

**Oregon State Bar
Meeting of the Board of Governors
October 3, 2014
Special Open Session Agenda**

The Special Open Session Meeting of the Oregon State Bar Board of Governors will begin at 11:30 a.m. on October 3, 2014.

Friday, October 3, 2014, 11:30 a.m.

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| 1. Call to Order/Finalization of the Agenda | | | |
| 2. Legal Ethics Committee Proposal for Amending RPC 1.2 [Ms. Hierschbiel] | | | |
| A. Legal Ethics Committee's recommendation | Action | Exhibit | |
| 3. Approve HOD Agenda [Mr. Kranovich] | | | |
| A. Approval of Resolutions | Action | Exhibit | |
| B. Determine BOG Position on Delegate Resolutions and Identify Presenters and Speakers | Action | Exhibit | |
| 4. NBLSA Sponsorship Request [Ms. Hyland] | Action | Exhibit | |
| 5. PLF Board of Directors Vacancy Appointment [Ms. Bernick] | Action | Exhibit | |
| 6. Special Closed Executive Session – CLOSED Agenda | | | |
| A. Executive Session per ORS 192.660(2)(i) – E.D. Evaluation | Action | Handout | |

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: September 5, 2014
From: Helen M. Hierschbiel, General Counsel
Re: Legal Ethics Committee Recommendation
To Amend Oregon Rule of Professional Conduct 1.2

Issue

Consider the Legal Ethics Committee's recommendation to amend Oregon RPC 1.2 to address lawyers' duties in the face of conflicts between state and federal law.

Background

In November 1998, Oregon voters approved the Oregon Medical Marijuana Act (OMMA). The state implemented a registration program the following year and, early this year, a medical marijuana dispensary program. In November 2014, Oregon voters will decide whether to legalize and regulate the recreational use of marijuana.

Currently, lawyers are being asked to assist clients with various legal matters relating to the medical marijuana industry, such as: real estate transactions where use of the property will involve the cultivation, dispensation, sale or use of marijuana; entity formation for the purpose of operating a marijuana business authorized by OMMA; and, regulatory compliance with OMMA. If recreational use of marijuana is legalized in Oregon, the need for legal counsel will likely expand further. Lawyers have expressed concern that providing clients with legal advice or assistance relating to Oregon's medical marijuana laws may violate their professional responsibilities under RPC 1.2(c), which prohibits a lawyer from counseling or assisting a client to engage in conduct that the lawyer knows is illegal or fraudulent. While users, growers and dispensaries who comply with OMMA requirements are protected from state criminal prosecution for production, possession or delivery of marijuana, OMMA does not protect individuals from federal prosecution under the Federal Controlled Substances Act or related federal statutes. In other words, while the client's conduct may be legal under state law, it remains illegal under federal law. Thus, lawyers who assist their clients with such conduct, arguably violate Oregon RPC 1.2(c) as written.

Other states that have legalized the medical or recreational use of marijuana have encountered similar questions about the limitations imposed by Rule 1.2. The bars and courts in these other jurisdictions have responded in different ways. The State Bar of Arizona adopted a formal ethics opinion that allows lawyers to counsel or assist clients in legal matters permitted under the Arizona Medical Marijuana Act as long as: (1) the Act has not been held to be preempted, void or invalid; (2) the lawyer reasonably believes the client's conduct is allowed

under the Act; and (3) the lawyer advises the client about the federal law implications. See State Bar of Arizona Ethics Op No 11-01.

Not all states have agreed with Arizona's interpretation of Rule 1.2. For example, the Colorado Bar Association concluded in its formal ethics opinion, that "a lawyer cannot advise a client regarding the full panoply of conduct permitted by" Colorado's marijuana laws. Specifically, the Colorado Bar Association determined that the plain language of Rule 1.2 would prohibit lawyers from assisting clients in structuring or implementing transactions in furtherance of a marijuana business, because the client's conduct would violate federal law. See Colorado Bar Association Formal Op No 125. Subsequently, the Colorado Supreme Court adopted commentary to its Rule 1.2 which clarifies that lawyers may counsel and assist clients regarding their state's medical marijuana laws. To the extent that such laws conflict with federal law, the commentary also requires that lawyers advise the client regarding related federal law and policy. The Nevada Supreme Court followed suit, adopting commentary to its Rule 1.2, and the Washington Supreme Court is also considering adopting commentary to its Rule 1.2.

The Oregon Supreme Court has expressed any interest in adopting commentary to the Oregon Rules of Professional Conduct. According, that is not an option in Oregon. To resolve the uncertainty surrounding this issue, the OSB Board of Governors asked the OSB Legal Ethics Committee to either draft a formal ethics opinion or an amendment to the rules which would clarify that lawyers may provide legal counsel and assistance to clients with medical marijuana businesses without running afoul of their professional responsibilities.

A majority of the Legal Ethics Committee determined that any opinion they would draft would likely reach a conclusion similar to that reached by the Colorado Bar Association (i.e., that advising about conduct contrary to federal law would violate Rule 1.2). Moreover, the LEC felt that an amendment to RPC 1.2 would provide greater clarification and assurance to lawyers about the propriety of advising and assisting clients with their marijuana-related businesses. Therefore, the LEC drafted and recommends adoption of the following proposed amendment.

In order to avoid the unintended consequences of a very broadly worded exception to RPC 1.2(c), the LEC proposal limits the exception to marijuana-related laws. On the other hand, the proposal does not refer specifically to OMMA so that it would cover any issues that might similarly arise from the legalization of recreational marijuana. Given the continued existence of conflicting federal law, the LEC felt it important to require lawyers to advise clients about federal law and policy related to marijuana. This requirement is similar to language included both in the commentary adopted by the Colorado and Nevada Supreme Court, and in the Arizona Formal Ethics Opinion.

LEC Proposed Amendment to RPC 1.2

Rule 1.2 Scope of Representation and allocation of authority between client and lawyer

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

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

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

(d) Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon's marijuana-related laws. In the event Oregon law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.

Oregon State Bar
2014 House of Delegates Meeting

*Oregon State Bar Center
16037 SW Upper Boones Ferry Road
Tigard, Oregon 97224
503.620.0222
Friday, November 7, 2014
10:00 a.m.*

Oregon State Bar

Dear Oregon State Bar Member:

I am pleased to invite you to the 2014 OSB House of Delegates meeting, which will begin at **10:00 a.m.** on **Friday, November 7, 2014**, at the Oregon State Bar Center.

The preliminary agenda for the meeting includes several proposed amendments to the Oregon Rules of Professional Conduct, a resolution supporting adequate funding for low-income legal services, and two delegate requests to survey the membership, one about the OSB logo and the other about appropriate resolutions for the HOD. The agenda also includes a notice of the annual membership fees and assessments for 2015, which will remain unchanged from 2014.

All bar members are welcome and encouraged to participate in the discussion and debate of HOD agenda items, but only delegates may vote on resolutions. If you are unable to attend, please contact one of your delegates to express your views on the matters to be considered. Delegates are listed on the bar's website at www.osbar.org/_docs/leadership/hod/hodroster.pdf.

If you have questions concerning the House of Delegates meeting, please contact Camille Greene, Executive Assistant, by phone at 503-431-6386, by e-mail at cgreen@osbar.org, or toll free inside Oregon at 800-452-8260 ext 386.

Remember that delegates are eligible for reimbursement of round-trip mileage to and from the HOD meeting. Reimbursement is limited to 400 miles and expense reimbursement forms must be submitted within 30 days after the meeting.

I look forward to seeing you at the HOD Meeting on November 7, and I thank you in advance for your thoughtful consideration and debate of these items.



Tom Kranovich, OSB President

OREGON STATE BAR
2014 House of Delegates Meeting AGENDA

Oregon State Bar Center, 16037 SW Upper Boones Ferry Road, Tigard, Oregon 97224
10:00 a.m., Friday, November 7, 2014
Presiding Officer: Tom Kranovich, OSB President

Reports

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| 1. Call to Order | 4. Comments from the Chief Justice of the Oregon Supreme Court |
| <i>Tom Kranovich</i>
<i>OSB President</i> | <i>Thomas A. Balmer, Chief Justice</i>
<i>Oregon Supreme Court</i> |
| 2. Adoption of Final Meeting Agenda | 5. Report of the Board of Governors Budget and Finance Committee |
| <i>Tom Kranovich</i>
<i>OSB President</i> | <i>Hunter B. Emerick, Chair</i>
<i>BOG Budget and Finance Committee</i> |
| 3. Report of the President | 6. Overview of Parliamentary Procedure |
| <i>Tom Kranovich</i>
<i>OSB President</i> | <i>Alice M. Bartelt, Parliamentarian</i> |

Resolutions

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| 7. In Memoriam
(Board of Governors Resolution No. 1)
<i>Presenter: Tom Kranovich, OSB President</i> | 12. Amendment of Oregon Rule of Professional Conduct 1.2
(Delegate Resolution No. 1)
<i>Presenter: Eddie D. Medina, HOD, Region 4</i> |
| 8. Amendment of Oregon Rule of Professional Conduct 8.4
(Board of Governors Resolution No. 2)
<i>Presenter: David Elkanich?</i> | 13. Support for Adequate Funding for Legal Services to Low-Income Oregonians
(Delegate Resolution No. 2)

<i>Presenters:</i>
<i>Kathleen Evans, HOD, Region 6</i>
<i>Gerry Gaydos, HOD, Region 2</i>
<i>Ed Harnden, HOD, Region 5</i> |
| 9. Amendment of Oregon Rule of Professional Conduct 5.5
(Board of Governors Resolution No. 3)
<i>Presenter: Helen Hierschbiel, General Counsel</i> | 14. Investigation Regarding Change to Oregon State Bar Logo
(Delegate Resolution No. 3)
<i>Presenter: David Seulean, HOD, Region 3</i> |
| 10. Veterans Day Remembrance
(Board of Governors Resolution No. 4)
<i>Presenter: Richard Spier, BOG, Region 5</i> | 15. HOD Agenda Items
(Delegate Resolution No. 4)
<i>Presenter: Danny Lang, Douglas Co. Bar</i> |

Resolutions

7. In Memoriam
(Board of Governors Resolution No. 1)

Hon T. Abraham	Joseph A. Brislin Jr	David F. Cargo	Shannon K. Connall
Richard H. Allen	James W. Britt III	Richard R. Carney	Des Connall
Arthur R. Barrows	Nancy Elizabeth Brown	Robert R. Carney	Debra Deem
David S. Barrows	Franklyn N. Brown	Lawrence Lee Carter	Michael J. Dooney
William R. Barrows	Ellen P. Bump	James Casby	Edward Ray Fechtel
William O. Bassett	John H. Buttler	Kelly WG Clark	Douglas M. Fellows
Marc D. Blackman	Victor Calzaretta	Lynda A. Clark	Barbara H. Fredericks

George C. Fulton	Thomas A. Kennedy	C Richard Neely	Herman F. Smith
Joel A. Gallob	Peter R. Knipe	Robert J. Neuberger	Monica A. Smith
Caroline D. Glassman	James P. Leahy	Gregory A. Nielson	Scott D. Sonju
James B. Griswold	Hon Winfrid K.F. Liepe	Hon Albin W. Norblad	Harvard P. Spigal
Hon Harl H. Haas	Margaret M. Maginnis	Hon Jack F. Olsen	Garth F. Steltenpohl
Samuel A. Hall Sr	Michael V. Mahoney	James P. O'Neal	Sharon C. Stevens
Lloyd G. Hammel	Lisa A. Maybee	Michelle I. Pauly	Randolph J. Stevens
John N. Harp Jr	Daniel T. McCarthy	Walter H. Pendergrass	Robert H. Thomson
Eric Haws	William S. McDonald	Lester L. Rawls	Harold Uney
Donald E. Heisler	Lee J. McFarland	Steve Rissberger	Hon Darrell J. Williams
Loren D. Hicks	Rodney W. Miller	John Leslie Roe	Gerald Williams
Hon Ralph M. Holman	Robert Mix	Matthew C. Runkle	M Keith Wilson
James H. Huston	Richard H. Muller	William A. Sabel	
Hon Robert E. Jones	Stephen B. Murdock	Ross M. Shepard	

*Presenter: Tom Kranovich
OSB President*

8. Amendment of Oregon Rule of Professional Conduct 8.4 (Board of Governors Resolution No. 2)

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

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

Resolved, That the amendment of Oregon Rule of Professional Conduct 8.4 as set forth below is approved and shall be submitted to the Oregon Supreme Court for adoption:

RULE 8.4 MISCONDUCT

- (a) It is professional misconduct for a lawyer to:
 - (1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
 - (2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
 - (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;
 - (4) engage in conduct that is prejudicial to the administration of justice;
 - (5) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law; [or]
 - (6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law[.]; or

(7) in the course of representing a client, knowingly 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.

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

(c) Notwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein.

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 would 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 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. There were also two non-voting BOG liaisons.

In its charge from the BOG, 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 provided 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 recommended that the language set forth above be presented to the Board of Governors for its consideration. At its meeting on June 27, 2014, the BOG considered the Committee’s proposal and voted unanimously to recommend it to the HOD.

*Presenter: David Elkanich
RPC 8.4 Drafting Committee Member*

9. Amendment of Oregon Rule of Professional Conduct 5.5 (Board of Governors Resolution No. 3)

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

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

Resolved, That the amendment of Oregon Rule of Professional Conduct 5.5 as set forth below is approved and shall be submitted to the Oregon Supreme Court for adoption:

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE

- (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.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- (c) A lawyer admitted in another [*United States*] jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
 - (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
 - (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
 - (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternate dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission;
 - (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; or
 - (5) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission.
- (d) A lawyer admitted in another [*United States*] jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.
- (e) A lawyer who provides legal services in connection with a pending or potential arbitration proceeding to be held in his jurisdiction under paragraph (c)(3) of this rule must, upon engagement by the client, certify to the Oregon State Bar that:

- (1) the lawyer is in good standing in every jurisdiction in which the lawyer is admitted to practice; and
- (2) unless the lawyer is in-house counsel or an employee of a government client in the matter, that the lawyer
 - (i) carries professional liability insurance substantially equivalent to that required of Oregon lawyers, or
 - (ii) has notified the lawyer's client in writing that the lawyer does not have such insurance and that Oregon law requires Oregon lawyers to have such insurance.

The certificate must be accompanied by the administrative fee for the appearance established by the Oregon State Bar and proof of service on the arbitrator and other parties to the proceeding.

Background

In May 2013, the BOG appointed the Task Force on International Trade in Legal Services to study the effect of free trade agreements and the regulatory framework for lawyers practicing law in Oregon on the delivery of legal services across international borders.

The reasons for the Task Force were two-fold. First, international trade is increasingly important in Oregon. It supports nearly 490,000 jobs, and Oregon exports billions of dollars in goods and services annually to customers in 203 countries around the globe. Foreign-owned companies invest in Oregon and employ more than 40,000 Oregonians. Thus, Oregon lawyers are more often serving clients who have legal needs that cross international borders.

Second, in addition to the General Agreement on Trade in Services (GATS) and the North American Free Trade Agreement (NAFTA), the United States has negotiated 15 other international trade agreements all of which contain a common clause requiring that parties to the treaty ensure that domestic regulation measures do not create unnecessary barriers to trade. Lawyer regulation is no exception, and the federal government arguably has the power to compel states to ensure that their lawyer regulations do not unreasonably interfere with trade agreement obligations. Therefore, many jurisdictions are recognizing that reviewing regulations relating to the practice of law for "unnecessary barriers to trade" is a prudent undertaking.

The Task Force has studied issues relating to both permanent and temporary practice in Oregon by foreign-licensed lawyers and continues to work on its final report and recommendations. This proposal relates only to the Task Force's findings and recommendations relating to temporary practice by foreign-licensed lawyers.

A. Barriers to Trade

Oregon RPC 5.5(c) allows lawyers licensed in another U.S. jurisdiction to provide legal services in Oregon on a temporary basis under certain circumstances. In addition, Oregon RPC 5.5(d) allows lawyers licensed in other U.S. jurisdictions to provide legal services in Oregon when federal law specifically authorizes them to do so. Out-of-state lawyers may not establish a "systematic or continuous presence" within Oregon, nor hold themselves out to the public as admitted to practice in Oregon unless that is, in fact, the case.

Notably, RPC 5.5(c) and (d) do not apply to or otherwise address temporary law practice by lawyers licensed outside of the United States. In fact, unless they are also licensed in Oregon, lawyers licensed outside of the United States are not authorized to provide any legal services within the state of Oregon under any circumstances.

There are problems with the current approach. Given the pervasive expansion of international business transactions noted above, and lawyers' interests in supporting and advancing their clients' objectives in such matters, the Task Force assumed that more lawyers from outside the United States will seek to visit Oregon to provide legal services to their clients and that Oregon lawyers have an interest in encouraging such visits for the benefit of their clients. Although the Task Force found no empirical evidence for this conclusion, its members recounted numerous examples from their own experiences of needing or wanting foreign lawyers to provide legal services on a temporary basis to their clients. The rules of professional conduct as currently written, however, stand as a barrier to the provision of such services. The Task Force then asked whether the barrier is necessary. Laws prohibiting the practice of law without a license are consumer protection measures, the purpose of which are to protect the public from the consequences that flow from efforts to provide services by those who are neither trained nor qualified to do so. The Task Force expressed concern that precluding foreign lawyers from providing legal services on a temporary basis in Oregon—under the same terms and conditions that lawyers licensed in other U.S. jurisdictions do—is not necessary in order to protect the public and therefore constitutes an unnecessary barrier to trade. Specifically, the Task Force could not find any basis to conclude that a foreign-licensed lawyer would pose any more of a risk to consumers than an out-of-state lawyer would when providing services on a temporary basis as allowed under RPC 5.5(c) and (d). This conclusion is based in large part on the restrictions that currently exist within the rule that serve to protect the consumer.

B. Existing Rule and Effect of Changes

The proposed amendment would allow lawyers licensed to practice law outside of the United States to provide legal services on a temporary basis in Oregon to the same extent as lawyers who are licensed in other U.S. jurisdictions are currently allowed to do.

Currently, under RPC 5.5(c)(1) an out-of-state lawyer may provide legal services on a temporary basis in Oregon as long as undertaken in association with a lawyer admitted to practice in Oregon. The consumer is protected because services provided under this provision are undertaken in association with an Oregon lawyer.

Under the existing RPC 5.5(c)(2), an out of state lawyer may appear in Oregon courts as long as the lawyer complies with the *pro hac vice* admission requirements, including, associating with an Oregon lawyer who participates substantially in the matter, certifying that he or she will comply with all Oregon laws, and carrying professional liability insurance coverage substantially equivalent to that required of Oregon lawyers. See UTCR 3.170. Most importantly, the court in which the lawyer will be appearing has to approve pro hac vice admission and has continued oversight and ability to revoke the pro hac vice admission. Again, the consumer is protected by the strict requirements of pro hac vice admission and the oversight of the courts.

Currently, under RPC 5.5(c)(3) and (4), an out-of-state lawyer may provide legal services on a temporary basis in Oregon without association of local counsel so long as they arise out of or are reasonably related to the lawyer's practice in the jurisdiction in which the lawyer is licensed. Although this phrase has not been interpreted in Oregon, the ABA Model Rule 5.5, Comment [14] offers examples of how such a relationship might be determined:

The lawyer's client may have been previously represented by the lawyer or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

The underlying premise of RPC 5.5(c)(3) and (4) is that clients are protected either by virtue of having a past relationship with the lawyer or because the lawyer has some expertise in the area of law at issue. In addition, when an out-of-state lawyer provides legal services in connection with a mediation or arbitration in Oregon, the lawyer must complete the certification requirements set forth in RPC 5.5(e), which provide additional protections to the consumer.

Under current RPC 5.5(c)(5) an out of state lawyer may provide legal services to the lawyer's employer or its organizational affiliates. As noted by the ABA Model Rule commentary, provision of services in this context generally serves the interest of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

Finally, RPC 5.5(d) recognizes that federal law preempts state licensing requirements to the extent that the requirements hinder or obstruct the goals of the federal law. See *Sperry v. Florida ex rel. Florida Bar*, 373 US 379 (1963). Thus, where federal law allows foreign lawyers to practice, Oregon could not prohibit it, notwithstanding the current rule.

The proposed amendment would allow a foreign-licensed lawyer to provide legal services in Oregon on a temporary basis under the same conditions as set forth above. The same consumer protection measures that currently exist would be equally applicable to foreign lawyers. Furthermore, just like out-of-state lawyers, foreign lawyers would not be allowed to establish a "systematic or continuous presence" within Oregon, nor hold themselves out to the public as admitted to practice in Oregon unless that is, in fact, the case.

C. Comparison to ABA Model Rule

ABA Model Rule 5.5 takes a narrower approach than what is proposed here, permitting foreign-licensed lawyers to practice temporarily in a U.S. jurisdiction only as house counsel on foreign law issues or as otherwise authorized by federal law.

Connecticut, Indiana, Kansas and Wisconsin have adopted rules that are the same or similar to the ABA rule. Arizona and Alabama allow practice by foreign lawyers only when authorized by federal law. Ten jurisdictions (Colorado, Delaware, the District of Columbia, Florida, Georgia, Idaho, New Hampshire, North Carolina, Pennsylvania, and Virginia) have amended their Rule 5.5 in the same manner as proposed here.

D. Conclusion

Because of the potential problems with the current rule, the BOG concurs with the Task Force recommendation that RPC 5.5(c) and (d) be amended to allow the temporary practice of law in Oregon by lawyers licensed in jurisdictions outside of the United States. This can be accomplished simply by deleting the words "United States" from RPC 5.5(c) and (d).

*Presenter: Helen Hierschbiel
OSB General Counsel*

**10. Veterans Day Remembrance
(Board of Governors Resolution No. 4)**

Whereas, Military service is vital to the perpetuation of freedom and the rule of law; and

Whereas, Thousands of Oregonians have served in the military, and many have given their lives; now, therefore, be it

Resolved, That the Oregon State Bar hereby extends its gratitude to all those who have served, and are serving, in the military and further offers the most sincere condolences to the families and loved ones of those who have died serving their country.

*Presenter: Richard Spier
Board of Governors, Region 5*

**11. Amendment of Oregon Rule of Professional Conduct 1.2
(Board of Governors Resolution No. 5)**

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

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

Resolved, That the amendment of Oregon Rule of Professional Conduct 1.2 as set forth below is approved and shall be submitted to the Oregon Supreme Court for adoption:

**Rule 1.2 Scope of Representation and
allocation of authority between client and lawyer**

- (a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall

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

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

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

(d) Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon's marijuana-related laws. In the event Oregon law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.

Background

In November 1998, Oregon voters approved the Oregon Medical Marijuana Act (OMMA). The state implemented a registration program the following year and, early this year, a medical marijuana dispensary program. In November 2014, Oregon voters will decide whether to legalize and regulate the recreational use of marijuana.

Currently, lawyers are being asked to assist clients with various legal matters relating to the medical marijuana industry, such as: real estate transactions where use of the property will involve the cultivation, dispensation, sale or use of marijuana; entity formation for the purpose of operating a marijuana business authorized by OMMA; and, regulatory compliance with OMMA. If recreational use of marijuana is legalized in Oregon, the need for legal counsel will likely expand further.

While users, growers and dispensaries who comply with OMMA requirements are protected from state criminal prosecution for production, possession or delivery of marijuana, OMMA does not protect individuals from federal prosecution under the Federal Controlled Substances Act or related federal statutes. In other words, while the client's conduct may be legal under state law, it remains illegal under federal law. Thus, lawyers who assist their clients with such conduct, arguably violate Oregon RPC 1.2(c) as written.

Other states that have legalized the medical or recreational use of marijuana have encountered similar questions about the limitations imposed by Rule 1.2. The bars and courts in these other jurisdictions have responded in differing ways. The State Bar of Arizona adopted a formal ethics opinion that allows lawyers to counsel or assist clients in legal matters permitted under the Arizona Medical Marijuana Act as long as: (1) the Act has not been held to be preempted, void or invalid; (2) the lawyer reasonably believes the client's conduct is allowed under the Act; and

(3) the lawyer advises the client about the federal law implications. See State Bar of Arizona Ethics Op No 11-01.

By contrast, the Colorado Bar Association concluded in its formal ethics opinion that “a lawyer cannot advise a client regarding the full panoply of conduct permitted by” Colorado’s marijuana laws. Specifically, the Colorado Bar Association determined that the plain language of Rule 1.2 would prohibit lawyers from assisting clients in structuring or implementing transactions in furtherance of a marijuana business, because the client’s conduct would violate federal law. See Colorado Bar Association Formal Op No 125. Subsequently, the Colorado Supreme Court adopted commentary to its Rule 1.2 which clarifies that lawyers may counsel and assist clients regarding their state’s medical marijuana laws. To the extent that such laws conflict with federal law, the commentary also requires that lawyers advise the client regarding related federal law and policy. The Nevada Supreme Court followed suit, adopting commentary to its Rule 1.2, and the Washington Supreme Court is also considering adopting commentary to its Rule 1.2.

The Oregon Supreme Court has thus far declined to add commentary to the Oregon Rules of Professional Conduct, so the Colorado approach is not an option in Oregon. To resolve the uncertainty surrounding this issue, the OSB Board of Governors asked the OSB Legal Ethics Committee to either draft a formal ethics opinion or an amendment to the rules that would clarify that lawyers may provide legal counsel and assistance to clients with medical marijuana businesses without running afoul of their professional responsibilities.

A majority of the Legal Ethics Committee determined that any opinion they would draft would likely reach a conclusion similar to that reached by the Colorado Bar Association. Moreover, the LEC felt that an amendment to RPC 1.2 would provide greater clarification and assurance to lawyers about the propriety of advising and assisting clients with their marijuana-related businesses. Therefore, the LEC drafted and recommended adoption of the proposed amendment.

In order to avoid the unintended consequences of a very broadly worded exception to RPC 1.2(c), the LEC proposal limits the exception to marijuana-related laws. On the other hand, the proposal does not refer specifically to OMMA so that it would cover any issues that might similarly arise from the legalization of recreational marijuana. Given the continued existence of conflicting federal law, the LEC felt it important to require lawyers to advise clients about federal law and policy related to marijuana. This requirement is similar to language included both in the commentary adopted by the Colorado and Nevada Supreme Court, and in the Arizona Formal Ethics Opinion.

*Presenter: Helen Hierschbiel
OSB General Counsel*

**12. Amendment of Oregon Rule of Professional Conduct 1.2
(Delegate Resolution No. 1)**

Whereas, Oregon attorneys wish clarify the ethical duties of Oregon attorneys complying with current Oregon law; now, therefore, be it,

Resolved, That the Board of Governors formulate an amendment and/or subsection to ORPC 1.2(c), for approval by the House of Delegates and adoption by the Supreme Court, that clarifies ORPC 1.2(c) to allow a lawyer to assist a client in conduct that the lawyer reasonably believes is permitted by the Oregon Medical Marijuana Program, the Medical Marijuana Dispensary Program and any other Oregon law (including the 2014 Initiative Measure 91 – The Control, Regulation, and Taxation of Marijuana and Industrial Hemp if it passes) related to the use and regulation of marijuana and/or hemp including regulations, orders, and other state or local provisions implementing those laws. The clarification should also include a provision requiring the lawyer to advise the client regarding conflicting federal law and policy.

Background

Currently, ORPC 1.2(c) states that '[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

ORPC 1.2(c) is vague regarding the scope of counsel and assistance an Oregon attorney may give to clients wishing to conduct business under Oregon's Medical Marijuana Program, the Medical Marijuana Dispensary Program and the imminent legalization of recreational marijuana and hemp. This amendment would merely clarify that an attorney is not in violation of the ORPC's by working with businesses complying with Oregon law.

Clarification of ORPC 1.2 is necessary because the Colorado Bar Assoc. Ethics Committee recently interpreted a nearly identical rule (Colo. RPC 1.2(d)) to prohibit lawyers from (1) drafting or negotiating contracts to facilitate the purchase and sale of marijuana between businesses and/or (2) drafting or negotiating leases for properties or facilities, or contracts for resources or supplies, that clients intended to use to cultivate, manufacture, distribute, or sell marijuana. In addition, the Committee interpreted the rule to prohibit a lawyer from representing the lessor or supplier in such a transaction if the lawyer knew the client's intended uses of the property, facilities or supplies was related to marijuana. The Committee found that violation of the ethics rule occurred even though those transactions complied with Colorado law. Colo. Bar Assoc., *Formal Opinion 125 – The Extent to Which Lawyers May Represent Clients Regarding Marijuana-Related Activities*, 42 The Colo. Lawyer 19 (2013), http://www.cobar.org/tcl/tcl_articles.cfm?articleid=8370.

In direct response to the Committee's findings, the Colorado Supreme Court clarified Colo. RPC 1.2(d) and stated that it was not a violation of the Colo. RPC's for a lawyer to "counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, **and [a lawyer] may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them.** In these circumstances, the lawyer shall also advise the client regarding related federal law and policy." Colo. Rules of Prof.'l Conduct, Rule. 1.2[14].

In conclusion, without additional clarification of ORPC 1.2(c), Oregon attorneys run the risk of a violating the ORPC's by merely drafting or negotiating a contract on behalf of a business

participating in Oregon's legal marijuana/hemp marketplace. The fact that no disciplinary action has been taken to date against any Oregon lawyer regarding this specific ethical issue does not provide sufficient guidance or assurances to Oregon lawyers that wish to provide valuable and needed legal services to clients in this highly regulated industry.

Financial Impact: None.

*Presenter: Eddie D. Medina
House of Delegates, Region 4*

**13. Support of Adequate Funding for Legal Services for Low-Income Oregonians
(Delegate Resolution No. 2)**

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

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

Whereas, Programs providing civil legal services to low-income Oregonians is a fundamental component of the Bar's effort to provide such access; and

Whereas, Since 1998, pursuant to ORS 9.575, the Oregon State Bar has operated the Legal Services Program to manage and provide oversight for the state statutory allocation for legal aid in accordance with the Bar's Standards and Guidelines (which incorporate national standards for operating a statewide legal aid program); and

Whereas, Poverty in Oregon increased 61% between 2000 and 2011, the 8th largest increase in the nation, and most of Oregon's poor have nowhere to turn for free legal assistance; and

Whereas, During the great recession the staffing for legal aid programs was reduced while the poverty population in Oregon increased dramatically, thus broadening "the justice gap" in Oregon; and

Whereas, Oregon's legal aid program currently has resources to meet about 15% of the civil legal needs of Oregon's poor creating the largest "justice gap" for low-income and vulnerable Oregonians in recent history; and

Whereas, Oregon currently has 1 legal aid lawyer for every 9,440 low-income Oregonians, but the national standards for a minimally adequately funded legal aid program is 2 legal aid lawyers for every 10,000 low-income Oregonians; and

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

Resolved, That the Oregon State Bar:

(1) Strengthen its commitment and ongoing efforts to improve the availability of a full range of legal services to all citizens of our state, through the development and

maintenance of adequate support and funding for Oregon's legal aid programs and through support for the Campaign for Equal Justice.

(2) Request that Congress and the President of the United States make a genuine commitment to equal justice by adequately funding the Legal Services Corporation, which provides federal support for legal aid.

(3) Work with Oregon's legal aid programs and the Campaign for Equal Justice to preserve and increase state funding for legal aid and explore other sources of new funding.

(4) Actively participate in the efforts of the Campaign for Equal Justice to increase contributions by the Oregon legal community, by establishing goals of a 100% participation rate by members of the House of Delegates, 75% of Oregon State Bar Sections contributing \$50,000, and a 50% contribution rate by all lawyers.

(5) Support the Oregon Law Foundation and its efforts to increase resources through the interest on Lawyers Trust Accounts (IOLTA) program, and encourage Oregon lawyers to bank at OLF Leadership Banks that pay the highest IOLTA rates.

(6) Support the Campaign for Equal Justice in efforts to educate lawyers and the community about the legal needs of the poor, legal services delivery and access to justice for low-income and vulnerable Oregonians.

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

(8) Support the fundraising efforts of those nonprofit organizations that provide civil legal services to low-income Oregonians that do not receive funding from the Campaign for Equal Justice.

Background

"The mission of the Oregon State Bar is to serve justice by promoting respect for the rule of law, by improving the quality of legal services and by increasing access to justice." OSB Bylaw 1.2. One of the four main functions of the bar is to be "a provider of assistance to the public. As such, the bar seeks to ensure the fair administration of justice for all." *Id.*

The Board of Governors and the House of Delegates have adopted a series of resolutions supporting adequate funding for civil legal services in Oregon (Delegate Resolutions in 1996, 1997, 2002, 2005–2013). This resolution is similar to the resolution passed in 2013, but specifically provides updates regarding "justice gap".

The legal services organizations in Oregon were established by the state and local bar associations to increase access for low-income clients. The majority of the boards of the legal aid programs are appointed by state and local bar associations. The Oregon State Bar operates the Legal Services Program pursuant to ORS 9.572 to distribute the state statutory allocation for civil legal services and provide methods for evaluating the legal services programs. The Campaign for Equal Justice works collaboratively with the Oregon Law Foundation and the Oregon State Bar to support Oregon's legal aid programs. The Bar and the Oregon Law Foundation each appoint a member to serve on the board of the Campaign for Equal Justice.

Oregon's legal aid program consists of four separate non-profits that work together as part of an integrated service delivery system designed to provide high priority free civil legal services to

low-income Oregonians in all 36 Oregon counties through offices in 17 communities. There are two statewide programs, Legal Aid Services of Oregon (LASO) and the Oregon Law Center (OLC); and two county wide programs, Lane County Legal Aid and Advocacy Center and the Center for Non-Profit Legal Services (Jackson County). Because the need is great and resources are limited, legal aid offices address high priority civil legal issues such as safety from domestic violence, housing, consumer law, income maintenance (social security, unemployment insurance, and other self-sufficiency benefits), health, employment and individual rights. Over 40% of legal aid's cases are family law cases, usually helping victims of domestic violence. All of these programs work to stretch limited resources through pro bono programs and self help materials. Legal aid's website, oregonlawhelp.com receives about 70,000 unique visitors a year.

Providing access to justice and high quality legal representation to all Oregonians is a central and important mission of the Oregon State Bar. An Oregon study concluded that low-income Oregonians who have access to a legal aid lawyer have a much improved view of the legal system compared with those who do not have such access: 75% of individuals without access to a lawyer felt very negatively about the legal system, but of those who had access to a legal aid lawyer, 75% had a positive view of the legal system regardless of the outcome of their case. The 2014 Task Force on Legal Aid Funding, which included representatives of the Bar, the Law Foundation, the judiciary, the legislature and private practice concluded that legal aid funding should be doubled over the next 10 years. Because funding for legal aid is a state, federal and private partnership, with about 80 different sources of funding, increases in funding must be made across the board to address the justice gap.

Currently, slightly more than 20% of lawyers contribute to the Campaign for Equal Justice, but in some Oregon regions (Jackson County and Lane County, for example), participation is as high as 40%.

Presenters:
Kathleen Evans, HOD, Region 6
Gerry Gaydos, HOD, Region 2
Ed Harnden, HOD, Region 5

**14. Investigation Regarding Change of Oregon State Bar Logo
(Delegate Resolution No. 3)**

Whereas, The previous Douglas Fir logo of the Oregon State Bar was a beautiful symbolic representation for the Oregon State Bar; and

Whereas, The current logo of the Oregon State Bar is a simple block list sets forth no distinguishing characteristic logo for the Oregon State Bar; and

Whereas, Certain members of the Oregon State Bar have expressed an interest in changing the logo of the Oregon State Bar back to the Douglas Fir logo; now, therefore, be it

Resolved, The administrative staff of the Oregon State Bar shall investigate the costs associated with changing the Oregon State Bar logo back to the Douglas Fir logo and conduct a survey among members of the Oregon State Bar to determine whether or not a majority of the

membership of the Oregon State Bar desires a change back to the Douglas Fir logo and report such findings back to the membership of the Oregon State Bar House of Delegates for considering whether or not to change the logo of the Oregon State Bar back to the Douglas Fir logo at the 2015 Oregon State Bar House of Delegates meeting.

Background

The previous logo of the Oregon State Bar contained emblems of Douglas fir trees and presented a logo that uniquely represented the Oregon State Bar and its membership. The current logo is a simple block that does not make the representation for the bar and its members. A survey of the membership of the Oregon State Bar should be undertaken to determine logo the membership desires.

Financial impact: Financial impact of any change will be determined by its Oregon State Bar administrative staff research. Determination of the desire of the Oregon State Bar membership regarding a change of logo would be minimal.

*Presenter: David P.A. Seulean
House of Delegates, Region 3*

15. HOD Agenda Items (Delegate Resolution No. 4)

Whereas, Section 1.2 [Purposes] of the By-Laws of the Oregon State Bar includes providing for consideration of Matters relevant to the “Advancement of the Science of Jurisprudence”; and

*Whereas, Bar members and HOD Delegates have submitted Proposed HOD Agenda Items upon a variety of subjects under the umbrella of pertaining to the “*Advancement of the Science of Jurisprudence*”; and*

Whereas, examples of subject matter for inclusion may or may not include matter so Public Interest, such as the Oregon Death Penalty, legalization of marijuana, Gay Marriage, Gender and Economic Bias; compared with subjects limited to internal Oregon State Bar Issues such as Admittance, Bar Exam, and Discipline; and

Whereas, Issues have arisen among Oregon State Bar Members and within the Board of Governors as to whether or not each such topic qualified for inclusion upon the House of Delegates Agenda; now, therefore, be it

Resolved, That the House of Delegates recommends that the Board of Governors undertake a Survey of the Membership to better focus the scope of Matters allowed to be placed upon the House of Delegates Agenda and provide guidance/standards for inclusion or exclusion accordingly.

*Presenter: Danny Lang
Douglas County Bar Association Alternate for
Ron Sperry, III
Douglas County Bar Association President*

KELLY E. FORD, P.C.

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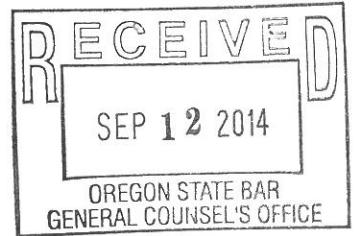
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kelly@kellyfordpc.com

September 11, 2014

Helen M Hierschbiel, General Counsel
Oregon State Bar
16037 SW Upper Boones Ferry Rd
PO Box 231935
Tigard OR 97281



Re: Comments for HOD's consideration of proposed revisions to RPC 8.4

Dear Helen,

You requested I join the ad hoc committee formed early this year for the purpose of editing the proposed revisions to RPC 8.4. The previous work on that rule had been approved by the BOG and by the HOD in its November, 2013 meeting, but were referred by the Supreme Court for reconsideration at its December, 2013 public meeting. I was a coauthor of comments to the Supreme Court concerning the 2013 version, containing constitutional and public policy concerns to the proposed amendments pending in 2013. Following the Court's rejection of the 2013 proposed amendments, BOG's charge to the ad hoc committee was to address the Court's constitutional concerns with the 2013 version, but not to revisit policy considerations to the rule's adoption. We followed that charge. I voted in favor of the new proposed amendments strictly in view of that limited charge, because I believe the new version is more likely to survive constitutional challenge than its predecessor. However, I do not agree the amendments should be enacted into the RPC.

These comments, which I ask you to include in the HOD members' package for the November 14th meeting, are directed to my continuing constitutional concerns, as well as to the advisability and necessity of enacting the amendments as now constituted.

Continuing Constitutional Concerns.

The committee struggled mightily to craft wording that would meet the stringent standard for protection of speech under the Oregon Constitution, Article I, Section 8. After several hours of attempting, unsuccessfully, to reach an agreed statement of attorney misconduct that results in listed proscribed effects, the committee defaulted to the "intimidate or harass" language contained in the current draft rule. This language, while not as patently unconstitutional as its predecessor, will still prove problematic, at least until tested under fire.

In *Oregon v. Johnson*, 191 P3d 665 (2008), the Oregon Supreme Court said this when it struck down a criminal harassment statute as a violation of Article I, Section 8 of the Oregon Constitution:

Harassment and annoyance are among common reactions to seeing or hearing gestures or words that one finds unpleasant. Words or gestures that cause only that kind of reaction, however, cannot be prohibited in a free society, even if the words or gestures occur publicly and are insulting, abusive, or both.

See also Oregon v. Harrington, 680 P2d 666 (OR 1984) and *Oregon v. Blair*, 601 P2d 766 (OR 1979). In *Oregon v. Hendrix*, 813 P2d 1115 (Or App 1991), the Court of Appeals upheld the constitutionality of Oregon's criminal racial intimidation statute against an Article I, Section 8 challenge because the statute prohibited inflicting physical injury on a victim, whereas in *Harrington, supra*, the court struck down a harassment statute under Article I Section 8 that provided

A person commits the crime of harassment if, with intent to harass, annoy or alarm another person, the actor . . . (b) publicly insults another by abusive or obscene words or gestures in a manner likely to provoke a violent or disorderly response.

Rejecting the state's argument the statute was directed at preventing violence, the court found the statute impermissibly punishes insulting language regardless of the effect upon the listener. Obviously, there is no element of physical injury or even threatened physical injury, to save our work from an Article I, Section 8 challenge.

It is impossible to know in advance whether the Supreme Court will afford attorneys in a disciplinary context the same speech protections as it does criminal defendants. The Court could extend the "incompatibility exception" developed in *In re Laswell*, 673 P.2d 855 (OR 1983) and *In re Fadeley* 802 P2d 31 (OR 1990) to this context and find the new rule facially constitutional, or, in light of the importance of zealous advocacy as a core principal of legal representation, it could apply a constitutional standard as rigorous as in *Johnson, supra* to protect attorneys acting on behalf of their clients. If it does, the committee's efforts will have failed.

Policy Considerations.

1. The amendments are largely unnecessary.

If a lawyer is guilty of criminal intimidation based on a protected category, the lawyer undoubtedly has committed a crime that "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects: ORPC 8.4 (a)(2). See, e.g., ORS 166.065; 166.155. So, the amendments to Rule 8.4 are unnecessary to apply discipline to such criminal conduct.

RPC 4.4(a) provides that "in representing a client or the lawyer's own interests, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, harass, or burden a third person . . ." In one respect this prohibition is *broader* than the proposed Rule 8.4

amendments, in that it is not restricted to conduct based on the third person's membership in a protected class. I criticized the committee's work in that respect, requesting to the group that the amendments be made generally applicable to all third persons, but I received no support in the committee for that position.

Existing RPC 4.4(a) in my opinion, adequately synthesizes the conduct that could be prohibited under the amendments to Rule 8.4, including its "legitimate advocacy" exception. In other words, in my opinion, Rule 4.4(a) already prohibits all the conduct that I believe should or would be prohibited by proposed Rule 8.4, as protected by the legitimate advocacy exception. If so, the amendments are redundant and should be rejected for that reason alone.

At best, the new rule would add a layer of uncertainty and confusion concerning how it could be constitutionally applied to conduct not already prohibited by ORPC 8.4(a)(2) and 4.4(a). I have heard no convincing explanation why the proposed rule is needed in the form we have written, insofar as punishing categories of behavior that should be, can be, but are not already punishable.

2. The amendments are under broad in who they protect.

The public policy underlying creating a prohibition on attorney speech that is intimidating or harassing is that the behavior causes undesirable effects - feelings of intimidation or harassment - in third parties under circumstances where the behavior is not part of the advocacy process. Due to attorneys' unique role in society, the argument goes, such conduct should not be permitted. But that public policy is not dependent upon – indeed, is completely unrelated to - the characteristics of the third party victims, insofar as I can discern. I know of no reason why an attorney should, for example, escape discipline for harassing behavior directed to a person's political beliefs if the same type of behavior is punishable when directed to the person's race or religion. Indeed, a complainant – based – on - politics could make out a violation of RPC 4.4(a) while being excluded from protection under Rule 8.4. This makes no sense to me. Whether or not this "under inclusiveness" survives constitutional concerns, a matter not researched by the committee, it is bad public policy in my view.

For the preceding reasons, my view is that the proposed amendments to RPC 8.4 are ill advised and should be rejected.

Thank you.

Very truly yours,

Kelly E. Ford

2014 HOD Resolutions

Item	Sponsor	Description	On HOD Agenda?	Presenter	BOG Position?	Presenter of BOG Position
7	BOG	In Memoriam	Yes	Tom Kranovich	n/a	n/a
8	BOG	Amend RPC 8.4		David Elkanich?		
9	BOG	Amend RPC 5.5		Helen Hierschbiel		
10	BOG	Veterans' Day Rememberance	Yes	Rich Spier		
11	BOG	Amend RPC 1.2				
12	Delegate	Amend RPC 1.2		Eddie D. Medina, HOD Reg 4		
13	Delegate	Adeq. Funding for Legal Svcs.		K.Evans/G.Gaydos/E.Harnden		
14	Delegate	Change OSB Logo		David Seulean, HOD Reg 3		
15	Delegate	HOD Agenda Items		Danny Lang, Douglas Co Bar		

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: October 3, 2014
From: Sylvia E. Stevens, Executive Director
Re: NBLSA Request for Sponsorship

Action Recommended

Consider the request of the National Black Law Students Association for sponsorship of its March 11-15 2015 annual convention that will be held in Portland.

Background

Royce Williams, Director of Corporate Relations for the NBLSA (and a student at Lewis & Clark Law School), requests that the Oregon State Bar be a sponsor of the NBLSA's 2015 annual convention that will be held in Portland. Although he suggests at the OSB sponsor at the \$5,000 Silver level, sponsorship opportunities begin at \$300.

The BOG will recall that a \$5,000 contribution to the ABA Young Lawyers Division October 2014 Fall Conference was approved in June 2014. In July, the BOG approved a \$250 donation to the Oregon Women Lawyers' 25th Anniversary Celebration.



NBLSA™

Striving to Balance Since 1968.



*We look forward to seeing you in Portland for the 47th Annual
National Black Law Students Association Convention!*

March 11-15 2015



Halimah Najieb-Locke
NATIONAL CHAIR

Caylin Young
NATIONAL VICE-CHAIR

Porscha Brown
NATIONAL SECRETARY

Antwan Williams
NATIONAL TREASURER

Anthony Franklyn
NATIONAL DIRECTOR-THURGOOD MARSHALL
MOCK TRIAL COMPETITION

Justin Mitchell
NATIONAL DIRECTOR-FREDERICK DOUGLASS
MOOT COURT COMPETITION

Erica Clark
NATIONAL DIRECTOR
OF COMMUNITY SERVICE

Jordan Hadley
ATTORNEY GENERAL

Alisha Lubin
NATIONAL DIRECTOR OF PROGRAMMING

Evelina Rene
MID-ATLANTIC REGIONAL CHAIR

Grace Akinlembola
MIDWEST REGIONAL CHAIR

John-Raphael Pichardo
NORTHEAST REGIONAL CHAIR

Myriah Downs
ROCKY MOUNTAIN REGIONAL CHAIR

Ellise Washington
SOUTHERN REGIONAL CHAIR

Erin McIntire
WESTERN REGIONAL CHAIR

Oluwafemi Masha
EXTERNAL CHIEF OF STAFF

Joy Anderson
INTERNAL CHIEF OF STAFF

ReAzalia Allen
NATIONAL DIRECTOR OF COMMUNICATIONS

Kim Brimm
NATIONAL DIRECTOR OF PUBLIC RELATIONS

Betty Gentle
NATIONAL DIRECTOR OF MEMBERSHIP

Simone Otenaika
NATIONAL CONVENTION COORDINATOR

Royce Williams
NATIONAL DIRECTOR
OF CORPORATE RELATIONS

Shawn Greene
NATIONAL FINANCIAL SECRETARY

Brandon Hicks
NATIONAL SOCIAL ACTION CHAIR

Julianne Kelly
NATIONAL DIRECTOR OF NELSON MANDELA
INTERNATIONAL NEGOTIATIONS
COMPETITION

Kiara Gradney
NATIONAL DIRECTOR OF EDUCATION
AND CAREER DEVELOPMENT

Cameo-Diamond Joseph
NATIONAL DIRECTOR OF INTERNATIONAL
RELATIONS

Kenneth Mitchell
NATIONAL DIRECTOR OF THE
PRE-LAW STUDENT DIVISION

Belasia Wallace
NATIONAL DIRECTOR OF ALUMNI AFFAIRS &
DEVELOPMENT

Donald Cooley
NATIONAL PARLIAMENTARIAN

Dania Lofton
NATIONAL HISTORIAN

A.J. Cooper, Esq.
IN-HOUSE COUNSEL

NATIONAL BLACK LAW STUDENTS ASSOCIATION

1225 11th Street, N.W., Washington, DC 20001

Dear Sir or Madam:

I bring you greetings on behalf of the National Black Law Students Association (NBLSA). It is my sincerest desire that this letter finds you well. NBLSA is a 501(c)(3) corporation and the nation's largest student-run organization representing nearly 6,000 minority law students from over 200 chapters and affiliates throughout the United States and six other countries. NBLSA will host its 47th annual convention in Portland, Oregon from March 11 -15, 2015. This is a three-day convention beginning with a reception Thursday and full day activities and seminars Friday and Saturday, culminating in a black tie banquet Saturday evening, and we invite you to join us.

The theme for the 2014-2015 term of NBLSA is *Igniting the Spirit of NBLSA on the Road to 50*. As we approach NBLSA's 50th Anniversary, we must press forward doing the great work of our organization and return to its mission to improve the relationship between Black law students, Black attorneys, and the American legal structure. In the 2014-2015 term, we will further our mission by strengthening our partnership with organizations like yours that increase our outreach for minority law students and align with our mission of increasing the diversity within the legal profession through academic and professional preparation. In addition to our national presence, NBLSA has overseas chapters in six different countries, including affiliates in Nigeria and South Africa. NBLSA has readily championed diversity in all its forms, and assisted with the formation of the National Latino/Latina Law Students Association ("NLLSA"), the National Association of Law Students with Disabilities ("NALSD"), and the National Asian Pacific American Law Student Association ("NAPALSA").

Our success greatly depends on the generosity of corporate sponsors. Serving as an official sponsor is an opportunity for your organization to become an active participant in NBLSA. Moreover, your sponsorship highlights your ongoing commitment to diversity in the legal profession and advances your company as an industry leader and agent of positive social change.

NBLSA members are not only talented law students, but also involved community advocates. Our alumni are among the most talented and respected legal practitioners and are active and influential community leaders. NBLSA remains committed to helping minority law students think intensively and critically to foster positive change in the world.

NBLSA's success greatly depends on the generosity of corporate sponsors and partners. Serving as an official sponsor for NBLSA's Annual National Convention is a great opportunity for your organization to become an active participant with NBLSA. Moreover, your sponsorship highlights your ongoing commitment to diversity in the legal profession and advances your company as an industry leader and agent of positive social change.

Attached to this cover letter are the levels of sponsorship that are available and the opportunities and benefits for each of the sponsorship levels. We truly hope that you will consider being a Silver Sponsor, \$5,000, or higher for our convention.

Thank you for your support,

Royce Williams
Lewis and Clark Law School | Juris Doctor Candidate 2015
National Director of Corporate Relations, 2014-2015
National Black Law Students Association

MEMBER DEMOGRAPHICS

NBLSA members are not only talented law students, but also involved community advocates. Our alumni are among the most talented and respected legal practitioners and are active and influential community leaders

Last year, over 200 schools were represented in our membership, including:

- The George Washington University
- John Marshall
- American University
- Columbia University
- Cornell University
- Duke University
- Emory University
- Florida A&M
- Georgia State University
- Georgetown University
- Harvard University
- Howard University
- Lewis and Clark
- Loyola University Chicago
- New York University
- North Carolina Central University
- Northwestern University
- Stanford University
- Southern University
- Southern Methodist University
- Texas Southern University
- Tulane University
- UCLA
- University of Missouri
- University of Pennsylvania
- University of Texas at Austin
- University of South Carolina
- University of Virginia
- University of Wisconsin
- Vermont
- Yale University

Last year NBLSA rose

A total in cash donation amount of
\$118,650
And

A total in-kind donation of \$83,750

**This year our goal with your
help is to raise \$500,000!**

CONVENTION SPONSORSHIP OPPORTUNITIES & BENEFITS

PLATINUM SPONSOR (15,000)

- Opportunity to deliver greetings/remarks Reception
- Seven all-access Convention passes **
- One reserved table at gala
- Table at Career Fair Expo
- Promotional item/material in all convention bags
- Recognition on NBLSA official signage
- Logo/link placement on website
- Recognition in NBLSA Magazine and Annual Report
- 2 page ad in Convention Guide to include but not limited to the back cover of the Convention Guide
- Recognition in Luncheon Programs
- Access to NBLSA Resume Book
- High visibility for logo on all Convention marketing materials
- Recognition as Platinum Sponsor in Convention Program included in Convention bag

GOLD SPONSOR (10,000)

- Opportunity to deliver greetings/remarks at an appropriate event
- Three all-access Convention passes **
- Table at Career Fair Expo
- Workshop panelist opportunities
- Logo on Convention materials and website
- Recognition as Gold Sponsor in Convention Program
- Recognition in NBLSA Magazine and Annual Report
- 1 page ad in Convention Guide
- Ability to provide marketing materials for Convention attendees
- Access to Resume Book

SILVER SPONSOR (5,000)

- Two all-access Convention passes **
- Table at Career Fair Expo
- Workshop panelist opportunities
- Logo/link placement on website
- Recognition in NBLSA Magazine
- 1/2 page ad in Convention Guide
- Recognition as Silver Sponsor in Convention Program
- Opportunity to have 2 representatives judge both the Thurgood Marshal Mock Trial Competition and the Fredrick Douglas Moot Court Competition

BRONZE SPONSOR (3,000)

- Recognition as Bronze Sponsor in Convention Program
- 1/4 page ad in Convention Guide
- One all-access Convention pass **
- Opportunity to have 1 representative judge both the Thurgood Marshal Mock Trial Competition and the Fredrick Douglas Moot Court Competition

COPPER SPONSOR (2,000)

- Recognition as Copper Sponsor in Convention Program
- One all-access Convention pass **
- Opportunity to have 1 representative judge either the Thurgood Marshal Mock Trial Competition, the Fredrick Douglas Moot Court Competition, or the Nelson Mandela International Negotiations Competition

CHROME SPONSOR (1,000)

- Recognition as Chrome Sponsor in Convention Program
- One all-access Convention pass**

**SPECIAL PACKAGES ARE AVAILABLE UPON REQUEST
ALL SPONSORSHIP LEVEL PRICING IS SUGGESTED**

**All-Access Convention pass includes tickets to all luncheons, receptions and gala in addition to the panels and networking opportunities during the convention.

Additional Convention Sponsorships and Benefits

EVENT PROGRAM ADVERTISEMENT \$250-\$750

Place your advertisement in the 47th Annual National Convention Program

The Event Program allows you to:

- Promote your organization's services, products, and career opportunities;
- Celebrate your NBLSA chapter's extraordinary accomplishments;
- Show support of a local, regional, or national NBLSA member; and
- Join us in celebrating 47 years of service to our communities. Highlight your moment with an:
 - Quarter-page advertisement - \$250
 - Half-page advertisement - \$500
 - Full-page advertisement. - \$750

VENDOR'S EXHIBITOR SPACE \$325

Exhibitor space allows you to showcase your services, products and distribute marketing materials to attendees throughout the 47th Annual National Convention.

T-Shirt sponsor \$3,500

Logo prominently displayed on official convention T-shirt

Bags \$3,500

Logo prominently displayed on outside of convention bag

Bag inserts \$2,500

Promotional item/material in all convention bags

Workshop sponsor \$2,000

Opportunity to pick topic and panelists for convention workshop

Convention Breakfast \$4,000

The Convention Breakfast will take place on

SPECIAL SPONSORSHIP OPPORTUNITIES 2015

CHAMPION CIRCLE (500)

- Recognition as a Champion of NBLSA in the Convention Program
- A Legacy of NBLSA Reception Sponsor

ADVOCATE CIRCLE (400)

- Recognition as an Advocate of NBLSA in the Convention Program
- A Legacy of NBLSA Reception Sponsor

SUPPORTER CIRCLE (300)

- Recognition as a
 - Reception Sponsor
 - Supporter of NBLSA in the Convention Program
- A Legacy of NBLSA

Competition Sponsorship Opportunities and Benefits

MOOT COURT COMPETITION SPONSOR \$10,000

The Moot Court Competition will be held from March 11-14, 2015

- Company logo on all NBLSA Moot Court Competition Materials
- Exclusive official NBLSA Moot Court Competition signage
- Recognition during gala
- Presentation of NBLSA Moot Court Awards at gala
- 5 all-access Convention passes
- Logo/link placement on website
- 1/2 page ad in Convention Guide
- Recognition in NBLSA Magazine and Annual Report

MOCK TRIAL COMPETITION SPONSOR \$10,000

The Mock Trial Competition will be held from March 11-14, 2015

- Company logo on all NBLSA Mock Trial Competition Materials
- Exclusive official NBLSA Mock Trial Competition signage
- Recognition during gala Presentation of NBLSA Mock Trial Awards at gala
- 5 all-access Convention passes
- Logo/link placement on website
- 1/2 page ad in Convention Guide
- Recognition in NBLSA Magazine and Annual Report

NEGOTIATIONS COMPETITION SPONSOR \$10,000

The Negotiations Competition will be held from March 11-14, 2015

- Company logo on all NBLSA Negotiations Competition Materials
- Exclusive official NBLSA Competition signage
- Recognition during gala Presentation of NBLSA Negotiations Awards at gala
- 5 all-access Convention passes
- Logo/link placement on website
- 1/4 page ad in Convention Guide
- Recognition in NBLSA Magazine and Annual Report

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: October 3, 2014
Memo Date: September 29, 2014
From: Carol Bernick, PLF CEO (Effective October 1, 2014)
Re: PLF Board of Directors

Action Recommended

Approve the PLF Board of Directors recommendation that Ira Zarov be appointed to immediately fill the vacant BOD position that resulted from board member John Berge's resignation.

Background

The PLF Board currently has a vacancy due to the resignation of John Berge, who has been hired by the PLF as a Claims Attorney starting September 29, 2014. Two regular course vacancies will arise when Guy Greco and Val Fisher's terms expire on December 31, 2014.

The Nominating Committee of the PLF Board and I will be submitting a slate of candidates for the two expiring terms for the BOG's consideration prior to your next regular meeting. However, I would like to ask the BOG to immediately fill John Berge's position with Ira Zarov. For reasons mostly related to my schedule, I was not able to join the PLF staff while Ira was still working. Ira and I have met several times and we were able to meet with the reinsurers in London in early September, which was invaluable; there was no change in rate for this renewal year. I have very much valued Ira's insights and "download" but there is much I am still learning. While I am confident that Ira would be generous with his time after his retirement in any circumstance, I believe the Board, the staff and I would all have a more seamless transition if Ira were appointed to the Board to fill the remaining 15 months of John's term.

I appreciate your consideration.