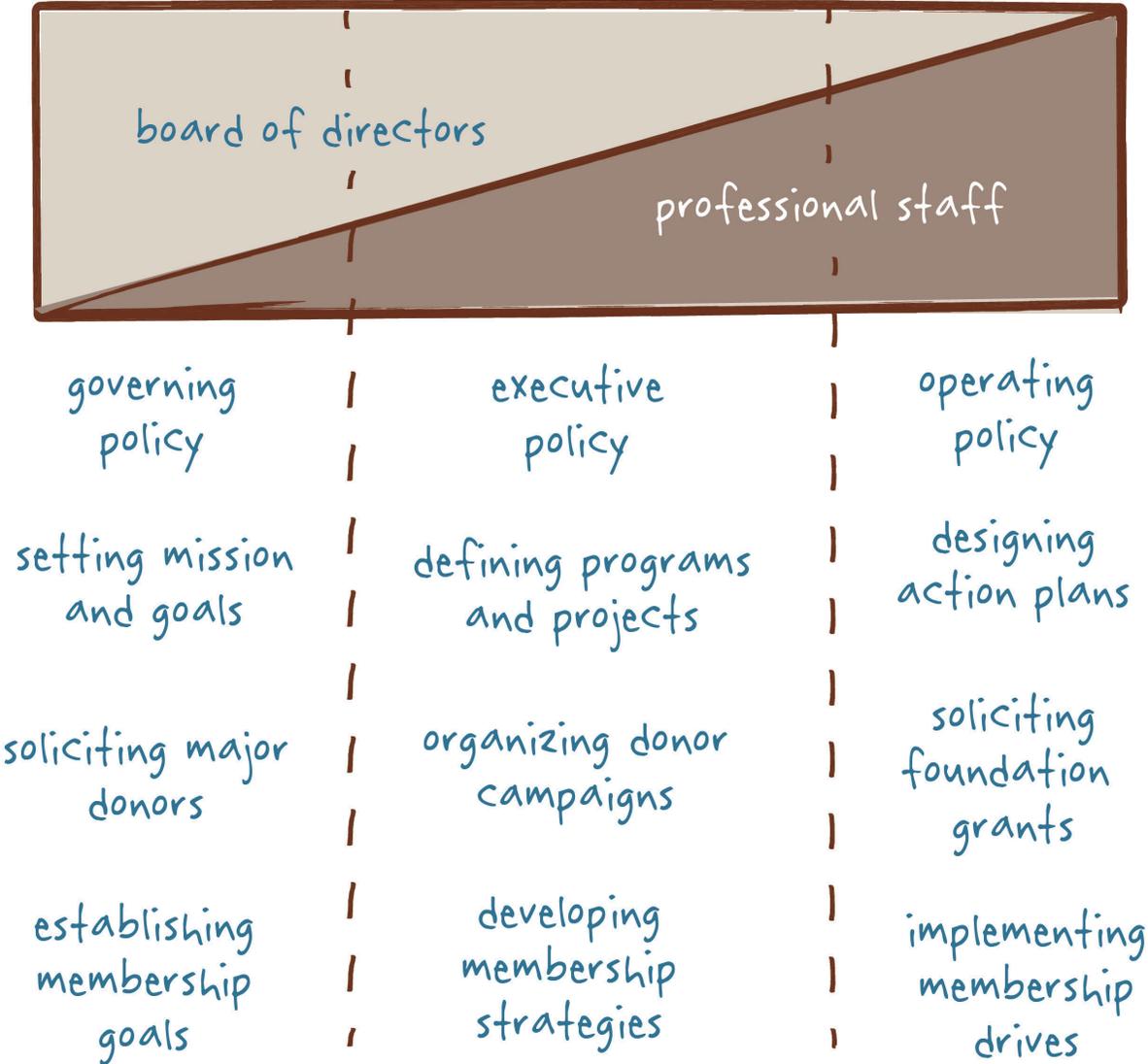
- **Program Planning and Implementation** – taking the strategic direction to the next level of detail and putting it into action.
- **Administration** – ensuring the effective management of the details behind programs.

For smaller organizations (with less than four paid staff), the board usually delegates only some of the management functions to staff. For larger organizations (with more than four staff members), the board usually delegates nearly all of the management functions. The board should never delegate the governing functions to staff as these represent its core responsibilities to its constituencies and to the general public.

# Lines of Authority



# Levels of Influence



## Board Fundraising Functions

Fundraising is one of the fundamental responsibilities of the board of directors. In many cases, however, the board will delegate certain functions to staff because of the specific skills and more in-depth knowledge they possess. This does not remove the responsibility from the board, but merely shifts it from a role of implementing key programs to overseeing their implementation.

Regardless of the level of delegation given to staff, the board will always have a key role in the fundraising process. This role draws on the board member's unique position as a community volunteer and leader. Below is a list of activities that board members can do as part of their ongoing fundraising responsibilities:

1. Make a cash donation to the organization that for them represents a "significant contribution." A "significant contribution" could be defined as the largest single donation to a nonprofit group for the year (with the exception of religious contributions). If a board member belongs to more than one nonprofit, the donation should at least be equal to other gifts given to other groups.
2. Commit to and participate in effective planning efforts that develop both strategic plans and specific fundraising plans. Develop the organizational structure to support planning efforts, including the development of an effective Fundraising Committee.
3. Personally make requests to funding sources (individuals, foundations and corporations), usually as part of a team supported by staff or another board member. Not every board member is suited for this task, but at least some of the board should have experience asking for money and be prepared to do so for the organization.
4. Provide support and advice to staff involved in fundraising to help them complete their duties. Remember that in this role, the board member is simply an advisor and volunteer and has no supervisory responsibilities.
5. Participate in or observe programs to develop a thorough understanding of the specific program objectives and benefits to the community.
6. Contribute names and/or lists for direct mail acquisition mailings. Sign letters on personal letterhead for solicitations to personal contacts.
7. Participate in special events and other "friendraising" activities that expand the number of prospects who can be solicited for donations.
8. Diligently oversee the organization's budget to assure that the needs of the organization are being met. Don't let the financial needs of the organization get lost in the other details of governance.

# The Basics of Board Development

Development of the board of directors is the most fundamental activity needed to build and maintain a strong nucleus for a nonprofit organization. It is a responsibility that boards should put near the top of the list of priorities.

The steps in the development of the board are:

- **Nomination and Recruitment** — the process of identifying the right individual to meet the needs of the organization and convincing her to become part of the organization.
- **Orientation** — the steps taken to give new board members information on the background, programs, and culture of the organization.
- **Training** — the regular efforts to build new skills and abilities among existing board members.
- **Evaluation** — the annual task of evaluating individual board member's contributions to the board, and evaluating the board's contribution to the individual board members.
- **Recognition** — the on-going process of recognizing work well-done and thanking board members for their commitment and the contributions they make to the organization.

Each of these elements of board development are critical to the organization's success. For this reason, most boards will develop a specific committee responsible for these board development tasks. Often the committee is called the Nominations Committee or Board Development Committee.

These issues and procedures are applicable not only to the development of board members, but also to the development of non-board committee members and other key volunteers.

# Roles in Board Development

## **Board Development Committee Responsibilities**

- Develop board member criteria
- Recruit potential board members
- Present potential members to the board
- Provide orientation of potential and new board members
- Provide training and continuing education for all members
- Provide regular recognition to board members

## **Board of Directors Responsibilities**

- Approve board member criteria
- Elect members
- Terminate members
- Charter Board Development Committee
- Ensure nomination and election of officers
- Ensure nomination and election of board members
- Ensure evaluation of board effectiveness and individual member effectiveness
- Rotate board jobs

## Board Recruitment Process

- 1. Develop criteria for Board Profile Grid.**

Use the profile grid to identify the skills, background, and demographics to be represented on the board. Establish the priorities and the initial profiles to be recruited.
- 2. Identify recruiting prospects.**

Identify the people and organizations to contact as part of the recruiting process. Get the names and numbers of people to be contacted as prospects for the board. As part of this process, try to understand what each person could bring to the board.
- 3. Narrow the list of potential board members to top prospects.**

Go through the list of possible board members and narrow the list to the strongest core group (six to nine individuals). Prioritize the list of remaining applicants based on the diversity needs of the board. Make plans for immediate follow-up with the core group prospects.
- 4. Assign contact person to each prospect.**

Assign an individual to contact each of the board prospects. Give each contact person the appropriate recruiting materials, including orientation packet, application, and job description. If the prospect is interested, give her or him the materials and discuss the next steps.
- 5. Contact top prospects.**

Set up interviews with top prospects. Interview should include a board member and the Executive Director. Focus discussion on expectations of board members and the identification of other possible prospects. Try to get final commitment from prospect at this meeting. Ask the person to complete the application, either in the meeting itself or by sending it into the office. Discuss opportunities for involvement on committees in lieu of board membership.
- 6. Conduct orientation.**

Conduct a board member orientation for all new board members. Assign mentors to assist new members, and make committee assignments to all board members. Ask each board member to complete the board member agreement and send to office.

# Board Profile Grid

	José	Cynthia	Sam	Walter	Lydia	Dawn	Steven	Lamar
<b>Skills and Knowledge</b>								
Accounting/Financial Mgt.	✓					✓		
Personnel Management			✓	✓				
Fundraising								
Strategic Planning		✓		✓				✓
Nonprofit Management		✓		✓				
Leadership			✓					
Public Relations/Publications		✓	✓					
Meeting Skills			✓	✓				
Legal Issues	✓							✓
Education					✓			
Biology/Site Ecology					✓			
Grassroots Organizing		✓						
Real Estate	✓							✓
<b>Contacts and Influence</b>								
Business Community	✓				✓			
Media			✓					
Government Agencies								
Ethnic/Minority Groups	✓					✓		✓
Conservation Organizations		✓			✓			
Native American Tribes						✓		
<b>Demographics</b>								
Female		✓			✓	✓		
Under 45 years	✓	✓	✓		✓	✓	✓	✓
Ethnic/Cultural Minority			✓			✓		✓
Rural Oregon		✓			✓		✓	
Low income	✓			✓	✓			



# Board Orientation/Training Program

## I. Recruitment Stage

1. Introduce the prospect to the agency and its goals at an initial meeting with a recruiting board member and the executive director. Have the recruiting board member pitch the organization and the positive aspects of board membership. At that time, give the prospect an information packet that includes at least the following information:
  - An overview of the organization's purposes, major programs, funding sources, etc.
  - A list of expectations of prospective members—meetings, committee assignments, tenure, and time commitment.
  - A list of current board members and key volunteers.
  - Copy of bylaws and last annual audit of agency.
2. Schedule a visit to the agency by the prospective member to see programs in action or to talk with program staff.
3. Invite the prospect to attend a board meeting to get an idea of how the organization makes decisions and delegates responsibilities.

## II. New Member Orientation

1. Schedule a meeting between the new board member and key people in the organization. Provide a detailed Board Member Manual, which should include bylaws, articles of incorporation, program descriptions, current budget, last audited financial statements, list of board members and their addresses, lists of committee and staff assignments, copies of minutes for the previous year, and a copy of the strategic or long-range plan.
2. At first meeting, introduce new member to all current board members and staff. Consider assigning a "mentor" board member to work with the new board member through the first three months. Also, make committee assignment.

## Orientation/Training Program (continued)

### III. During First Three Months

1. Have regular check-ins with board "mentor" to answer questions and help member become acquainted.
2. Assign a specific committee task as part of regular implementation process.
3. Continue orientation to the work of the specific committee.
4. Continue to provide written background material to answer questions.

### IV. Ongoing Training

1. Consult with appropriate committee chair and staff to obtain full involvement of new member.
2. Provide assistance in carrying out responsibilities.
3. Provide opportunities for board members to attend special workshops related to the assignments and interest of the member. Provide special leadership training to current and prospective officers.
4. Expand responsibilities and rotate committee assignments to help satisfy the interests and needs of the board member. This has the added advantage of providing continuous development of volunteer leaders for the organization.

## Board Manual - Sample Contents

1. **Organization Mission Statement**
2. **List of Board Members** — Names, addresses, short biographies
3. **Board Member Job Description**
4. **By-laws**
5. **Organizational Chart**
6. **Committee List** with assignments of all board and staff members
7. **Strategic Plan**, including Goals, Objectives, and Committee Work Plans
8. **Operating Policies** of the Board
9. **Confidentiality Statement**
10. **Short History** of the Organization
11. **Minutes** for the last year
12. **Staff Job Descriptions**, presented in brief outline form
13. **List of Programs**, with descriptive data
14. **Budget**
15. **Audited Financial Statements** for the previous year.
16. **Sources of Funding**
17. **Friends of the Organization**, including Advisory Council, ex-officio members, key volunteers.
18. **Glossary of Terms**

# Job Description: Board Member

## Responsibilities:

The board as a whole has the responsibility for governing the entire organization. The board is responsible for determining agency policy in the following areas: Human Resources, Planning, Finance, Development, Community Relations, and Operations.

### Leadership/Human Resources

1. Board membership, which includes recruiting and orienting new board members, training, evaluating and recognizing existing board members and providing board members with opportunities to grow and develop as leaders.
2. Selecting and supporting the Executive Director, including reviewing performance regularly and providing on-going assistance as requested by the Executive Director.
3. Personnel policies, which include setting policy regarding salaries, benefits and grievance procedures.
4. Volunteer involvement, which includes setting policy regarding how the organization treats, recognizes and celebrates its volunteers.

### Strategic Planning

1. Set and review the organization's mission and goals on an annual basis.
2. Plan for the organization's future, on a long-term and short-term basis.

3. Decide and plan which projects and programs the organization will provide.
4. Evaluate the organization's programs and operations on a regular basis.

### Financial Management

1. Ensure financial accountability of the organization.
2. Oversee an ongoing process of budget development, approval and review.
3. Manage and maintain properties and investments the organization possesses.

### Resource Development

1. Ensure adequate resources to achieve the organization's mission and implement the organization's programs and projects.
2. Participate in fundraising activities based on the individual's skills and background.

## Job Description: Board Member (continued)

### Community Relations

1. Ensure that the organization's programs and services appropriately address community/constituents needs.
2. Promote the organization to the general public, including serving as an emissary of the organization to the community.
3. Promote cooperative action with other organizations, including activities and occasions when the organization should take part in coalitions, joint fundraising, etc.

### Operations

1. Ensure that the organization's administrative systems are adequate and appropriate.
2. Ensure that the board's operations are adequate and appropriate.
3. Ensure that the organizational and legal structure are adequate and appropriate.
4. Ensure that the organization and its board members meet all applicable legal requirements.

### *Requirements for Board Service:*

- A demonstrated interest in the organization's mission and goals.
- Specific experience and/or knowledge in at least one area: Human Resources, Planning, Finance, Development, Community Relations, or Operations.
- Representative of a key aspect or segment of the population of the community.
- A willingness to expand knowledge or board responsibilities through orientation and ongoing training.
- A willingness to represent the organization to the community.
- Six to ten hours per month, distributed approximately as follows:
  - 3-4 hours*— Board meetings (preparation and attendance)
  - 2-3 hours*— Committee meetings (preparation and attendance)
  - 1-3 hours*— Special requests
- A willingness to participate in board fundraising activities and make a financial contribution to the organization to the best of one's ability.

# Board Member Agreement

As a board member, I have certain expectations about my involvement with this board. These expectations include both what I want to give and what I want to get back in return.

## **What I expect from the Board**

I want to serve on this board because:

The things I expect to enjoy the most about being on this board are:

The things I expect to enjoy the least are:

There are certain personal or professional goals that my involvement in this group can help satisfy. The areas where I want to grow are:

I expect the following from this organization:

- Clearly defined roles and responsibilities for board and staff members, including clear lines of authority.
- Orientation and training necessary to enhance my effectiveness as a board member.
- Materials provided in advance of meetings where decisions or deliberation will occur.
- Timely and accurate financial reporting.
- Appropriate use of committees to assure efficient use of board and staff time.

I also recognize that this board has certain expectations of its members. It is as important for the board to get what it needs from me as it is for me to get what I need from the board.

## Board Member Agreement (continued)

### What the Board expects from me

As a board member, I believe that I bring the following strengths, skills, and knowledge:

I will serve in the following areas as defined by my personal work plan:

Fundraising

Relationship Building

Other

I accept responsibility for ALL of the following:

### Time Commitment:

- Attend board orientation and training sessions.
- Attend board meetings, committee meetings and membership meetings.
- Complete assignments and prepare for meetings.

### Participation:

- Participate in board fundraising activities and make a financial contribution to the organization to the best of my ability.
- Participate in meetings and ask appropriate questions when needed.
- Serve on at least one committee as a part of my board role.
- Participate in the ongoing tasks of the board.
- Act as an advocate for the organization to the outside public.

### Knowledge and Preparation:

- Educate myself on the organization's purpose, history, and needs.
- Keep current on the outside trends affecting this organization.
- Keep current on the role and responsibility of board involvement.

I have read and agree to this commitment as a member of the board of directors.

**Signature:**

**Date:**

## Board Member Evaluation

*This is an evaluation based on a version of the board member agreement shown earlier in this packet.*

Below are a list of specific things from your board agreement that you wanted to get out of your involvement with this organization.

How well did this organization give you what you wanted?

What could be done to improve your satisfaction with this board?

What could the board do to improve relationships among board members?

Below are a list of specific things from your board agreement that you wanted to give to this organization as a board member.

Were you able to give what you wanted to give?

What could be done to improve your contribution?

## Board Member Evaluation (continued)

What could this organization do to help you with your contribution to the Board? Below is a list of specific responsibilities from the board agreement. How would you rate your involvement in each area below (1 = Excellent, 2 = Satisfactory, 3 = Needs Work, 4 = Poor)?

### Time Commitment

- \_\_\_\_\_ Attend board orientation and training sessions
- \_\_\_\_\_ Attend board meetings, committee meetings, and annual planning retreat
- \_\_\_\_\_ Complete assignments and prepare for meetings

### Participation

- \_\_\_\_\_ Financially support this organization to the best of my ability
- \_\_\_\_\_ Participate in meetings and ask appropriate questions when needed
- \_\_\_\_\_ Serve on at least one committee of the board
- \_\_\_\_\_ Provide assistance to staff at their request
- \_\_\_\_\_ Act as an advocate for the organization to the outside public

### Knowledge and Participation

- \_\_\_\_\_ Educate myself on the purpose, history, and needs of this organization
- \_\_\_\_\_ Keep current on outside trends and issues affecting this organization
- \_\_\_\_\_ Keep current on the role and responsibility of board involvement

What would you suggest to improve your involvement in the areas above?

Is this evaluation a helpful tool to improve your participation in the board? How could it be improved?

Does this board ask too much from its members?

Is there anything else you would like to say about board member's involvement and participation?

# Recognition Activities

## **Informal Recognition Activities**

Comments

Phone Calls

Notes

## **Formal Recognition Activities**

Recognition Events

Special Honors

Publicity

Fun

# 'Brain surgeon' lawyering in crises isn't enough

[abajournal.com/legalrebels/article/brain\\_surgeon\\_lawyering\\_in\\_crises\\_isnt\\_enough](http://abajournal.com/legalrebels/article/brain_surgeon_lawyering_in_crises_isnt_enough)

One of us (Paul) had the opportunity last week to speak to [Richard Suskind's](#) conference in Scotland on the future of law, enjoying one of the great expressions from Richard: "Most clients would rather have a guardrail at the top of the hill rather than an ambulance at the bottom." While that's undoubtedly true of clients, the professional culture in law (and other fields) tends to value the "brain surgeon" work responding to crises more than the civil engineer (or worse, "commodity") work that simply prevents calamity.

The other of us (Jeremy) has had a series of conversations over the years with many leading attorneys who represented top management in large organizations. A common lament has historically been: "The hardest part of my job ... is getting clients to include us in the early stages of a project so we could plan to keep things moving forward, rather than hearing from management only after bad decisions had been made." Given law schools' traditional classroom orientation to "causes of action" rather than problem prevention, it's understandable that many lawyers found themselves waiting by the ambulance rather than at the top of the hill.

Dean Jeremy Paul

Part of the problem may be language. The very word "compliance" suggests predictable conformity, not the spark of imagination that we all like to think of ourselves as possessing.

To give compliance the central role it deserves, we need to consider the nature of modern organizations and the complex ways they interact with law. Another of the UK world's leading legal lights is [Philip Wood](#), QC, Allen Overy's special global counsel, head of its legal intelligence unit, and banking law professor at Oxford and Cambridge. Wood (and A&O) has just published a superb paper entitled "International Legal Risks for Banks and Corporates." Wood describes how legal complexity is growing faster than gross domestic product, using the total number of pages of statutes and regulations as an indicator of complexity.

According to Wood, "There has been a massive increase in legal risk for banks and corporations over recent years. This increase results mainly from 1) the intensification of regulatory regimes (of which there are nearly 30), 2) the fact that nearly all of the world's 320 jurisdictions are now part of the world economy, 3) the increase in volatility of the law, 4) the tiering or layering of domestic legal systems, 5) the disparity in many countries between the written law and how it is applied, and 6) extraterritorial legal regimes."

Simply put, there's way too much complexity in law for the reactive model to work, and "brain surgeon" lawyering will rarely achieve the broad social and commercial purposes of law. At the same time, top management theorists ranging from [Gary Hamel at Harvard](#) to [Boston Consulting Group](#) are calling on companies to simplify themselves and distribute decision-making authority to avoid drowning in complexity, and they often cite lawyers as a source of bureaucratization. Even banking chiefs such as [Jamie Dimon of JPMorgan Chase](#) have pointed out (like Wood) that a risk of creating multiple regulatory authorities is that regulators may inadvertently take inconsistent positions, even within one jurisdiction such as the United States. Can lawyers help companies manage risks and improve ethics without stifling innovation?

We think the answer is yes, and have partnered to create integrated teams of people, process and technology to



enable compliance without stifling innovation. Yet as we travel around the country spreading word about our exciting partnership that introduces new lawyers to the field of compliance, as well as to contract drafting, we are puzzled by a nagging concern.

Sure, Legal On-Ramp and law schools, including Northeastern, are partnering to create ways to save clients time and resources, but aren't we devaluing legal work by pushing legal concerns down into the nitty-gritty of the organization? The short answer is no. Lawyers who ensure that organizations structure daily operations to address compliance concerns are doing work of the highest value and helping all of us to live in a society where the rule of law is practiced, not simply preached about.

As a result of this new organizational reality, we now see the best companies embracing compliance, investing heavily in building organizations that spend money early to stay on the right side of the law rather than wasting money later having to clean up messes. The intellectual challenge of creating internal structures that encourage legal compliance should be prized as an exciting form of 21st-century lawyering.

Our embrace of compliance as an exciting field should find resonance throughout many sections of the legal academy. Since the days of legal realism, leading scholars have emphasized that law on the ground often differs from the law on the books. Lawyers now devoting time to building compliance structures are simply taking this scholarly message into the field.

For example, the Dodd-Frank Act and other forms of recent financial regulation focus on the need for “living wills” and the ability to “resolve” a financial institution quickly if its assets lose too much value. The Lehman Brothers bankruptcy, which by conventional legal standards was “brain surgeon” work, consumed [more than \\$2 billion in legal fees](#) and dragged on for years, dragging down the economy with it—talk about a situation where guardrails would have been better! Now with Dodd-Frank, a bank properly managing complexity should have a rich database of all its agreements so that it can be quickly resolved. Is that “commodity” work or higher-order brain surgery? It's just good commercial and risk management practice, and takes a very sophisticated team to architect and implement.

[Tony Kronman](#) of Yale has written about the role of lawyers as trusted “statesmen.” To fulfill that role in today's highly complex organizations, lawyers must understand end-end processes of the company, the roles and incentives of individual actors, the state of legal and commercial information, and the areas of possible failure. Unlike traditional legal work and training, which emphasizes the creation of a retrospective “narrative” of good and bad actors, the modern approach creates the narrative through systems.

Neither Perry Mason nor Alicia Florick chose law school to tackle compliance. But in a world of increasing complexity, building guardrails is among the most important and challenging tasks for lawyers.

---

*Paul Lippe is the CEO of the Legal OnRamp, a Silicon Valley-based initiative founded in cooperation with Cisco Systems to improve legal quality and efficiency through collaboration, automation and process re-engineering. Jeremy Paul is dean of Northeastern University School of Law and teaches constitutional law, property and jurisprudence.*

[Click to Print](#)

---

June 10th, 2014 | by [NIGEL JAQUISS](#) News | Posted In: Legislature, Politics

---

## Even the Oregon State Bar Has to Pay to Play in Salem

---



Oregon's loosely regulated campaign finance laws—which allow any party to give as much as they want to any candidate, committee or cause—sometimes create eyebrow-raising contributions.

Here's the latest example: a **\$2,500 contribution** this week by the **Oregon State Bar** to the House Republican caucus, which is called the Promote Oregon Leadership PAC.

That transaction is puzzling because the Bar primarily exists to **license and regulate** Oregon's more than 14,000 lawyers.

Although the Bar is a public corporation and does not receive any taxpayer funding, in function it is more like the state's Department of Environmental Quality than a trade organization such the Oregon Business Association, which advocates for its members' financial interests.

Bar spokeswoman Kateri Walsh, says her organization began contributing to the caucus PACs of both major parties in 2010. Records show those contributions began at \$1,000 per year for each PAC and increased in 2011 to \$2,500 per PAC per year. Walsh says the Bar always gives equally to the four caucuses and never to individual candidates.

Walsh says the contributions are the **cost of entry**.

"The contributions have the sole objective of allowing us access to the process," she says, "so we can continue to support legislation moving us towards fair and equal access to the justice system."

## Business of Law

# Is Wal-Mart law coming to the US? Retailer adds lawyers on site for Toronto-area shoppers

Posted May 8, 2014 12:06 PM CDT

By [Debra Cassens Weiss](#)



[trekandshoot](#) / [Shutterstock.com](#)

Shoppers at a handful of Wal-Mart stores in the Toronto area can consult with lawyers whose offices are conveniently on site.

The law offices are staffed by Axess Law, which aims to offer fast and affordable legal services to Wal-Mart shoppers, the [Toronto Star](#) reports. The newspaper visited a bright-orange Axess office at a Wal-Mart in Markham, Ontario, and spoke with law firm founders Lena Koke and Mark Morris.

“A lot of people are intimidated by lawyers,” Koke told the Star. “This is a non-intimidating setting.”

In Markham, the law offices are open seven days a week, until 8 p.m. Hours vary at some of the other offices, [listed here](#). Evenings and weekends are the busiest times in Markham.

The firm charges \$99 for a simple will, \$25 to notarize a document, and \$19 to notarize additional documents. Prices are lower because of the volume, Koke says.

The retail sites will also offer services in real-estate law and powers of attorney. Uncontested divorces will be added beginning in the fall. Other cases will be referred to other lawyers.

Koke and Morris hope to expand to locations throughout Ontario in the next two years and throughout Canada in the next four years.

FindLaw’s [Strategist](#) blog noted the story. “Will this model jump the border?” the blog asks. Its answer is, “Maybe.”

Wal-Marts in the United States could lease office space to lawyers or it could dive “into the DIY game” by selling form documents, the Strategist says.

“Take a legal system that prices services out of the reach of middle and low income individuals,” the blog says, “add in favorable rulings for legal services providers (like LegalZoom) that aren’t exactly law firms, toss in tens of thousands of unemployed lawyers, and you have an unserved market, a tempting business model, a cheap labor supply, and a distribution network already in place.”

Copyright 2014 American Bar Association. All rights reserved.

# Law school leaders are dividing into two camps: stuck v. serious

[abajournal.com/legalrebels/article/law\\_deans\\_are\\_designing\\_ways\\_to\\_get\\_unstuck](http://abajournal.com/legalrebels/article/law_deans_are_designing_ways_to_get_unstuck)

- [Home](#)
- [Legal Rebels](#)
- Law school leaders are dividing into two camps: stuck v. serious

As law schools continue to struggle with an extraordinary decline in applications, their leaders—deans—seem to be dividing themselves into two camps: the stuck and the serious.

The stuck camp is exemplified by the [New York Times](#) op-ed by University of California at Irvine Dean Erwin Chemerinsky two weeks ago.

"This crisis mentality is not only unfounded, but is also creating pressure for reforms that would make legal education worse, not better." The stuck can't see their way to a better place, so they defend the status quo.

Perhaps a more careful piece from Chemerinsky would have referenced the nearly identical November 2012 [New York Times](#) op-ed by now former Dean Lawrence Mitchell of Case Western, which has not held up to subsequent events (see attorney and consultant Bruce MacEwen's excellent essay at [Adam Smith, Esq.](#)).

Among the "inconvenient truths" for the stuck:

- Only [57 percent of the class of 2013](#) have real law jobs; with the class of 2014 about to hit the market, there's no way the numbers are getting better—if anything, expect to see salary compression at the high end, not rapid job uptake.
- Forget the peak in 2009—LSAT test-taking last fall hit its [lowest point since 1998](#).
- The boom in law was driven by a onetime explosion in e-discovery and overall information complexity that yielded revenues for firms and law schools but not professional satisfaction for young lawyers. But now clients are looking for higher-quality, cheaper substitutes than traditional associate hours, and young lawyers either want law jobs that reflect the reason they went to law school in the first place or they want information-processing jobs that reflect the generally collaborative nature of younger companies.
- The financial underpinning of law schools has been full-freight, unqualified federal student loans, which are in rapid decline and [subject to tighter repayment standards](#)—as [Bill Henderson](#) said to me the other day: "Things are better today for law schools than they will ever be in the future."
- Even recently graduated lawyers who have the highest-paying, "elite" jobs [are quite dissatisfied](#) with the hierarchical, pre-modern work styles that characterize most large firms (of course most deans left those firms).

This is not a *P.R. problem*, as the stuck would suggest; it is a *reality problem*—lawyers have not kept pace with modern demands to improve value, and dynamic young people see more attractive career opportunities in other fields. It is no overstatement to say that the driving force in BigLaw in my generation was lawyers looking at what was happening with their investment banker and private equity peers and trying to emulate them; now young people look at their more engaged contemporaries at Google and ask: "Why law at all if I can't really apply my



skills?"

Fortunately for all of us, the serious camp is now ascendant, the intrinsic value of the rule of law is enormously high, and most deans are grappling with reality, trying to preserve the best of law school while enabling appropriate change. Three of the most serious deans—Phil Weiser from Colorado, Dan Rodriguez from Northwestern and Trish White from Miami—were key players at the [Future of Law School Innovation](#) conference at Colorado Law last week and see various videos linked.

The heart of the conference was two presentations by [George Kembel](#), the head of the Institute of Design at Stanford (full disclosure, my daughter is at d.school and *loves* it). Kembel describes a six-step approach to “design-centric thinking” for complex problem-solving: empathy, problem definition, ideation, prototype, test, iterate.

Many folks would argue/observe that “empathy” is a difficult trait for lawyers, or indeed any professional, because the professional is taught a combination of superiority and distance.

But as Kembel said, to really problem-solve, you have to think deeply about the problem and then consider changing the mix of how you solve it. “You have to decide which ‘constraints’ are fixed, and which you can change.”

Kembel talked about the challenge of improving access to incubators in Nepal. The d.school research team found that incubators were available in large hospitals in Kathmandu, but prematurely born babies in the countryside had no access to them. So the design team came up with a [sleeping bag](#) in which preemies could be safe while being transported to a hospital with the right equipment. (Kembel’s colleague [Margaret Hagan](#) was featured in a nice piece on “law by design” in [CBA National Magazine](#) last week, in which she laid out how these approaches can be applied to law.)

The *big reveal* from Kembel came in his second talk, when we shared a panel (no video available, so you’ll have to take my word).

First, when he disagreed with the moderator’s emphasis on “how law schools should prepare students to *get* jobs” by saying: “We think schools should prepare students to *create their own jobs*,” and second, when he disclosed that he himself was born prematurely, and so had a natural empathy for the “incubator problem.”

The good news is that lots of people throughout law have already implicitly been applying design-centered thinking, especially corporate legal departments and others who wrestle with problems of scale and complexity. Mark Roellig, the general counsel of Massachusetts Mutual Life Insurance Co., described his world-class legal department, which *already* does all the “innovative” things faculty are starting to argue for and so delivers far more bang for the buck than most law firms. [Colorado law](#) was *already* collaborating with Cisco on a legal internship and boot camp to build a better “bridge to practice.”

Many of the deans described similarly “design-compliant” initiatives for their schools:

- Miami (White) collaborating with UnitedLaw to develop project management skills.
- Northwestern (Rodriguez) focusing admissions on folks “with work experience and better potential to become [what Dan Katz would call “T-shaped” lawyers](#).”
- Washington & Lee (Nora V. Demleitner) revamping the 3rd year curriculum.
- Brooklyn Law School (Nicholas Allard) reducing tuition to challenge the U.S. News orthodoxy of increasing rankings based on driving students further into debt.
- New York Law School (Anthony Crowell, former counselor to New York City Mayor Michael Bloomberg) creating an “Institute for In-House Counsel .”

Although she wasn’t at the conference, probably the single most “design-centric” move in law in the last decade was Harvard Dean Martha Minow’s putting Jonathan Zittrain in charge of Harvard’s library. “The faculty is the heart of our law school” is common talk, but the library has been the heart of the university for 800 years. If you connect

law's biggest library with its best technologist, something design-ish is bound to happen.

Law is enormously valuable for all aspects of society, but we have to come to the grips with the reality that some "better-designed" styles of practice are much more effective than others. If law schools use more client-and-lawyer empathy and a little less judge-and-academic empathy to start assessing those better practice styles, they can readily produce 21st-century lawyers and sustainable law schools.

Seriously getting this right is a lot easier than stuckedly defending a status quo that isn't working.

---

*Paul Lippe is the CEO of the Legal OnRamp, a Silicon Valley-based initiative founded in cooperation with Cisco Systems to improve legal quality and efficiency through collaboration, automation and process re-engineering.*

### On Age, Globalization, Technology and the Bar

Robert T. Wetherell  
 President, Idaho State Bar  
 Board of Commissioners

**T**he baby boom generation is considered to be those individuals born between 1945 and 1963. Some people stretch it to 1965, but the decline in the birth rate began in 1963. This 18-year generation has had a tremendous impact on the United States and on the legal profession. However, people forget it is impossible to lump this group completely together as a demographic.

For instance, my brother, the Honorable Michael Wetherell, was born in 1946. Many of his experiences are entirely different from mine. While he was in high school for the Kennedy years, I was there for Nixon. While his music was the Beach Boys and The Beatles, for me it was Bruce Springsteen and The Rolling Stones. While he grew up watching *Leave It to Beaver*, I grew up watching *All in the Family*. The views of this demographic group are widely divergent, as are their life experiences. The oldest of the baby boomers have just turned 69 and the youngest are in their 50s. This creates a challenge for Bar Associations throughout the United States and here in Idaho.

A snap shot of the legal profession provides us with a view as to where our profession may be headed. Latest figures reveal the following:



Over 60% of Idaho judges will be eligible for retirement in the next five years. Eight of our nine appeals judges will be eligible for retirement in the next five years.

There are 1,268,011 lawyers in the United States. These lawyers are employed as follows:

- 75% Private Practice
- 8% Government
- 8% Private Industry
- 4% Retired
- 3% Judiciary
- 1% Educational
- 2% Legal Aid/Public Defender
- 1% Private Association/Charity

Of the 75% Private Practitioners, they are structured as follows:

- 49% Solo Practice
- 14% 2-5 Lawyers
- 6% 6-10 Lawyers
- 6% 11-20 Lawyers
- 6% 21-50 Lawyers
- 4% 51-100 Lawyers
- 16% 101+ Lawyers

Of the total number of law firms, their size breaks out as follows:

- 76% 2-5 Lawyers
- 13% 6-10 Lawyers
- 6% 11-20 Lawyers
- 3% 21-50 Lawyers
- 1% 51-100 Lawyers
- 1% 101+ Lawyers

Recent University of Idaho statistics for the Class of 2012 reveal this trend. Out of 104 graduates, only three went to work for firms of 25 lawyers or more; 37 went to work for firms of 10 or less; the remainder obtained non-private practice employment; four remain unemployed.

Of the total number of lawyers, approximately 50% are over 50 years old and will be eligible for retirement in the next 15 years. The ABA estimates that 400,000 lawyers will retire within the next 10-15 years and at least 100,000 will "drop out" (that is, use their law degree to pursue a second career). Over 60% of Idaho judges will be eligible for retirement in the next five years. Eight of our nine appeals judges will be eligible for retirement in the next five years.

Some state bars, especially in rural states, face a serious shortage of lawyers in rural communities. South Dakota has already started to address this problem with a pilot program so that members of rural communities will not have to travel several hundred miles to meet with an attorney.

When you look at the numbers, it appears new lawyers are flocking to the cities to be unemployed. There is a great unmet need for lawyers in rural communities throughout the United States and Idaho.

Idaho has 5,669 licensed Bar members. About 4,700 actively practice law. Just over 200 of these lawyers are under 30 years of age. More than 2,000 of them are over 50 years old. Approximately 1,200 are between 40-49 years old. A groundbreaking shift is about to occur and Bar leaders and the courts must begin to discuss these issues.

### Aging lawyers

The first issue the Bar and Bench must address is the aging lawyer. I was at the Courthouse a few years ago and saw a lawyer in his mid to late 70's on his way to court. I had known this lawyer for 30 years. When I asked what he was up to he responded, "poor planning."

A large number of lawyers who are eligible to retire do not have the resources to retire and, let's face it, the ability to stay on top of a legal practice slips with age. To top it off, the majority of these lawyers will be solo practitioners with little or no backup. How will the Bench and Bar deal with the lawyer who should retire?

The second issue is where these lawyers will be practicing. A recent Forbes article noted that over the last three years, 250 large law firms laid off over 10,000 lawyers and these lawyers are not being rehired. Some commentators predict there will be 40% fewer lawyers practicing law in the next 13 years largely as a result of retirement, technology and globalization. (I have limited space here, but the ABA website and a presentation by Ury and Lyons is well worth five minutes of your time and thought.)

[http://www.americanbarfoundation.org/uploads/cms/documents/rl\\_spring\\_2011.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/rl_spring_2011.pdf)

### Globalization

As for globalization, legal costs in the United States have escalated by 75% in the last 15 years, especially at large law firms. The United States is a signator to the GAP Trade Agreement and that Agreement specifically includes the legal trade. The United Kingdom, India, Australia and New Zealand all have lawyers who speak English and are trained in the common law. By 2015, it is estimated that \$5.8 billion of legal work will be outsourced to India alone. E-mail a draft contract, receive a re-draft that same day at a fraction of the cost. The latest figures available under GAP signed by the United States in 1995, show that in 2007 the United States exported 6.7 billion dollars of legal services and imported \$1.6 billion. Large American law firms are scrambling to compete for work from corporations that are very fee conscious. Will a significant amount of legal work be practiced overseas and how will Bar leaders deal with this trend?

### Technology

The final issue regarding where lawyers will practice deals with technology.

When I graduated from law school, I interviewed with then-private

practitioner Michael McLaughlin of Mountain Home. His father, Bob McLaughlin, was a well-respected lawyer in Mountain Home. In fact, it was Bob McLaughlin who, on a *pro bono* basis, took up the cause of Ms. Reed and equal protection for women all the way from the Probate Court, to the Idaho Supreme Court and later associated Alan Derr to present the case of *Reed v. Reed* to the U.S. Supreme Court.

As a third generation lawyer in Idaho, three fourths of the physical plant from which now Judge McLaughlin operated had one of the finest private law libraries in the state, assembled over 75 years. You did not have to travel to Boise to do research. Today, that same library is now available on-line and complex litigation can be handled from a law office in Emmett as easily as from a large firm in Boise. Furthermore, the Idaho Judiciary has just initiated the process of putting pleadings online.

Imagine the tremendous amount of legal work product now available for free review. When I started practicing law, Fred Kennedy would read a Supreme Court case and send me to the basement of the Idaho Supreme Court to read the briefs that had been filed, both at the District Court level and before the Supremes. Although a great resource, it was

The latest figures available under GAP signed by the United States in 1995, show that in 2007 the United States exported 6.7 billion dollars of legal services and imported \$1.6 billion.

only available to those in Boise and only used by those who knew of the resource. In a matter of years, that work product will be a click away.

The future challenges for the Bar include an aging bar, rural legal demand, foreign lawyers, cyberspace law sites and technology. Will new lawyers move to rural communities and necessarily enhance those communities by their presence and community involvement, or will citizens of rural communities be required to engage city lawyers over the internet? The California State Bar Executive Director recently spoke at a conference and his comments were disturbing. The California Bar is no longer primarily a resource for California lawyers but is first and foremost a regulatory agency. The Executive Director made it clear that he saw his role and the role of the California Bar as a regulatory agency with the mission of protecting the public from predatory lawyers.

His comments were not directed at California lawyers but at all lawyers, especially cyber-lawyers, who see California as a potential scammer's paradise. He stated bluntly that this was the future of Bar organizations nationwide. The Idaho State Bar has always prided itself on being a resource for Idaho lawyers to make them better practitioners, elevate professional behavior and civility and in that way, better serve the public. How future Bar leaders handle these issues will determine if the Idaho State Bar simply becomes a regulatory agency or an effective legal/public resource.

---

#### Thanks to kickoff sponsor

Please join me in welcoming Idaho Trust Bank as the official sponsor of this year's President's Reception which will kick off the Idaho State Bar Annual Meeting. The reception

will be held July 16 from 6 to 7 p.m. at the Juniper Hills Country Club in Pocatello. Thanks go to Tom Prohaska, CEO of Idaho Trust Bank for this generous support. We hope you can join us on July 16. Thank you again to Idaho Trust Bank.

#### About the Author

**Robert T. Wetherell** is a 1982 graduate of the University of Idaho Law School and clerked for the United States District Court for the District of Idaho immediately upon his graduation. Since that time he has been in private practice in the city of Boise and is currently a principal and partner at Capitol Law Group. Mr. Wetherell began serving as Bar President in January of 2014. He has been married to his wife, Deborah, for 29 years and they have two adult children; Marie Ellen, a third-year law student at the University of Idaho College of Law and R. John, a senior at the University of Idaho. GO VANDALS!

STRUCTURED SETTLEMENTS  
PROPRIETARY ATTORNEY FEE STRUCTURES  
MEDICARE SET-ASIDES  
TRUSTS  
LIEN RESOLUTION



# MILLENNIUM

SETTLEMENT CONSULTING



**Audrey Kenney**

208-631-7298

[akenney@msettlements.com](mailto:akenney@msettlements.com)

[www.msettlements.com](http://www.msettlements.com)

# The incidental lawyer

By [Jordan Furlong](http://www.law21.ca/author/jordan-furlong/) (http://www.law21.ca/author/jordan-furlong/) • April 24th, 2014

The South Carolina Supreme Court ruled this week that LegalZoom's services do not constitute the unauthorized practice of law. As reported by [Greg Lambert at 3 Geeks](http://www.geeklawblog.com/2014/04/legalzoom-gets-nod-from-south-carolina.html) (http://www.geeklawblog.com/2014/04/legalzoom-gets-nod-from-south-carolina.html), LegalZoom's press release celebrates the news, while also taking pains to note that the company's documents have been reviewed by the state Supreme Court and that it frequently refers its customers to licensed lawyers for more complex work.

What interests me more than the outcome of the case, however, is that a lawyer (and he's not the only one) felt compelled to spend time and money challenging LegalZoom in the first place. Think about the practical results that would have followed had this lawsuit succeeded.

A source of legal materials that, by most accounts, is at least adequate for the needs of its customers would disappear from the state, leaving those customers once again with the prospect of hiring a lawyer they know they can't afford or seeking a lesser alternative (along with a chilling effect on any other business inclined to try the same thing). Would lawyers have reduced their fees in response, to become more affordable to the low-income market segment that LegalZoom serves? If so, it would have been history's first recorded instance of a supplier lowering, not raising, its prices in response to reduced competition. If there's a net social benefit here, I'm not seeing it.

What, exactly, are efforts like this designed to achieve? "The protection of the public interest" is the standard justification – even though the public has an equal if not overriding interest in having tools and processes with which to exercise its legal rights, is already protected by the right to sue an incompetent or fraudulent provider in court, and is comprised of adults who presumably can make informed decisions about their own lives with their own money. There's a subtle but importance difference between "protecting the public interest" and "serving the public interest," and we're supposed to be pursuing the latter more than the former.

The likelier explanation, of course, is that these efforts are really trying to protect the interests of lawyers. But I think they're actually achieving the opposite. Whenever we reflexively oppose "non-lawyer" legal service providers, we're saying: "There is no place for anyone in this market except lawyers." But that sentiment is not based in reality. If you believe it, then you ought to take a step back and consider just how incidental lawyers already are in in this market – how far we've drifted from the centre of the legal system and towards its periphery. And every time we try asserting our indispensability in the face of reality, we just accelerate that drift.

## The American Bar Association

([http://www.americanbar.org/content/dam/aba/administrative/delivery\\_legal\\_services/ls\\_resolution\\_and\\_report\\_108.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_resolution_and_report_108.authcheckdam.pdf)),

the [Canadian Bar Association](http://www.cba.org/CBA/equaljustice/main/) (www.cba.org/CBA/equaljustice/main/), the UK's [Legal Services Board](http://www.legalfutures.co.uk/latest-news/smes-deeply-unhappy-legal-services-lawyers-warned-risk-going-way-hmv)

(<http://www.legalfutures.co.uk/latest-news/smes-deeply-unhappy-legal-services-lawyers-warned-risk-going-way-hmv>),

the [World Justice Project](http://worldjusticeproject.org/rule-of-law-index) (http://worldjusticeproject.org/rule-of-law-index), [Stanford Law School](http://www.law.stanford.edu/publications/access-to-justice-an-agenda-for-legal-education-and-research-0)

(<https://www.law.stanford.edu/publications/access-to-justice-an-agenda-for-legal-education-and-research-0>), the [Canadian](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf)

[Department of Justice](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf) (http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07\_la1-rr07\_aj1/rr07\_la1.pdf), and the [Canadian](http://www.cfcj-fcj.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf)

[Action Committee on Access to Justice in Civil and Family Matters](http://www.cfcj-fcj.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf) (http://www.cfcj-

[fcj.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcj-fcj.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf)) are among the groups that have released studies over the past several years demonstrating what a small and shrinking segment of the legal market is actually served by lawyers. A good example is the Department of Justice study from 2007, which asked thousands of Canadians if they'd had a "justiciable problem" over the past three years, and if so, what they did about it:

- Slightly less than half dealt with it themselves.
- About a fifth did nothing.
- About another fifth got non-legal help (e.g., unions, government, friends or family).
- Less than 12% got legal help.

Given that this survey was published a year before the financial crisis, I don't see how that 12% figure has improved since then.

When that survey was published a year before the financial crisis, I don't see how that 12% figure has improved since then. And it's not an outlier: the UK survey found a similar result, as only about 16% of small businesses with legal issues turned to a lawyer to help them. According to the ABA, courts across the United States report between 60% and 90% of family law matters involve at least one self-represented litigant. The legal market, viewed in its entirety, is like an iceberg, 85% hidden below the surface. Lawyers have concerned themselves only with the small fraction above water. Everyone else is down there on their own, holding their breath.

We normally use facts like these to illustrate the "access to justice" crisis, and we convene panels in which we sternly lecture the profession and the courts about our moral failure: "[Your access to justice is bad and you should feel bad](http://knowyourmeme.com/memes/your-musics-bad-and-you-should-feel-bad)" (<http://knowyourmeme.com/memes/your-musics-bad-and-you-should-feel-bad>). And that's fine. But what these facts should also illustrate is something that we ought to take just as seriously: the "lawyer irrelevance" crisis.

With a few exceptions (principally criminal defence work), lawyers are simply not relevant to 80% to 85% of all individuals and businesses with legal issues. We're off the table: we're briefly considered and quickly dismissed. We need to recognize and absorb the fact that a huge amount of legal activity already takes place entirely without our involvement.

And that was the situation *before* the market began bringing forth new options for legal solutions. We were already peripheral before barriers to non-lawyer entry began falling, before legal technology began making such impressive strides, before LegalZoom was bringing in \$200 million a year, before the legal startup sector received \$458 million in outside funding last year. One startup I spoke with last month was just the latest to tell me that that its product was designed to "take lawyers out of the equation." When you consider how few equations we're already in, this ought to bring us to immediate attention.

Consider what's going on in the market right now:

- Australia approved "non-lawyer" law firm ownership a decade ago, England & Wales has issued 300 Alternative Business Structures licences since 2012, and Ontario will soon become the first North American jurisdiction to grapple with this option (aside from Washington State, which has already approved limited-license legal technicians).
- Computers can now do the following things: draft commercial contracts, review contract provisions, assess electronic evidence for relevance, answer legal and regulatory questions interactively, predict the outcome of negotiations, and partition marital assets in a divorce. What will they be able to do in another five years, or ten?
- Self-represented litigants are receiving growing levels of institutional support: courthouse kiosks provide them with guidance, lawyers unbundle services to support them through limited-scope retainers, and startups create systems and programs that maximize their ability to get the results they want. Self-representation is becoming *normalized*.

So let's say that lawyers serve about 15% of the total potential market, and make a decent living doing so. As a lawyer, you might be satisfied with that: let the other 85% take care of itself, or use one of these alternatives. You'll continue to serve the highest-level, most lucrative market segment, the small chunk of the iceberg above the water. So what if lawyers are peripheral to the entire market? We're central to the richest part of the market, the one you care about, right?

Right. But what happens when all these "non-lawyers," all this technology, all these self-represented litigants and their supporters, get better at what they do? What happens when, in addition to being cheaper than lawyers and faster than lawyers, they start to become almost as good as lawyers? Do you really think they're not going to look up through the water at the tip of the iceberg and think, "I'd like a piece of that?"

This is what I mean when I talk about lawyers becoming increasingly incidental. A huge amount of legal activity already takes place without us — and what the foregoing should make clear is that that amount is *growing*. The ability of the legal market to function adequately and competently without the involvement of lawyers is increasing. Deprived of access to the best and most valuable asset available to assist them — lawyers — people have started to look for substitute assets, and where they can't find such assets, to create them. Those substitutes are now here, and filing UPL lawsuits against them isn't going to stop the process that spawned their development.

Because too often, that's how we've been responding to what the market is telling us: with hostility, or with arrogance. I've lost count of the number of lawyers who've chuckled at warnings about "non-lawyer" providers, saying (sometimes literally), "Ka-ching! Every time a client tries to use one of these companies, it just means more business for me when they come looking for help to straighten out the mess they made." What a selfish, unprofessional attitude we've developed: comfortably serving our 15% of the market, blocking the other 85% from accessing whatever help they can get, and smugly feasting off the problems of those for whom even these efforts went wrong. And we wonder why people are looking for alternatives?

But here's the thing: I don't believe that lawyers are doomed to the periphery of the market — after all, we used to be central to it. There was a time when we were integral to the enforcement of legal rights and the execution of legal procedures, essential to

it. There was a time when we were intrinsic to the enforcement of legal rights and the execution of legal procedures, essential to a functioning market in legal services. But over time, we allowed ourselves to become optional, to become something close to a luxury good — content to serve the most well-heeled clients with the most interesting cases in the most convenient manner. We're meant to be stewards of the entire legal system, but we've confined ourselves to our small gated grounds and let the rest of the property manage itself.

But that is not irreversible. I've met too many concerned, creative and compassionate lawyers, and I've seen too many praiseworthy change efforts already within the legal profession, for me to give up on lawyers as a universal legal solution. I believe that lawyers can and should serve more than 15% of the market. I believe we can because the tools and the procedures are now available to enable us to offer high-quality legal services more efficiently, effectively, and affordably. And I believe we should because we are still (for the moment) the most valuable and effective resource available for the resolution of legal problems, and it's wrong for those resources to benefit only a select few.

Maybe not everyone needs the skills and expertise of a lawyer. But everyone deserves the opportunity to find out if they do. Let's stop fighting the needs of the 85% and start figuring out how we can serve them instead.

*Jordan Furlong (<mailto:jordan@law21.ca>) delivers dynamic and thought-provoking presentations to law firms and legal organizations throughout North America on how to survive and profit from the extraordinary changes underway in the legal services marketplace. He is a partner with [Edge International](http://www.edge.ai/Edge-International-1492510.html) and a senior consultant with [Stem Legal Web Enterprises](http://www.stemlegal.com/jordan-furlong/).*

### 3 Responses to "The incidental lawyer"



**Karen Skinner (<http://www.gimbalcanada.com>)**

April 24, 2014 (<http://www.law21.ca/2014/04/incidental-lawyer/#comment-8315>)

Jordan, excellent article (as always!). I agree that lawyers need to concern themselves with staying "relevant." We first started talking about this over lunch with Fred Headon one day, and I know it's behind his push for innovation and change through the CBA Futures initiative. We all need to be looking for ways to best meet client needs – and if those needs are changing (which they are), then we must abandon our traditional outlook and change, too. Our monopoly is long gone. Thanks again for the post.

Karen.



**Paul McGuire (<http://www.paul-mcguire.com>)**

April 24, 2014 (<http://www.law21.ca/2014/04/incidental-lawyer/#comment-8487>)

Excellent article! One thing I've seen in my practice is that for certain cases it makes sense for clients to hire attorneys through legal insurance. This isn't ideal for the more complex cases but it creates a way for people with smaller legal issues to access a lawyer and not have to pay a huge amount.

I think figuring out the way to meet the needs of the population in a way that is affordable is the challenge for the modern crop of solo attorneys to face.



**Peter MacDonald (<http://aluvionlaw.com>)**

April 30, 2014 (<http://www.law21.ca/2014/04/incidental-lawyer/#comment-16014>)

A great diagnosis of the problem. It's eerie when lawyers use the term 'access to justice' as if by default means 'access to lawyers'.

I wish more legal articles were written with embedded links to KnowYourMeme.

### Leave a Reply

Your Website

Your Comment Here...



Submit Comment

Jordan Furlong is a Partner with Edge International. One of the world's leading management consultancies, Edge has been providing strategic planning to law firms for more than 30 years. [Learn more about Edge. \(http://www.edge.ai/Edge-International-1492510.html\)](http://www.edge.ai/Edge-International-1492510.html)

Jordan Furlong is a Senior Consultant with Stem Legal and leads its Content Marketing service. Stem provides online profile and business development services for law firms in the U.S. and Canada. [Learn more about Stem \(http://www.stemlegal.com/jordan-furlong/\)](http://www.stemlegal.com/jordan-furlong/).

## Current Clients

Here is a selection of some current Stem clients:

- [Russell Alexander Collaborative Family Lawyers \(http://www.russellalexander.com/\)](http://www.russellalexander.com/)
- [Canadian Corporate Counsel Association \(http://cancorpconsulting.org/\)](http://cancorpconsulting.org/)
- [Waterstone Law \(http://www.waterstonelaw.com/\)](http://www.waterstonelaw.com/)
- [Pushor Mitchell \(http://www.pushormitchell.com/\)](http://www.pushormitchell.com/)
- [Clio \(http://goclio.com/\)](http://goclio.com/)
- [Small Firm Innovation \(http://www.smallfirminnovation.com/\)](http://www.smallfirminnovation.com/)
- [Hissey Kientz \(http://hkllp.com/\)](http://hkllp.com/)

And here is a selection of articles written by current Stem clients:

- "Capacity To Make A Will: Medical Evidence Is Not Always The Last Word," (<http://www.pushormitchell.com/law-library/article/capacity-make-will-medical-evidence-not-always-last-word>) by Matthew Blow, **Pushor Mitchell**
- "The Modern Employer: Accommodating the 21st Century Workforce," ([http://www.ccca-accje.org/En/resources/PDF/The%20Modern%20Employer\\_HeenanBlaikie.pdf](http://www.ccca-accje.org/En/resources/PDF/The%20Modern%20Employer_HeenanBlaikie.pdf)) by Ryan Edmonds and Emily Shepard, Heenan Blaikie LLP , on behalf of the **Canadian Corporate Counsel Association**
- "Linking Email and Social Media to Family Violence," (<http://www.waterstonelaw.com/2013/02/20/linking-email-and-social-media-to-family-violence/>) by Janette Kovacs, **Waterstone Law**
- "Why Collaborative Practice Works for Family Law," (<http://www.russellalexander.com/resources/collaborative-practice/>) by **Russell Alexander**
- "Recommended Reading: How Small Firms Look Big By Making Most of Resources," (<http://www.goclio.com/blog/2013/03/recommended-reading-how-small-firms-look-big-by-making-most-of-resources/>) by **Clio Law Practice Management**
- "How the Right Client Experience Can Make Clients For Life," (<http://www.smallfirminnovation.com/2013/03/how-the-right-client-experience-can-make-clients-for-life/>) by Susan Cartier Liebel for **Small Firm Innovation**

Search for:



## Post Categories

### Recent Blog Posts

- The incidental lawyer (<http://www.law21.ca/2014/04/incidental-lawyer/>)
- Me again (<http://www.law21.ca/2014/04/me-again/>)
- You say you want a revolution? (<http://www.law21.ca/2013/12/say-want-revolution/>)
- Advice to associates about law firm efficiency (<http://www.law21.ca/2013/12/advice-associates-law-firm-efficiency/>)

### Speaking Engagements

2014 Litigation, Dispute Resolution and Appellate Practice Institute (Milwaukee, WI) (<http://www.law21.ca/appearances/2014-litigation-dispute-resolution-appellate-practice-institute-milwaukee-wi/>)  
May 22, 2014

Nova Scotia Barristers' Society 2014 Annual Conference (Halifax, NS) (<http://www.law21.ca/appearances/nova-scotia-barristers-society-2014-annual-conference-halifax-ns/>)  
June 14, 2014

Vision 2016 President's Showcase, State Bar of Florida Annual Conference (Orlando, FL) (<http://www.law21.ca/appearances/vision-2016-presidents-showcase-state-bar-florida-annual-conference-orlando-fl/>)  
June 27, 2014

## Law 21 Twitter Updates

- Couples should be able to divorce without going to court, says top English judge: <http://t.co/Eb8iBg17aB> (<http://t.co/Eb8iBg17aB>) about 22 hours ago ([http://twitter.com/jordan\\_law21/statuses/464450730837831680](http://twitter.com/jordan_law21/statuses/464450730837831680)) from web
- How to Offer Subscription Fees: <http://t.co/xaDymXAOKz> (<http://t.co/xaDymXAOKz>) by [@samglover](http://twitter.com/samglover) (<http://twitter.com/samglover>) [@lawyerist](http://twitter.com/lawyerist) (<http://twitter.com/lawyerist>) about 23 hours ago ([http://twitter.com/jordan\\_law21/statuses/464441352306970624](http://twitter.com/jordan_law21/statuses/464441352306970624)) from web
- 40 Ways to Make Networking Work: <http://t.co/2UcoOIVjot> (<http://t.co/2UcoOIVjot>) by [@astintarlton](http://twitter.com/astintarlton) (<http://twitter.com/astintarlton>) [@atnyatwork](http://twitter.com/atnyatwork) (<http://twitter.com/atnyatwork>) about 23 hours ago ([http://twitter.com/jordan\\_law21/statuses/464440427240648704](http://twitter.com/jordan_law21/statuses/464440427240648704)) from web
- Visual law services are worth a thousand words—and big money: <http://t.co/XHRXr6JNah> (<http://t.co/XHRXr6JNah>) | Great [@ABAJournal](http://twitter.com/ABAJournal) (<http://twitter.com/ABAJournal>) article by [@bobambrogi](http://twitter.com/bobambrogi) (<http://twitter.com/bobambrogi>) about 23 hours ago ([http://twitter.com/jordan\\_law21/statuses/464439844249165824](http://twitter.com/jordan_law21/statuses/464439844249165824)) from web
- [@mmercortoronto](http://twitter.com/mmercortoronto), [@RichardMoorhead](http://twitter.com/RichardMoorhead) (<http://twitter.com/RichardMoorhead>), Chris Kenny, Laurel Terry, & me quoted in [@CBAnatmag](http://twitter.com/CBAnatmag) (<http://twitter.com/CBAnatmag>) feature on ABS in Canada: <http://t.co/Bw58XUk2Jy> (<http://t.co/Bw58XUk2Jy>) about 23 hours ago ([http://twitter.com/jordan\\_law21/statuses/464439331533230080](http://twitter.com/jordan_law21/statuses/464439331533230080)) from web

## Follow

## Get Email Updates

Enter your email address:

Subscribe

*We will never use your e-mail address for anything other than sending you post updates.*

## [Contact Jordan... \(/contact\)](#)

LEARN HOW TO BE HAPPIER AT WORK—TODAY

the muse HUFF POST **The Third Metric** Delivered straight to your inbox

**SIGN UP FOR A FREE CLASS**

May 12, 2014

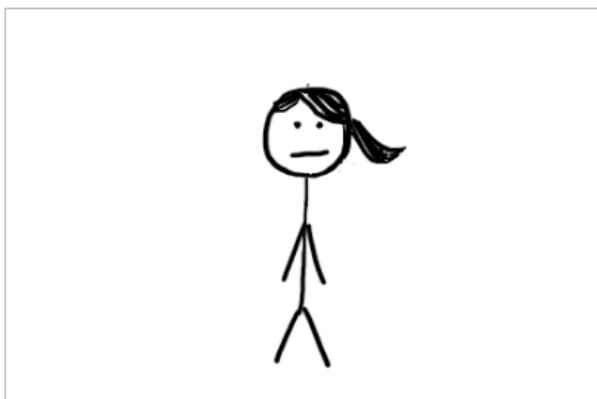
HUFF POST COLLEGE

# Why Generation Y Yuppies Are Unhappy

Posted: 09/15/2013 12:05 pm

Like 1,211,148 people like this.

Say hi to Lucy.



Lucy is part of Generation Y, the generation born between the late 1970s and the mid 1990s. She's also part of a yuppie culture that makes up a large portion of Gen Y.

I have a term for yuppies in the Gen Y age group -- I call them Gen Y Protagonists & Special Yuppies, or GYPSYs. A GYPSY is a unique brand of yuppie, one who thinks they are the main character of a very special story.

So Lucy's enjoying her GYPSY life, and she's very pleased to be Lucy. Only issue is this one thing:

Lucy's kind of unhappy.

To get to the bottom of why, we need to define what makes someone happy or unhappy in the first place. It comes down to a simple

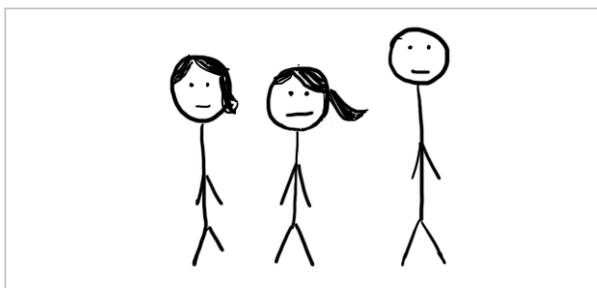
formula:

$$\text{Happiness} = \text{Reality} - \text{Expectations}$$

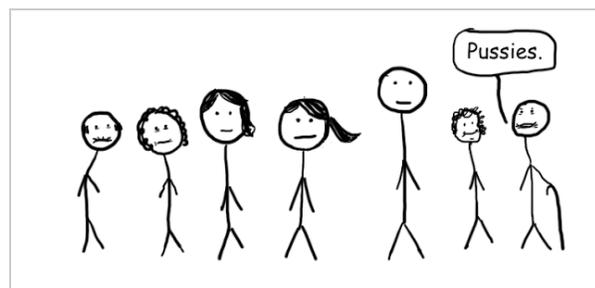
It's pretty straightforward -- when the reality of someone's life is better than they had expected, they're happy. When reality turns out to be worse than the expectations, they're unhappy.

To provide some context, let's start by bringing Lucy's parents into

the discussion:



Lucy's parents were born in the '50s -- they're Baby Boomers. They were raised by Lucy's grandparents, members of the G.I. Generation, or "the Greatest Generation," who grew up during the Great Depression and fought in World War II, and were most definitely not GYPSYs.



Lucy's

Depression Era grandparents were obsessed with economic security and raised her parents to build practical, secure careers. They wanted her parents' careers to have greener grass than their own, and Lucy's parents were brought up to envision a prosperous and stable career for themselves. Something like this:

They were taught that there was nothing stopping them from getting to that lush, green lawn of a career, but that they'd need to put in years of hard work to make it happen.

After graduating from being insufferable hippies, Lucy's parents embarked on their careers. As the '70s, '80s, and '90s rolled along,



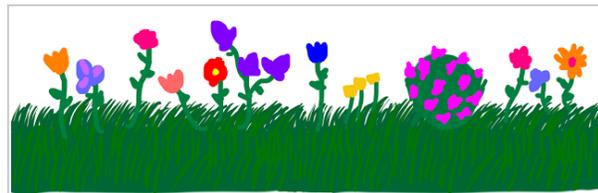
the world

entered a time of unprecedented economic prosperity. Lucy's parents did even better than they expected to. This left them feeling gratified and optimistic.



With a smoother, more positive life experience than that of their own parents, Lucy's parents raised Lucy with a sense of optimism and unbounded possibility. And they weren't alone. Baby Boomers all around the country and world told their Gen Y kids that they could be whatever they wanted to be, instilling the special protagonist identity deep within their psyches.

This left GYPSYs feeling tremendously hopeful about their careers, to the point where their parents' goals of a green lawn of secure prosperity didn't really do it for them. A GYPSY-worthy lawn has flowers.



This leads to our first fact about

GYPSYs:

**GYPSYs Are Wildly Ambitious**



The GYPSY needs a lot more from a career than a nice green lawn of prosperity and security. The fact is, a green lawn isn't quite exceptional or unique enough for a GYPSY. Where the Baby Boomers wanted to live The American Dream, GYPSYs want to live Their Own Personal Dream.

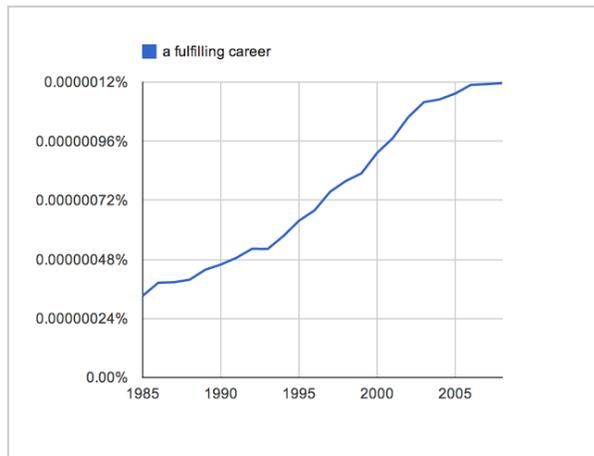
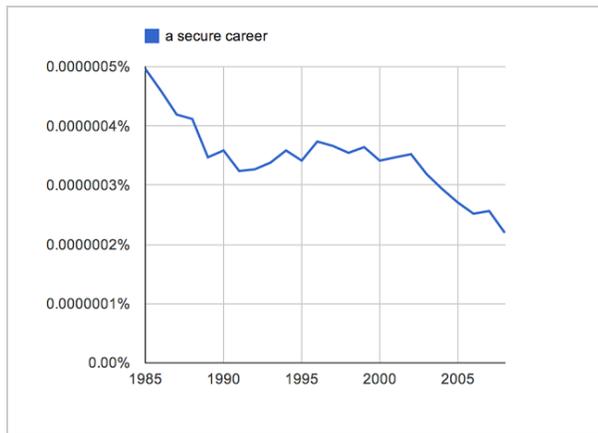
Cal Newport points out that "follow your passion" is a catchphrase that has only gotten going in the last 20 years, according to Google's Ngram viewer, a tool that shows how prominently a given phrase appears in English print over any period of time. The same Ngram viewer shows that the phrase "a secure career" has gone out of style, just as the phrase "a fulfilling career" has gotten hot.

To be clear, GYPSYs want economic prosperity just like their parents did -- they just also want to be fulfilled by their career in a way their

parents didn't think about as much.

But something else is happening too. While the career goals of Gen Y as a whole have become much more particular and ambitious, Lucy has been given a second message throughout her childhood as well:

This would probably be a good time to bring in our second fact about GYPSYs:

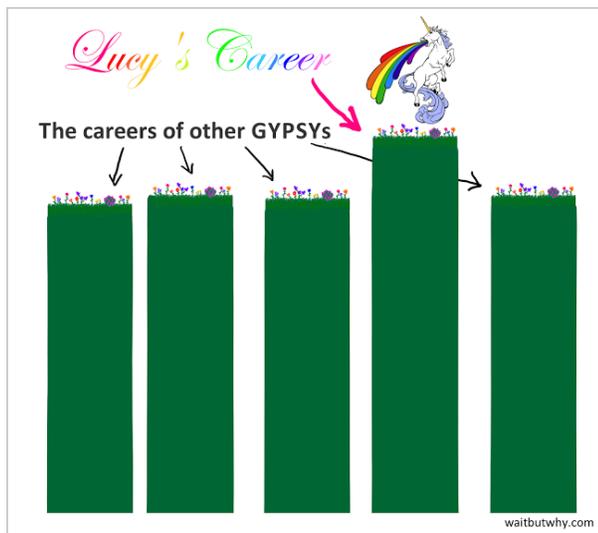


**GYPsYs Are Delusional**

"Sure," Lucy has been taught, "everyone will go and get themselves some fulfilling career, but *I am unusually wonderful* and as such, my career and life path will stand out amongst the crowd." So on top of the generation as a whole having the bold goal of a flowery career lawn, *each individual GYPsY* thinks that *he or she* is destined for

something even better --

*A shiny unicorn on top of the flowery lawn.*



So why is this delusional? Because this is what all GYPsYs think, which defies the definition of special:

**spe-cial** | 'speSHeI |  
*adjective*  
**better, greater, or otherwise different from what is usual.**

According to this definition, most people are not special -- otherwise "special" wouldn't mean anything.

Even right now, the GYPsYs reading this are thinking, "Good point... but I actually *am* one of the few special ones" -- and this is the problem.

A second GYPsY delusion comes into play once the GYPsY enters the job market. While Lucy's parents' expectation was that many years of hard work would eventually lead to a great career, Lucy considers a great career an obvious given for someone as

exceptional as she, and for her it's just a matter of time and choosing which way to go. Her pre-workforce expectations look something like this:

Unfortunately, the funny thing about the world is that it turns out to not be that easy of a place, and the weird thing about careers is that they're actually quite hard. Great careers take years of blood, sweat and tears to build -- even the ones with no flowers or unicorns on them -- and even the most successful people are rarely doing anything that great in their early or mid-20s.

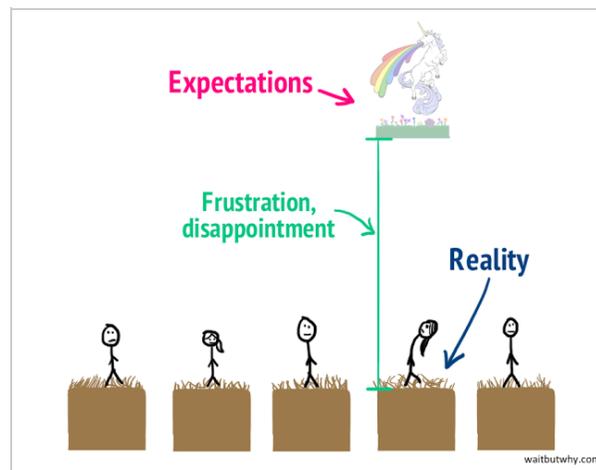
But GYPsYs aren't about to just accept that.

Paul Harvey, a University of New Hampshire professor and GYPsY expert, has researched this, finding that Gen Y has "unrealistic expectations and a strong resistance toward accepting negative feedback," and "an inflated view of oneself." He says that "a great source of frustration for people with a strong sense of entitlement is unmet expectations. They often feel entitled to a level of respect and rewards that aren't in line with their actual ability and effort levels, and so they might not get the level of respect and rewards they are expecting."

For those hiring members of Gen Y, Harvey suggests asking the interview question, "Do you feel you are generally superior to your coworkers/classmates/etc., and if so, why?" He says that "if the candidate answers yes to the first part but struggles with the 'why,' there may be an entitlement issue. This is because entitlement perceptions are often based on an unfounded sense of superiority and deservingness. They've been led to believe, perhaps through overzealous self-esteem building exercises in their youth, that they are somehow special but often lack any real justification for this belief."



And since the real world has the nerve to consider merit a factor, a few years out of college Lucy finds herself here:



Lucy's

extreme ambition, coupled with the arrogance that comes along with being a bit deluded about one's own self-worth, has left her with huge expectations for even the early years out of college. And her reality pales in comparison to those expectations, leaving her "reality - expectations" happy score coming out at a negative.

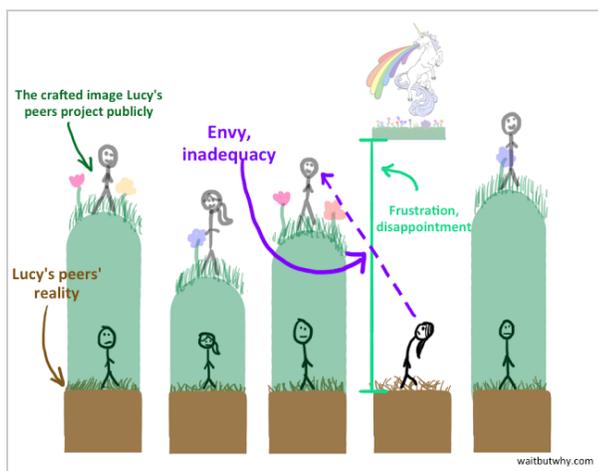
And it gets even worse. On top of all this, GYPSYs have an extra problem that applies to their whole generation:

**GYPSYs Are Taunted**

Sure, some people from Lucy's parents' high school or college classes ended up more successful than her parents did. And while they may have heard about some of it from time to time through the grapevine, for the most part they didn't really know what was going on in too many other peoples' careers.

Lucy, on the other hand, finds herself constantly taunted by a modern phenomenon: Facebook Image Crafting.

Social media creates a world for Lucy where A) what everyone else is doing is very out in the open, B) most people present an inflated version of their own existence, and C) the people who chime in the most about their careers are usually those whose careers (or relationships) are going the best, while struggling people tend not to broadcast their situation. This leaves Lucy feeling, incorrectly, like everyone else is doing really well, only adding to her misery:



So that's why Lucy is unhappy, or at the least, feeling a bit frustrated and inadequate. In fact, she's probably started off her career perfectly well, but to her, it feels very disappointing.

Here's my advice for Lucy:

- 1) Stay wildly ambitious.** The current world is bubbling with opportunity for an ambitious person to find flowery, fulfilling success. The specific direction may be unclear, but it'll work itself out -- just dive in somewhere.
- 2) Stop thinking that you're special.** The fact is, right now, you're not special. You're another completely inexperienced young person who doesn't have all that much to offer yet. You can become special by working really hard for a long time.
- 3) Ignore everyone else.** Other people's grass seeming greener is no new concept, but in today's image crafting world, other people's

grass looks like a glorious meadow. The truth is that everyone else is just as indecisive, self-doubting, and frustrated as you are, and if you just do your thing, you'll never have any reason to envy others.

*If you liked this article, you can subscribe to Wait But Why by entering your email here.*

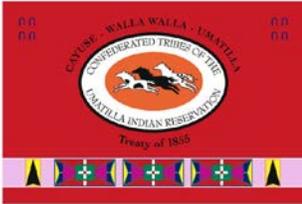
Visit Wait But Why: [www.waitbutwhy.com](http://www.waitbutwhy.com)

Wait But Why on Twitter: [www.twitter.com/waitbutwhy](http://www.twitter.com/waitbutwhy)

Wait But Why on Facebook: [www.facebook.com/waitbutwhy](http://www.facebook.com/waitbutwhy)

RELATED:

**WATCH: Why Does Generation Y Seem So Perpetually Unhappy?**



## Confederated Tribes of the Umatilla Indian Reservation

### Quick Facts...

Jan. 2013

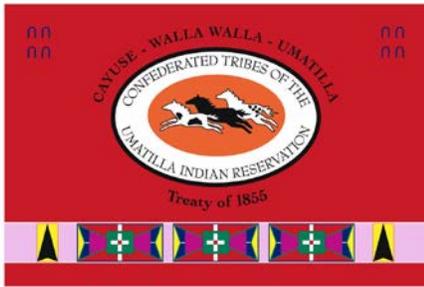
- The Confederated Tribes of the Umatilla Indian Reservation is a union of three tribes: Cayuse, Umatilla, and Walla Walla.
- The CTUIR has 2,916 tribal members. Nearly half of those tribal members live on or near the Umatilla Reservation. The Umatilla Reservation is also home to another 300 Indians who are members of other tribes. About 1,500 non-Indians also live on the Reservation. 30% of our membership is composed of children under age 18. 15% are elders over age 55.
- The Umatilla Indian Reservation is about 172,000 acres (about 273 square miles).
- CTUIR is governed by a Constitution and by-laws adopted in 1949. The Governing body is the nine-member Board of Trustees, elected every two years by the General Council (tribal members age 18 and older).
- Day-to-day business of the tribal government is carried out by a staff of about 550 employees in departments and programs such as natural resources, health, police, fire, education, social services, public works, economic development, and dozens more.
- More than 760 individuals are employed at the Tribe's Wildhorse Casino & Resort and close to 300 are employed Cayuse Technologies.
- In 1855 the three tribes signed a treaty with the US government, in which it ceded over 6.4 million acres to the United States. In the treaty, the tribes reserved rights to fish, hunt, and gather foods and medicines within the ceded lands, which today is northeastern Oregon and southeastern Washington. Tribal members still exercise and protect those rights today.
- Many tribal members still practice the traditional tribal religion called Washat. Some still speak their native languages. A language program is underway to preserve and teach the tribes' languages.
- Monthly newspaper: Confederated Umatilla Journal, published the first Thursday of each month.
- Radio Station: KCUW

Mailing and Street Address: 46411 Timine Way, Pendleton, Oregon 97801

Phone: 541-276-3165 FAX: 541-276-3095

Internet web site: [www.umatilla.nsn.us](http://www.umatilla.nsn.us) or [www.ctuir.org](http://www.ctuir.org). On Facebook at [www.facebook.com/CTUIR](http://www.facebook.com/CTUIR)

Internet e-mail for general info or forwarding: [info@ctuir.org](mailto:info@ctuir.org)



## Who are the Confederated Tribes of the Umatilla Indian Reservation?

---

Three Tribes make up the Confederated Tribes of the Umatilla Indian Reservation: Cayuse, Umatilla, and Walla Walla. The people of the three Tribes once had a homeland of 6.4 million acres in northeastern Oregon and southeastern Washington. In 1855, the Tribes and the United States Government negotiated a Treaty in which the Tribes “ceded,” or surrendered possession of, much of the 6.4 million acres in exchange for a Reservation homeland of 250,000 acres.

The three Tribes also reserved rights in the Treaty, which include the right to fish at “usual and accustomed” sites, and to hunt and gather traditional foods and medicines on public lands within the ceded areas. These rights are generally referred to as “Treaty reserved rights.”

As a result of federal legislation in the late 1800s that reduced its size, the Umatilla Reservation now is 172,000 acres -- 158,000 acres just east of Pendleton, Oregon plus 14,000 acres in the McKay, Johnson, and McCoy Creek areas southeast of Pilot Rock, Oregon.

Before European contact, the Cayuse, Umatilla, and Walla Walla population was estimated at 8,000. The present enrollment of the Confederated Tribes is more than 2,900 members. Roughly half of the tribal members live on or near the Reservation. The Umatilla Reservation is also home to about 300 Indians enrolled with other Tribes, including Yakama, Warm Springs, and Nez Perce, as well as 1,500 non-Indians.

The traditional religion still practiced by some tribal members is called “Washat” or “Seven Drums.” The Umatilla, Walla Walla, and Nez Perce languages are still spoken by some, but the Cayuse language has disappeared. A language program is underway to help preserve and revive the Tribes’ languages.

Prior to the 1855 Treaty, the Tribes’ economy consisted primarily of intertribal trade, livestock, trade with fur companies, and hunting, fishing, and gathering. Today, the economy of the Confederated Tribes consists of agriculture, livestock, timber, recreation, hunting, fishing, and commercial development such as a mini-market/gas station, trailer court, grain elevator, and the Wildhorse Resort (which includes a casino, hotel, RV Park, and 18-hole golf course). In July 1998, the Tribe opened its Tamastlikt Cultural Institute as the centerpiece of the Resort. CTUIR is the owner of Cayuse Technologies, a new business that opened on the Umatilla Reservation in 2006.

As a sovereign government, Tribal affairs are governed by an elected body called the “Board of Trustees.” Members of the Board are elected by the “General Council,” which consists of all Tribal members age 18 and older.

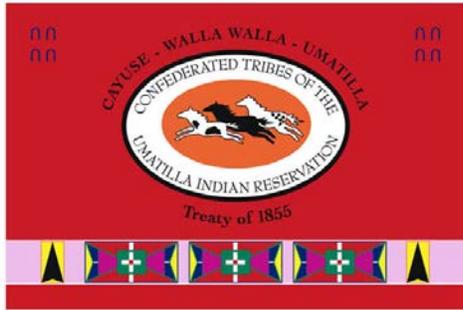
The day-to-day work of the tribal government is carried out by a staff of roughly 550 employees and includes departments such as administration, health and human services, natural resources, economic and community development, tribal services, education, fire protection, and police. An additional 760 employees are employed at the Wildhorse Casino and Resort and another 300 at Cayuse Technologies. The CTUIR is one of the largest employers in northeastern Oregon.

---

*Updated Jan. 2013. For more information on the Confederated Tribes of the Umatilla Indian Reservation, call 541-276-3165, or write to the CTUIR at 46411 Timine Way, Pendleton, OR 97801.*

*On the web at [www.umatilla.nsn.us](http://www.umatilla.nsn.us) or [www.ctuir.org](http://www.ctuir.org) On Facebook at [www.facebook.com/CTUIR](http://www.facebook.com/CTUIR)*

---



## Confederated Tribes of the Umatilla Indian Reservation:

### Information about our tribal government

---

Tribal affairs are governed by an elected body called the “Board of Trustees.” A chairman presides over the Board, which consists of eight other members. The Board sets policy, makes the final decisions on tribal affairs, and takes a lead role in determining priority projects and issues. The Board conducts business meetings twice a month, in addition to numerous work sessions with staff and special board meetings with external individuals and organizations.

All of the board members, except the Chair, participate in various commissions and committees established to oversee specific tribal issues, such as education, natural resources, water, health and welfare, cultural resources, fish and wildlife, law and order, and more.

The Board of Trustees is currently composed of the following people:

<i>Chair:</i>	Les Minthorn
<i>Vice-Chair:</i>	Leo Stewart
<i>Treasurer:</i>	Rosenda Shippentower
<i>Secretary:</i>	N. Kathryn Brigham
<i>Gen. Council Chair:</i>	Aaron Hines
<i>Members At-Large:</i>	Fred Hill Sr. Armand Minthorn Bob Shippentower Woodrow Star

The Board is elected by the General Council, which consists of all Tribal members age 18 and older. The General Council also elects its own officers. Currently, **Aaron Hines** is the Chairman of the General Council, who serves on the Board of Trustees. Other General Council Officers are: **Marcus Luke** as Vice-Chair; **Helen Morrison** as Secretary; and **Thomas Morning Owl** as Interpreter.

The General Council meets monthly to hear updates from its Chairman, the Board of Trustees, and various working groups. This is also an opportunity for General Council members to provide input and recommendations to the tribal officials. Special General Council meetings are occasionally held to discuss specific issues.

The day-to-day work of the Confederated Tribes government is carried out by a staff of more than 550 employees (46% are our own tribal members, 15% are Indians from other tribes, and 39% are non-Indians). The Executive Director and Deputy Executive Director are responsible for directing the staff, which is organized into several departments and programs, including: administration, finance, economic and community development, health, natural resources, education, fire protection, police, and tribal services.

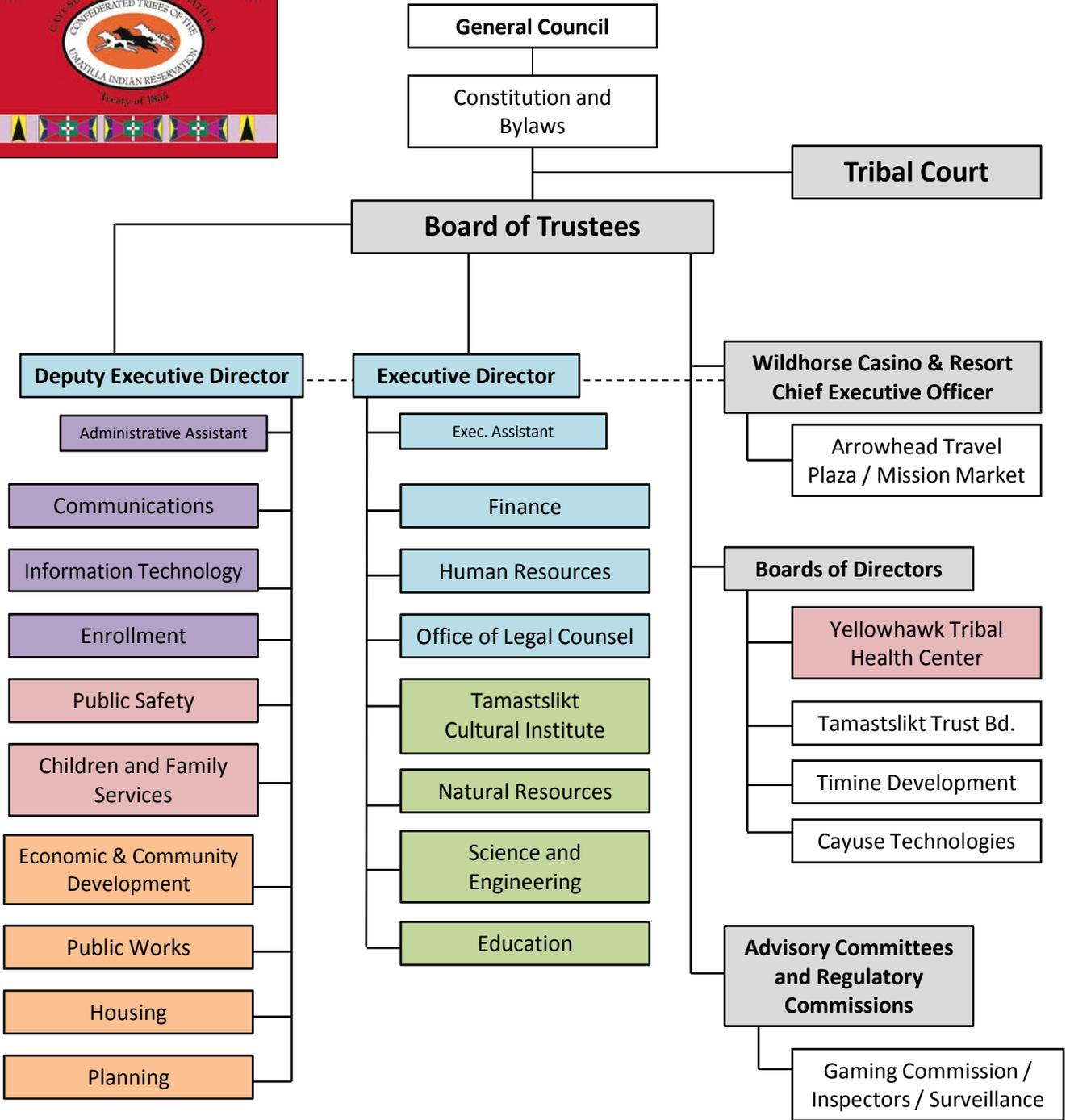
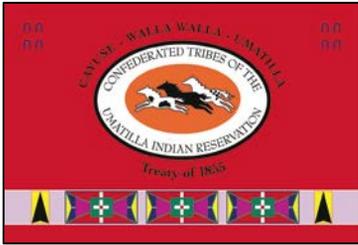
---

**Updated Jan. 2013. For more information on the Confederated Tribes of the Umatilla Indian Reservation call 541-276-3165, or write to the CTUIR at 46411 Timine Way, Pendleton, OR 97801.**

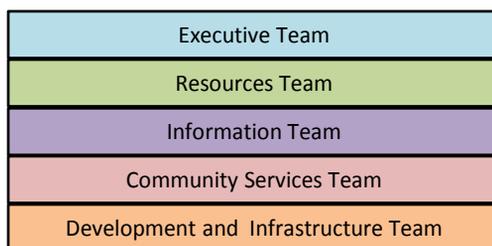
**<http://www.umatilla.nsn.us>. On Facebook at [www.facebook.com/CTUIR](http://www.facebook.com/CTUIR)**

---

# Confederated Tribes of the Umatilla Indian Reservation



**Staff Teams:**



# Confederated Tribes of the Umatilla Indian Reservation

## 2012 End of Year Labor Force Data

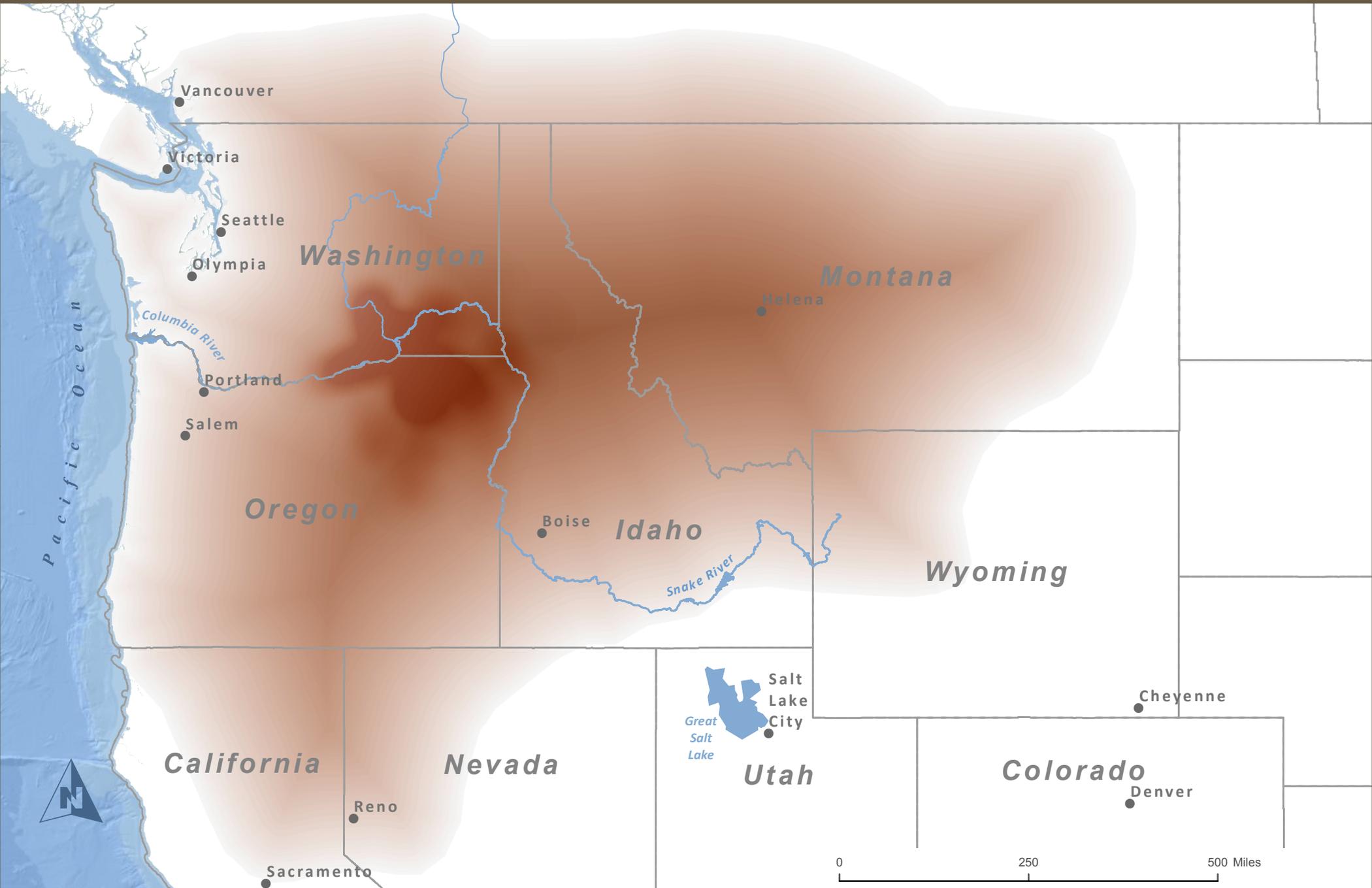
	Women	Men	CTUIR Tribal Member	Other Indian	Non-Indian	Total
Tribal Government *	203	227	201	63	166	430
Yellowhawk Clinic	70	25	37	16	42	95
Housing Authority #	8	10	10	3	5	18
<b>Total - Tribal Government</b>	<b>281</b>	<b>262</b>	<b>248</b>	<b>82</b>	<b>213</b>	<b>543</b>
			46%	15%	39%	
Cayuse Technologies	127	155	25	30	227	282
Wildhorse Resort	432	331	168	72	523	763
<b>Total - Enterprises</b>	<b>559</b>	<b>486</b>	<b>193</b>	<b>102</b>	<b>750</b>	<b>1045</b>
			18%	10%	72%	
<b>Grand Total</b>	<b>840</b>	<b>748</b>	<b>441</b>	<b>184</b>	<b>963</b>	<b>1588</b>
			28%	12%	61%	

\*Emergency-Hire and Special Project Employees are not reported for 2012, but were in 2011.

# Final Report for URHA. As of January 1, 2013 URHA incorporated as CTUIR Housing Department.

^ Beginning in 2012 Mission Market and Arrowhead Truck Plaza numbers are included in Wildhorse Resort

# Traditional Use by the Cayuse, Umatilla, Walla Walla Tribes



This map reflects traditional and customary areas used by the Cayuse, Umatilla and Walla Walla people over different seasons at or before treaty negotiations. Areas of heavier use are identified with darker color saturation. Data and information used to create this map includes the 1855 Treaty negotiation minutes, adjudicated use areas, oral histories information and documentation from literature. This map reflects non-exclusive traditional uses beyond current reservation boundaries, aboriginal lands and ceded lands defined by the Indian claims Commission findings – all of which are judicially established as inadequate to reflect the total extent of CTUIR uses, interests and rights under the Treaty. In many instances, the CTUIR Member used those areas in common with other tribes.



## Confederated Tribes of the Umatilla Indian Reservation

www.umatilla.nsn.us ~ phone 541-276-3165

# *Making a difference in northeastern Oregon*

Jan. 2013

### Jobs and Payroll

- Nearly 1,000 new jobs created since 1992.
- Total number of CTUIR employees: **nearly 1,600** (includes our Tribal government and our enterprises)
- 28% of total CTUIR jobs are held by CTUIR Tribal members; 12% of CTUIR jobs are held by Other Indians; 61% of CTUIR jobs are held by non-Indians
- **Total annual payroll of approximately \$50 million.**

### Operating Budget:

Operating budget of **\$228 million**. More than half of the budget is dedicated to operation of the Tribe's enterprises and about half is dedicated to providing governmental services to tribal members and residents of the Reservation.

### Gaming Profits:

Less than 20% of our Tribal government budget is revenue earned from gaming. The rest is revenue from interest earnings, taxes, federal and state funding, grants and contracts. According to the Tribes' Gaming Revenue Allocation Plan, 20% of gaming profits are distributed to the individual tribal members. In 1996 that amounted to \$500 a year to each tribal member; in 2007 each tribal member received roughly \$1,400 for the year. The remaining gaming profits are used to operate the CTUIR government and provide essential governmental services, invest in funds to enhance the Tribe's assets, provide scholarships to students, assist with burial expenses for tribal members, provide financial assistance to elders, fund economic development projects, and provide charitable contributions throughout the community.

In 2001 the **Wildhorse Foundation** was established to formally set in place the process of charitable giving on behalf of the CTUIR tribal government and its Wildhorse Casino. Since it was formed, the Foundation has donated more than **\$5 million to charitable organizations** and causes in Umatilla, Morrow, Union and Wallowa counties and in southeastern Washington. Three percent (3%) of the CTUIR's gaming revenue is earmarked for charitable giving.

### Tax Base:

The CTUIR imposes taxes on utilities operating on the Reservation, (electric, railroads, pipelines) as well as fuel, alcohol, cigarette and lodging taxes. These sources provide more than \$1 million in revenue. The CTUIR provides essential governmental services to all Reservation residents, including fire protection, police protection, water/sewer, solid waste disposal, zoning and land-use planning, and others without a major tax base like cities and counties.

### Major Economic Development Projects:

#### Coyote Business Park

- Coyote North (commercial Development- North of Freeway) completed Sept. 2007: 22 leasable acres
- Includes \$1.6 million water, sewer, road extension
- Coyote South (Industrial Development- South of Freeway) completed in Dec. 2008 – 140 leasable acres and 11 lots
- Coyote East (commercial development) completed in 2009 – 17 acres, 7 lots, north of Arrowhead Travel Plaza / south of Wildhorse Casino

### **Cayuse Technologies**

CTUIR's joint venture with Accenture LLP – Cayuse Technologies-- is operating at Coyote Business Park and employs more than 300 people in software development and business support services. Cayuse Technologies' on the job training in software development is allowing Northeast Oregon residents to enter this fast-growing industry without leaving home. The project is expected to utilize Reservation Enterprise Zone (first company in state to do so). A 40,000 sq. ft. facility was completed in Oct. 2007.

### **Davita Dialysis partnership**

CTUIR partnered with DaVita Inc., the nation's largest provider of dialysis services, in the construction of a new 12 bed, 5,800 square foot dialysis center at Coyote Business Park, reducing travel time for Northeast Oregon dialysis patients.

### **Energy Projects:**

- The CTUIR is a participant in the 104 megawatt **Rattlesnake Road Wind Farm** located near the town of Arlington, Oregon, which is just began operating. Horizon Wind Energy, LLC is the developer.
- **Yaka Energy** is the CTUIR's energy marketing business. It has now been certified as a minority owned and operated supplier of natural gas to utility companies by the National Minority Business Council, State of Oregon, and the California Public Utilities Commission. Yaka Energy currently has a pending application at the Small Business Administration to obtain its designation as an 8(a) minority business. Yaka Energy's customers are utility and gas companies located throughout the United States.
- **Wanapa Energy Center** is a partnership between the CTUIR, Port of Umatilla, and Eugene Water and Electric Board to develop proposed 500-1200 megawatt gas-fired energy facility. Wánapa Energy Center infrastructure will provide substantial benefit to adjacent industrial properties owned by the Port of Umatilla and the State of Oregon. The project is on hold due to current demand for electricity and the price of natural gas. The Tribes are pursuing other energy development options at this time.

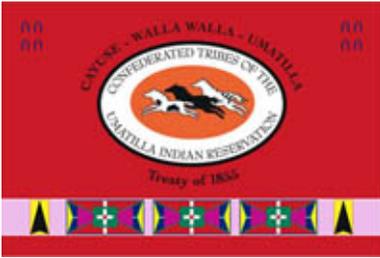
### **Successful Partnerships and Civic Participation**

Membership and Board representation on Round-Up City Development Corporation; Northeast Oregon Alliance; Pendleton Chamber of Commerce; Pendleton Progress Board, Greater Eastern Oregon Development Corporation; Eastern Oregon Telecommunications Consortium; Governor's Economic Strategy Advisory Group; Umatilla Chemical Weapons Depot Local Reuse Authority, among others.

Umatilla Basin irrigators and federal/state agencies on a nationally recognized fisheries project that has successfully restored salmon runs after 70 years of extinction AND kept the irrigated agriculture economy in tact. The Tribe is now working with irrigators in Walla Walla Basin on a similar project.

### **Lessons we've learned about Tribal economic development and its statewide and regional benefits:**

- 1. Reservations can attract unique businesses to Oregon.** - Cayuse Technologies was only looking for sites on Reservations.
- 2. Tribal economic growth has significant positive impact on the regional economy.** – Our Tribal government, Cayuse Technologies and Wildhorse Casino and Resort employ a mix of tribal and non-Indian employees. Many of these employees live, shop, and send their children to school off-Reservation.
- 3. Tribes have to be creative to survive, and are looking for ways to partner with local governments and off-Reservation businesses to grow.** - Like municipalities, tribal governments have obligations to provide essential governmental services (fire, police, zoning, housing, etc). Unlike municipalities, tribal governments don't have a tax base from which to fund these services. Revenue from Tribal enterprises must fill this need. Cayuse Technologies is a unique agreement with a Fortune 500 company – yielding revenues that will be taxed at 100% to pay essential governmental services.



# Gaming Profits...

## *and other facts about tribal gaming*

Confederated Tribes of the Umatilla Indian Reservation

46411 Timine Way, Pendleton, Oregon, 97801

Phone: 541-276-3165 fax: 541-276-3095

<http://www.umatilla.nsn.us>

---

---

When we began our gaming enterprise in late 1994, the Tribe adopted a **Gaming Revenue Allocation Plan** that outlines where gaming profits will be allocated. Within each category, the Board of Trustees, the Tribe's governing body, determines specifically which departments, programs and organizations receive funding.

- ❖ **Tribal Government** – Programs such as tribal court, foster care, building inspection, public works, rights protection, public information, fisheries, wildlife, and other activities that directly support Tribal Governmental responsibilities, operations and programs under Tribal law.
  
- ❖ **Tribal Welfare and Investments** -- Activities in this category deal with the long term security and enhancement of assets of the Tribes and its members. All investments are included in this category and include things like: scholarships, burial expense assistance, elders group, land acquisition, child protection, youth recreation program, housing improvement program, tribal language program, tutoring program, summer youth employment program, emergency housing assistance, and others.
  
- ❖ **Economic Development Projects** -- These are the costs associated with the development of new and expanded economic development projects by the Tribe, such as: resort management, Tamástsiht Cultural Institute, RV Park, Golf Course, gas station/convenience store, construction inspection, business service center, and others projects.
  
- ❖ **Charitable Contributions** – After the Tribe began earning gaming revenue, we began contributing directly to various charitable organizations. In addition, the Wildhorse Casino contributed to charitable causes and organizations separately from the Tribal government.  
  
In 2001 the **Wildhorse Foundation** was established to formally set in place the process of charitable giving on behalf of the CTUIR tribal government and its Wildhorse Casino. Since it was formed, the Foundation has donated more than \$4 million to charitable organizations and causes in Umatilla, Morrow, Union and Wallowa counties. Three percent (3%) of the CTUIR's gaming revenue is earmarked for charitable giving.
  
- ❖ **Dividends** – Dividends paid to each tribal member are based on 20% of our gaming revenue so the amount paid each year varies. In 1996 (the first full year after our casino opened) \$500 in dividends were paid to each tribal member. In 2007, each tribal member received just under \$1,400 for the year.

# Facts and Figures

## Confederated Tribes of the Umatilla Indian Reservation

	# of CTUIR Tribal Members	Unemployment rate	Total CTUIR Employees	Total annual payroll of CTUIR	CTUIR Operating Budget
Jan. 1992	1,456	37%	159	\$2.5 million	\$7.5 million
Jan. 1993		35%	184		\$9.3 million
Jan. 1994	1,492	34%	337		\$9.9 million
Nov. 1994	<i>Temporary casino opens</i>				
Jan. 1995	1,595	27%	507		\$12.7 million
March 1995	<i>Wildhorse casino opens (permanent structure)</i>				
Jan. 1996	1,876	21%	676		\$16.7 million
April 1996	<i>Tribe assumes management of Yellowhawk Clinic (formerly operated by Indian Health Service)</i>				
Jan 1997	1,975		701		\$43.2 million
Aug. 1997	<i>Wildhorse RV Park and Golf Course Open</i>				
Jan. 1998	2,082	19%	794		\$52.8 million
July 31, 1998	<i>Tamastlikt Cultural Institute opens</i>				
August, 1998	2,140				
Jan. 1, 1999	2,147		945		\$56.5 million
April, 1999	2,156		972		
August, 1999	2,174		986		
January, 2000	2,198	17%	951		\$73.5 million
October, 2000	<i>Tribe purchases Arrowhead Truck Plaza</i>				
January, 2001	2,262		1,121	\$24 million (yr. 2000)	\$81.5 million
January, 2003	2,377		994	\$31 million (yr. 2002)	\$97.3 million
January, 2005	2,461		1,078	\$32 million	\$114 million
January, 2006	2,536		1,066		\$126 million
October, 2006	<i>Tribe start new business: Cayuse Technologies</i>				
January, 2007	2,590		1,135 (May07)	\$35 million	\$145 million
January, 2009	2,743	13%	1,349		\$170 million
January, 2010	2,787		1,460		\$190 million
January, 2012	2,836				\$236 million
January, 2013	2,916	13%	1,588		\$228 million
<i>Note: the operating budget includes a variety of revenue sources such as grants and contracts, not just casino profits. It also includes operations of our enterprises, in addition to operation of Tribal government.</i>					

For more info on the Confederated Tribes of the Umatilla Indian Reservation, contact the Public Information Office at 541-429-7010, or 46411 Timine Way, Pendleton, OR 97801. On the web, <http://www.umatilla.nsn.us>