

Oregon State Bar
Meeting of the Board of Governors
 June 24, 2016
 Riverhouse Hotel, Bend, OR
Open Session Agenda

*The Open Session Meeting of the Oregon State Bar Board of Governors will begin at 1:00pm on June 24, 2016.
 Items on the agenda will not necessarily be discussed in the order as shown.*

Friday, June 24, 2016, 1:00pm

1. Call to Order / Finalization of Agenda

2. BOG Committees, Special Committees, Task Forces and Study Groups

A. Awards Special Committee [Ms. Hirschbiel]

1) Annual Awards Nomination Deadline June 30	Inform	Exhibit
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B. Policy & Governance [Mr. Levelle]

1) Judicial Administration Committee Sunset	Action	Exhibit
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2) Retired Inactive Status	Action	Exhibit
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3) OSB Bylaw Amendment re: Ethics Advice	Action	Exhibit
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4) OSB Bylaw Amendment re: Appellate Screening	Action	Exhibit
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C. Board Development Committee [Ms. Nordyke]

1) Oregon Law Commission Appointments	Action	Exhibit
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2) OSB House of Delegates Appointments	Action	Handout
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D. Budget & Finance Committee [Mr. Mansfield]

1) Financial Update	Inform	
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2) Investment Policy Bylaw Revisions	Action	Exhibits
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E. Public Affairs Committee [Mr. Ross]

1) Update	Inform	Handout
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2) Civil Rights Section Request	Action	Handout
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3. Professional Liability Fund [Ms. Bernick]

A. Financial Update	Inform	Exhibit
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B. Proposed Changes to PLF Policies 3.300 and 3.350	Action	Exhibit
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4. OSB Committees, Sections, Councils and Divisions

A. Discipline System Review Committee Update [Ms. Hirschbiel]	Inform	Exhibit
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B. Incubator Feasibility Study [Ms. Hirschbiel & Mr. Friedman]	Action	Exhibit
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C. Oregon New Lawyers Division Report [Mr. Andries]	Inform	Exhibit
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1) ABA YLD Rule Change Proposal Approval	Action	Exhibit
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| D. Legal Services Program Committee [Ms. Baker] | | | |
| 1) | Approve Recommendation for General Fund Disbursement | Action | Exhibit |
| E. Client Security Fund Committee [Ms. Hierschbiel] | | | |
| 1) Award Recommendation | | | |
| a) | GERBER (Middleton) 2015-43 | Action | Exhibit |
| 2) Request for Review | | | |
| a) | ECKREM (Smith) 2016-01 | Action | Exhibit |
| b) | WIESELMAN (Lowry) 2015-19 | Action | Exhibit |
| 3) | CSF Financial Reports and Claims Paid | Inform | Exhibit |
| F. Legal Ethics Committee [Ms. Hierschbiel] | | | |
| 1) | Update OSB Formal Ethics Opinions 2005-73 | Action | Exhibit |
| G. MCLE Committee | | | |
| 1) | Proposed Amendments to Rules and Regulations | Action | Posted 6/20 |
| H. Other | | | |
| 1) | OSB Sponsorship of Access to Justice Conference [Ms. Hierschbiel] | Action | Exhibit |
| 5. Consent Agenda | | | |
| A. Report of Officers & Executive Staff | | | |
| 1) | President's Report [Mr. Heysell] | Inform | |
| 2) | President-elect's Report [Mr. Levelle] | Inform | |
| 3) | Executive Director's Report [Ms. Hierschbiel] | Inform | Posted 6/20 |
| 4) | Director of Regulatory Services [Ms. Evans] | Inform | Exhibit |
| 5) | MBA Liaison Report [Mr. Levelle & Mr. Ramfjord] | Inform | |
| B. Approve Minutes of Prior BOG Meetings | | | |
| 1) | Regular Session April 22, 2016 | Action | Exhibit |
| 6. Closed Sessions – <u>CLOSED</u> Agenda | | | |
| A. Executive Session (pursuant to ORS 192.660(2)(f) and (h) and ORS 192.690(1)) | | | |
| 1) General Counsel/UPL Report | | | |
| 2) Reinstatements | | | |
| 7. Good of the Order (Non-Action Comments, Information and Notice of Need for Possible Future Board Action) | | | |
| A. Correspondence | | | |
| B. Articles of Interest | | | |

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2016
From: Helen Hirschbiel, Executive Director
Re: 2016 Awards Committee

Action Requested

Form an awards committee, chaired by the President, and including all interested board members.

Discussion

Each year, the Oregon State Bar presents the Award of Merit, President's Awards, and the Wallace P. Carson, Jr. Award for Judicial Excellence. In addition, the Oregon Bench and Bar Commission on Professionalism presents the Edwin J. Peterson Award. Nomination forms and criteria are attached to this memo and were included on the agenda at the April 22 BOG meeting. The nomination deadline is June 30 and board members were encouraged to submit nominations to Ms. Pulju.

In order to select the award recipients in time for the OSB Annual Awards Luncheon in December, an awards committee needs to be appointed at this time. The Awards Committee will meet during the July 22 BOG Committee meetings and prepare recommendations for the full board's consideration. On September 9, at the regular BOG meeting, award recipients will be selected. (This will be an action item with an exhibit that will be a handout.)

2016 Oregon State Bar Awards

The Oregon State Bar is seeking nominations for its annual awards. The Oregon State Bar presents the Award of Merit, President's Awards, and the Wallace P. Carson, Jr. Award for Judicial Excellence. The Oregon Bench and Bar Commission on Professionalism presents the Edwin J. Peterson Award. Please help us honor our most outstanding lawyers, judges and citizens by nominating your deserving colleagues for these awards.

Award of Merit

The Award of Merit is the highest honor that the bar can bestow. The recipient may be: 1) an Oregon lawyer who has made outstanding contributions to the bench, the bar and the community-at-large, and who exhibits the highest standards of professionalism; or 2) a non-lawyer who has made outstanding contributions to the bar and/or bench, and who exhibits the highest standards of service to the community-at-large. The award does not have to be granted every year, and only one award may be bestowed in any year.

Wallace P. Carson, Jr. Award for Judicial Excellence

The Wallace P. Carson, Jr. Award for Judicial Excellence honors a member of the state's judiciary. The criteria for the award are as follows: 1) a current or retired state court judge or federal judge; 2) who has made significant contributions to the judicial system; and 3) who is a model of professionalism, integrity and judicial independence.

President's Awards

President's Awards are presented in five categories: Diversity & Inclusion Membership Service, Public Service, Public Leadership and Sustainability. The Board of Governors wants to honor innovative, hard-working individuals who stand out because of their special contributions to the legal profession.

Diversity & Inclusion Award Criteria: The nominee must be an active or emeritus member of the Oregon State Bar, or an Oregon law firm; the nominee must have made recent significant contributions to the goal of increasing minority representation in the legal profession in Oregon through creative employment efforts, innovative recruitment and retention programs, advocacy or other significant efforts.

Membership Service Award Criteria: The nominee must have volunteered for the activity involved; must be an active or emeritus member of the Oregon State Bar; and must have made significant contributions to other lawyers through recent efforts in one or more of the following areas: OSB CLE programs or publications; OSB committees, sections, task forces, boards and other bar groups; the OSB legislative/public affairs process; or similar activities through local bar associations or other law-related groups.

Public Service Award Criteria: The nominee must have volunteered for the activity involved; must be an active or emeritus member of the Oregon State Bar; and must have made significant contributions to the public through recent efforts in one or more of the following areas: pro bono legal service to individuals or groups, law-related public education, coordination of public service law-related events (such as those associated with Law Day), service with community boards or organizations, or similar activities which benefit the public.

Public Leadership Award Criteria: The President's Public Leadership Award is given to someone who is not a member of the Oregon State Bar. The nominee must have made significant contributions in any of the areas covered by the president's awards to bar members.

Sustainability Award Criteria: The nominee must be an active or inactive member of the bar or be an Oregon law firm; the nominee must have made a significant contribution to the goal of sustainability in the legal profession in Oregon through education, advocacy, leadership in adopting sustainable business practices or other significant efforts.

Nomination Guidelines

To ensure full consideration of the nominee's contributions, your nomination packet should include:

1. Award Nomination Form: Fill in all requested information and specify the desired award category. A letter can be substituted if it includes the same information.
2. Supporting Detail: The thoroughness of this information can make the difference in the selection process. Supporting detail may include resume information, narratives describing significant contributions and special qualifications, a list of references with phone numbers, letters of recommendation, articles, etc.
3. Submitting Nominations: Nominations must be received by Thursday, June 30, 2016. Electronic submissions are preferred and should be sent to kpulju@osbar.org. Printed nominations should be mailed to: Oregon State Bar, Attn: Awards, P.O. Box 231935, Tigard, OR 97281-1935. For further assistance contact Kay via email or at (503) 431-6402 or 800-452-8260, ext. 402.

Selection Process

Nominations for the OSB awards will be reviewed by the Board of Governors Member Services Committee. The committee will recommend recipients to the Board of Governors. The Oregon Bench and Bar Commission on Professionalism will select the Edwin J. Peterson Award recipient.

Annual Awards Event

Award recipients will be honored at a luncheon on December 8, 2016 at The Sentinel Hotel (formerly The Governor Hotel) in Portland.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2016
From: Policy & Governance and Public Affairs Committees
Re: Judicial Administration Committee

Actions Recommended

1. Approve changes to the strategies contained in the 2014 Action Plan that support the OSB function as a partner with the judiciary.
2. Sunset the Judicial Administration Committee.

Background

On May 13, 2016, the Policy & Governance Committee had a joint meeting with the Public Affairs Committee to discuss a request from the Judicial Administration Committee ("JAC") that the Board approve a bar-wide survey regarding a wide variety of judicial administration matters. The intent of the survey was to solicit feedback from the membership about what the JAC charge and function should be. Seeking to understand the reason for the request (and to determine whether to recommend a survey to the BOG), the Committees took a broader look at the JAC and its current charge in the context of the OSB overall efforts to advance the bar's goal to support and protect the judiciary. This memo provides the background reviewed by the Committees and its recommendations for changes related to the strategies and means used to advance those strategies.

Partner with Judiciary Function

The OSB Board of Governors (BOG) is charged by the legislature (ORS 9.080) to "at all times direct its power to the advancement of the science of jurisprudence and the improvement of the administration of justice."¹ The OSB is also responsible, as an instrumentality of the Judicial Branch of the State of Oregon, for the regulation of the practice of law. As a unified bar, the OSB can use mandatory member fees only for activities that are germane to the purposes for which the bar was established. *Keller v. State Bar of California*, 496 US 1 (1990). The BOG has translated its statutory purposes into the following mission:

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.

¹ Webster's Dictionary defines jurisprudence as the "philosophy of law or the formal science of law." "The "administration of justice" has been defined in case law variously as the "systematic operation of the courts," the "orderly resolution of cases," the existence of a "fair and impartial tribunal," and "the procedural functioning and substantive interest of a party in a proceeding."

The Board has identified one of its five core functions to fulfill its mission as Guardian of the Judicial System, with a goal to support and protect the quality and integrity of the judicial system. The current strategies, and related activities, that the bar employs to advance that goal are:

1. Support adequate funding for the Judicial Branch
 - The BOG's top legislative priority for the last several years has been adequate funding for Oregon's courts. The Public Affairs Department advances this priority with advocacy related to funding for the judicial system as a whole, and more recently, with a focus on funding for Oregon eCourt, courthouse facilities and judicial compensation.
 - The Public Affairs Department also assists OJD in its legislative efforts around judicial funding, provides legal expertise to lawmakers regarding judicial system issues, supports the Citizens Campaign on Court Funding, and works with the bar's Media Relations team to increase public awareness of court funding issues.
2. Respond appropriately to challenges to the independence of the judiciary
 - The Public Affairs Department monitors legislative developments that could negatively impact judicial independence and manages the development of issues to facilitate an appropriate response and best outcome.
 - The bar has a policy for responding to unjust judicial criticism, particularly when the judicial canons may restrict a judge's ability to offer explanations to the public. Responses are coordinated by the Media Relations staff.
 - The Media Relations Director is a regular presenter at the annual new judge's conference, and frequently consults with individual judges on managing high-profile cases.
 - The Media Relations Director coordinates programs for the Bar/Press/Broadcasters council that work to improve media coverage of judicial system issues.
3. Participate meaningfully in judicial selection processes
 - The BOG's Appellate Screening Special Committee interviews candidates for appellate court appointments and makes recommendations to the Governor, and also serves as a resource for local bar screening committees.
 - The Member Services team conducts preferences polls for contested judicial elections, both at the primary and general election stages, and also will conduct preference polls for appointed positions at the request of the Governor.
 - The Media Relations team produces a popular Judicial Voter's Guide, which is posted on the bar's website and frequently cited by media sources.

- The bar plays a key role in notifying members about upcoming judicial vacancies and the application process for both state and federal positions.
4. Promote understanding of and respect for the rule of law and the legal profession
- The Communications & Public Services group produces a comprehensive online “library” of legal information topics intended for the public. Along with substantive law, there are topics on the courts, small claims court, judicial settlement conferences, hiring a lawyer, etc.
 - Past Legal Links programs have addressed the role of the judge in the U.S. justice system, and the new OSB Q&A video series will include questions on judges, lawyers and the rule of law.
 - The Media Relations Director works with the media to generate and shape media coverage that reflects on the courts and the legal profession.
 - The BOG provides monetary support to the Classroom Law Project, which supports civics education, teaching high school students the importance of active citizenship in a democratic government.
 - The Public Affairs Department produces and distributes an electronic newsletter, the Capitol Insider, which covers issues of importance to the judicial system and the legal profession.

Revisions to strategies

The Committees recommend that the Board amend Strategy #2. Referring to the “independence” of the judiciary has become somewhat controversial and arguably does not fully capture the types of challenges faced by the judiciary. A more apt strategy might be: “respond appropriately to challenges to a fair and impartial judiciary.”

In addition, Strategy #4 omits a key component of the bar’s historic public education piece, that is, to promote an understanding of the importance of the judicial system. The Committees recommend that the Board add that component to the fourth strategy, so that it reads “promote understanding of and respect for the rule of law, *the judicial system*, and the legal profession.”

Finally, the Committees noted that the current strategies do not fully capture the bar’s work in support of its efforts to protect the quality and integrity of the judicial system. For example, notably absent is any reference to the bar’s statutory purpose to “improve the administration of justice.” The Committees recommend that the Board include a strategy to “pursue improvements to the administration of justice.” The bar has been working to that end for years through the Public Affairs Department. Each year, the BOG approves a “law improvement package,” which includes legislative proposals that have been identified as

improvements to the administration of justice and sets forth the positions the bar will take on legislative proposals expected to arise in session. This work should be reflected in the bar's overall strategic functions and goals.

Judicial Administration Committee

The Judicial Administration Committee has historically helped the Board with its work to support and protect the judicial system by studying and making recommendations to the Board on a variety of system-wide judicial administration issues. It has ten specific responsibilities that are outlined in the attached charge.

Over the years, much of what the Committee was originally charged to do has been delegated to and is now being handled by other committees, commissions and groups. For example, the monitoring of eCourt implementation is now handled by the Oregon eCourt Implementation Task Force. Court facilities issues are now handled by the Court. The Board of Governors provides support to the Court on many issues of judicial administration—including facilities and funding—by making these issues a priority for the Public Affairs Committee and Department, and by approving a law improvement package for each legislative session. Judicial selection matters are handled by the BOG Appellate Screening Committee, and preference polling is handled by staff.

Finally, the Public Affairs Department identifies and monitors legislative developments that may be of interest to the BOG and bar members. The BOG Public Affairs Committee develops the policies that guide the Public Affairs Department work, and makes recommendations to the Board about positions the bar should take on legislative proposals. In turn, the Public Affairs Committee provides expertise and influence in the legislative process on issues affecting the legal profession and the justice system. In addition to members of the BOG Public Affairs Committee, the Public Affairs Department collaborates with hundreds of lawyer volunteers, most of whom are from bar sections and committees, both within and outside the bar, to accomplish this work. These include the following, with their corresponding charges:

- OSB Judicial Administration Committee
Study and make recommendations to the Board on matters concerning state judicial administration and the judiciary. Monitor and recommend improvement in technology, operation, discipline and funding with the judicial system.
- OSB Procedure and Practice Committee
Study and make recommendations to the Board on matters concerning the practice of law and procedural issues and rules matters governing disputes in Oregon. Monitor and recommend improvements in technology, court operations and the judicial system to facilitate the practice of law.
- OSB/OJD Task Force on Oregon eCourt
To work cooperatively with the Oregon Judicial Department and OSB members to monitor the ongoing operation of Oregon eCourt; to gather input and feedback from OSB members on how well Oregon eCourt is working for them and their staff; to propose solutions for problems identified by OSB members and court

staff, to maintain communication with OJD and continue to educate bar members about Oregon eCourt programs; and to provide periodic updates to the Board of Governors.

- Council on Court Procedures

Oregon public body responsible for creating, reviewing and amending the Oregon Rules of Civil Procedure that govern procedure and practice in all Oregon circuit courts.

- Uniform Trial Court Rules Committee

Chief Justice of Oregon Supreme Court appoints to review proposed changes to rules and make recommendations to Chief Justice, who has final authority to adopt, not adopt, or change the proposed UTCRs. See ORS 1.1002(a)(1); 1.006.

- State Family Law Advisory Committee (SFLAC)

Chief Justice of Oregon Supreme Court appoints to advise the State Court Administrator on family law issues in the courts. Researches and provides technical assistance on specific issues of concern in family law or pertaining to family courts. See ORS 3.436.

Because of the changing landscape and needs, the JAC has served, as a practical matter, primarily in only two roles over the last several years. First, it serves as a resource for staff and the board when system-wide issues arise for the judiciary that are not being addressed by other sections, committees, or groups. For example, when issues arose in the legislature around bail bonds, grand juries and eCourt, the JAC was able to provide expertise and assistance in developing a plan for response. In these cases, the JAC's role has not been long term; instead, it is typically short-term and reactionary.

Second, the JAC has worked with the courts to improve awareness of the important role of the judiciary in civil society. To that end, the speaker's bureau project has been a key area of focus for the Committee over the last several years. Committee members have spent considerable effort to develop a set of presentations for use by the courts to educate business and community leaders about how the judicial system works and the importance of a fair, impartial, and adequately funded judiciary. The JAC provides these materials to the county courts and assists the courts with identifying speaking opportunities in their communities.

At present, there appears to be limited interest in the speaker's bureau project and there are no obvious system-wide judicial administration issues for the committee to address. The 2015 JAC Annual Report noted that the JAC experienced a high rate of membership turnover in 2015. Several members resigned their membership, and those who remained had a low level of participation. The JAC recommended that the JAC and the bar consider whether there are other ongoing tasks that the group can participate in to improve membership interest and involvement.

Recommendation for the JAC

After a lengthy and thoughtful discussion, the P&G and Public Affairs Committees decided to recommend to the Board of Governors that the JAC be sunsetted. While the limited

remaining roles for the JAC are important, they do not warrant the time commitment required by full committee service. Further, the Committees identified no other activities that the JAC might undertake to advance the Board's goal to support and protect the judiciary. The speaker's bureau can be continued as a panel of volunteers and be administered by bar staff. The panel could do both community outreach and provide testimony to the legislature on court and legal services funding issues, as needed. All other system-wide judicial administration issues could be run through the Public Affairs Committee alone or through a task force or work group appointed as needed of individuals with backgrounds relevant to the particular judicial administration issue or issues at hand.

The Committees were chagrined that JAC had been slowly divested of its work and that volunteers were being appointed to serve without clear or meaningful purpose. In order to show that the BOG values the remaining JAC members, the Committees also suggest that the staff and BOG work with those members to find alternative volunteer opportunities at the OSB.

Staff has discussed this recommendation with the Chair of the JAC and has shared the Committees' recommendation with current JAC members. The JAC chair and one other committee member have commented that while they are sad to say goodbye to the JAC, they understand the decision to sunset and hope that they can provide assistance in some other realm. At the time of writing this memo, staff has received no other comments to the proposal.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2016
From: Policy & Governance Committee
Re: Inactive Retired Status Amendments

Action Recommended

Approve the proposed language for a new bylaws establishing Retired membership status as a category of inactive bar membership. The adoption of these bylaws would be in lieu of the bylaws adopted by the Board on January 9, 2016.

Discussion

At its meeting on January 9, 2016, after considerable discussion, the Board voted to enact bylaw amendments to create the new Retired membership status. In order to fully implement Retired status, the bar planned to also seek related statutory and MCLE Rule changes.

After the January board meeting, staff began to explore ways in which the bar might avoid pursuing statutory amendments to implement the new retired status. Amending the bylaws to provide that Retired status be a subcategory of inactive status would obviate the need for statutory changes, and simplify implementation. With this approach Retired Status would become a subcategory of Inactive Status in the same way Active Pro Bono status is a subcategory of Active status.

The new status would still be called "Retired" status. Lawyers who transfer to Retired status would be entitled to hold themselves out as Retired members of the bar. As the board previously recognized, one benefit of a retired status is to significant contributions to the legal community that are made by members who are age 65 or better after they cease practicing law.

Recommendation

Adopt the bylaw amendment and rule changes outlined below, in lieu of the bylaw amendment and rule changes adopted on January 9, 2016 to make Retired status a subcategory of Inactive status.

Article 6 Membership Classification and Fees

Section 6.1 Classification of Members

Subsection 6.100 General

Members of the Bar are classified as follows:

(a) Active member - Any member of the Bar admitted to practice law in the State of Oregon who is not an inactive or suspended member. Active members include Active Pro Bono members.

(b) Inactive member - A member of the Bar who does not practice law may be enrolled as an inactive member. The "practice of law" for purposes of this subsection consists of providing legal services to public, corporate or individual clients or the performing of the duties of a position that federal, state, county or municipal law requires to be occupied by a person admitted to the practice of law in Oregon. Inactive members include Retired members.

Subsection 6.102 Retired Status

(a) Purpose

(b) The purpose of the Retired category of inactive members in the Bar is to recognize the continuing contributions to the legal profession of members who are at least 65 years of age and are retired from the practice of law.

(c) -Eligibility for Retired Status

A member of the Bar who is at least 65 years old and who is retired from the practice of law (as defined in paragraph 6.100(b)) may be enrolled as a retired member.

(d) Membership Fees.

Retired members are assessed a fee that is equivalent to the inactive membership fee.

(e) Transfer of Membership

Retired members wishing to resume regular active membership status must comply with BR 8.14.

Other OSB Bylaws

Article 3 House of Delegates

Section 3.4 Meeting Agenda

After receiving all resolutions, the Board must prepare an agenda for the House. The Board may exclude resolutions from the agenda that are inconsistent with the Oregon or United States constitutions, are outside the scope of the Bar's statutory mission or are determined by the Board to be outside the scope of a mandatory bar's activity under the U.S. Supreme Court decision in Keller v. the State Bar of California. The House agenda, including any resolutions that the Board has excluded, must be published by the Board, with notice thereof, to all ~~active and inactive~~ bar members, at least 20 days in advance of the House meeting.

Article 17 Member Services¹**~~Section 17.2 Insurance~~**

~~Providers of Bar sponsored insurance may use the Bar's logo in their advertising and promotional material with the prior approval of the Executive Director. They may also indicate approval or endorsement by the Board in such material if the Board has approved or endorsed the insurance. Inactive membership status does not affect the eligibility of a member for bar sponsored insurance.~~

Bar Rules of Procedure**Title 1 – General Provisions****Rule 1.11 Designation of Contact Information.**

(a) All attorneys must designate, on a form approved by the Oregon State Bar, a current business address and telephone number, or in the absence thereof, a current residence address and telephone number. A post office address designation must be accompanied by a street address.

(b) All attorneys must also designate an e-mail address for receipt of bar notices and correspondence except ~~(i) attorneys whose status is are over the age of 65 and fully retired from the practice of law and (ii) attorneys for whom reasonable accommodation is required by applicable law. For purposes of this rule an attorney is "fully retired from the practice of law" if the attorney does not engage at any time in any activity that constitutes the practice of law including, without limitation, activities described in OSB bylaws 6.100 and 20.2.~~

¹ This bylaw is an overlooked vestige of time when we had a bar-sponsored insurance program in which members could participate, and should have been deleted long ago.

(c) An attorney seeking an exemption from the e-mail address requirement ~~for the reasons stated in~~ paragraph (b)(ii) must submit a written request to the Executive Director, whose decision on the request will be final.

(d) It is the duty of all attorneys promptly to notify the Oregon State Bar in writing of any change in his or her contact information. A new designation shall not become effective until actually received by the Oregon State Bar.

OREGON STATE BAR

Governance & Strategic Planning Committee Agenda

Meeting Date: June 24, 2016
From: Amber Hollister, General Counsel
Re: Revision to Legal Ethics Questions and Opinions
OSB Bylaw Article 19

Action Recommended

Approve the proposed language for a revision to Article 19 of the bylaws to clarify that information and materials provided to General Counsel as part of an ethics question or request for ethics opinion are not confidential, and may be shared with the public or other bar departments.

Background

General Counsel regularly provides prospective ethics advice to members about their own conduct – both over the phone and in writing. The “ethics hotline” is a popular member benefit, utilized by hundreds of members every year.

Bar staff who field ethics inquiries habitually remind members that because there is no attorney-client relationship between the members and bar staff, members should not share client confidences. After all, information and materials submitted to General Counsel as part of an ethics inquiry are public records, subject to disclosure upon request. The current bylaws, General Counsel’s “Ethics Home” web page, and various bar bulletin articles reinforce this message.

Even so, members have requested that the bar provide greater clarity on how information and materials provided to General Counsel during an ethics inquiry might be used by the bar. Amending OSB Bylaw Article 19, which outlines how and when General Counsel provides ethics guidance to members, would provide some degree of additional clarity.

The amendments proposed below reinforce the message that information shared with General Counsel is not confidential in two ways. First, the amendments direct members to submit their ethics questions in hypothetical form or obtain client informed consent prior to making any disclosure of confidential information. Second, the amendments plainly state that information and materials shared with General Counsel may be shared with the public, the Client Assistance Office or Disciplinary Counsel.

As a housekeeping measure, the proposed amendments also explain that General Counsel will not provide an opinion to members about the conduct of other members, except

to provide advice on whether they have a duty to report misconduct under Oregon RPC 8.3 (this is not a new limitation – the current bylaws already state the inquiry must be about the inquirer’s own conduct). As a practical matter, General Counsel gives lawyers who ask about other lawyers’ conduct general information about the application of the rules, and points the lawyers to the Client Assistance Office should they wish to make a complaint. The proposed amendments also delete the timeline for a response to an ethics inquiry. The General Counsel departmental performance measures already contain the same timeline for response to ethics questions; while benchmarks are important, this level of detail seems out of place in the bylaws.

Options

1. Adopt the recommended amendments to OSB Bylaw Article 19 outlined below.
2. Decline to amend the bylaws.

Article 19 Legal Ethics Questions and Opinions

Section 19.1 General Counsel's Office

Subsection 19.100 Submission and Questions

All legal ethics questions ~~from members or the public~~ regarding the propriety of a proposed course or act of professional conduct or the intent or interpretation of a rule or statute regulating the professional conduct of members of the Bar must be submitted or referred to General Counsel's office. Legal ethics questions may be submitted in writing ~~by mail, e-mail, fax~~ or by telephone.

Subsection 19.101 Determination by General Counsel

General Counsel's office will determine whether the matter appears to present or involve a question of ethics or professional conduct and whether ~~it the inquirer states has provided~~ facts sufficient to permit the formulation of an opinion ~~based on the facts stated~~. General Counsel's office may ask the inquirer to submit necessary additional facts or may advise the inquirer that no question of ethics or professional conduct is presented or involved.

Subsection 19.102 Ethics Advice to Bar Members

General Counsel's office will endeavor to assist bar members in analyzing the ethics of the inquirer's prospective conduct and may provide reactions to the questions presented. General Counsel will not offer an ethics opinion on past conduct by other members, except to assist a member to determine whether conduct described implicates the inquiring member's duty to report another lawyer's misconduct under Oregon RPC 8.3. Ethics questions and responses ~~thereto~~ are not confidential and communications with General Counsel's office are not privileged. No attorney-client relationship is intended or created by such communications with the Bar. Members should submit ethics questions in a hypothetical form that does not disclose client confidences, or obtain their client's informed consent prior to disclosure. Members submitting ethics questions must specify a deadline by which they need a response from the Bar. General Counsel's office will endeavor to meet the member's deadline, but General Counsel's office always has at least three business days after receiving a member's question to provide a written response to the member. Materials submitted to General Counsel in connection with ethics inquiries are public records, and may be disclosed by General Counsel to the public, the Client Assistance Office or Disciplinary Counsel's Office.

Subsection 19.103 Application of Oregon RPC 8.6

For Oregon RPC 8.~~5-6~~ to apply to a request for ethics assistance, a member must put his or her ethics question in writing. ~~"In writing" includes letters, faxes or e-mails.~~ General Counsel's office will respond in writing, ~~by fax, e-mail or regular mail,~~ as time allows. The Bar will retain all written ethics assistance requests and General Counsel's office responses for at least five years and those requests are public records. General Counsel's office has the discretion to decline to provide a written response, if it determines that the question should be considered by the Legal Ethics Committee due to the difficulty, complexity or novelty that the question raises or the difficulty or complexity of an appropriate response. Members must provide General Counsel's office and the Legal Ethics Committee with accurate, and as complete as possible, explanations of the facts underlying their ethics questions. ~~General Counsel's office may ask the inquirer to submit additional or clarifying information and the timeframe for response as set forth in Subsection 19.102 of the Bar's Bylaws does not begin until General Counsel's office receives the requested information.~~

Section 19.2 Limitation of Advice

Responses and opinions provided by General Counsel's office, the Legal Ethics Committee and the Board of Governors are limited to and deemed to address only the facts as submitted in writing by the inquirer.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2016
From: Policy & Governance Committee
Re: Proposed Amendment to Bylaw 2.703

Actions Recommended

Waive the one meeting notice requirement and approve changes to the appellate screening bylaws.

Background

On March 13, 2016, Josh Ross presented to the Policy and Governance Committee proposed changes to OSB Bylaw 2.703 based on his experience chairing the BOG Appellate Screening Committee in 2015. Mr. Ross's memo to the P&G Committee is attached.

With one slight change, the P&G Committee approved the proposed amendments, conditioned upon the proposal being submitted to the Governor's Office for review and comment.

Mr. Ross reached out to Misha Isaak in the Governor's Office about the proposed amendments. Mr. Isaak indicated that the Governor's Office was fine with the proposal and noted that the opportunity to participate in interviews with the Committee has been very helpful to the Governor.

At its meeting on April 22, 2016, the P&G Committee approved the proposed amendments to the appellate screening bylaws and recommends that they be approved by the Board of Governors. The proposed amendments (as revised by the P&G Committee) are attached.

Attachments: Ross Memo to P&G Committee

Redline of Proposed Amendments to OSB Bylaw 2.703

Memorandum

To: Policy and Governance Committee
From: Josh Ross
Date: February 18, 2016
Re: Proposed Changes to Bylaw 2.703

Attached to this memo are two documents which show proposed changes to OSB Bylaw 2.703. The first document shows the proposed changes in “redline” with the existing rule. The second document shows the proposed changes as they would appear if adopted.

Bylaw 2.703 generally governs the manner in which the BOG conducts its appellate screening process for statewide judicial appointments. This memorandum follows my experience chairing the committee during the last appointment cycle and explains the reasoning for my suggestions.

1. A number of the proposed changes are not substantive, but aim to make the rules clearer and internally consistent. For example, throughout the existing rules there are inconsistent references to the “appellate recommendation process,” the “bar’s review process,” and the “due diligence review.” I recommend the Bylaws only refer to the “appellate recommendation process” and the Appellate Selection Committee’s “review” of candidates. Another example is that I recommend moving existing Bylaw 2.703(b) to a more logical place, as new subsection (d). The reasons for other proposed changes of this sort are hopefully apparent.
2. I recommend changes to existing Bylaw 2.703(c) [shown as subsection (b) in the proposal] to clarify that the Appellate Selection Committee itself should establish the process by which it will conduct its work in each cycle. The existing rule, arguably, requires the committee to conduct interviews of all candidates and to conduct a thorough review of all candidates. I believe those decisions should be left to the committee based on the timelines and circumstances presented in a given cycle. This issue may arise, for example, when an extraordinary number of candidates submit applications, or if the timelines set by the Governor’s office demand particularly quick work. I recommend that the committee have the ability to make decisions regarding how it will conduct the appellate recommendation process within the scope of the Bylaw.
3. I propose deleting existing Bylaw 2.703(e). As written, any candidate who is deemed highly qualified is not “required” to reapply or be “re-interviewed,” but the Board must ask those candidates to update their materials. This rule seems unnecessary because the rule *does not* require the committee to include a previously highly qualified candidate on the list submitted to the Governor in a later appointment cycle. Instead, it simply gives a candidate the *option* not to participate when, in reality, all candidates have that option—no one is required to apply or be interviewed. Short of a rule requiring that a highly qualified designation “carry over” from one cycle to a next, each candidate in each cycle will have to decide whether or not to participate in our process and, so, the existing Bylaw is unnecessary.

Section 2.7 Judicial Selection

Subsection 2.703 Statewide Judicial Appointments

(a) For judicial appointments to a statewide court, the Board will appoint an Appellate Selection Committee to conduct the Board's appellate recommendation process. Bar members will be notified of the impending appointment and will be invited to participate in the ~~Board's~~ appellate recommendation process. If an appellate recommendation process has been concluded within three months preceding the announcement of a new appellate vacancy, the Board may, in its discretion, forego ~~has the option of not~~ conducting a separate appellate recommendation process and instead resubmit ~~, but resubmitting~~ the previous list of highly qualified candidates to the Governor without notification to members.

~~(b) In addition to submitting its list of "highly qualified" candidates, the Board will respond to any specific request of the Governor whether certain other candidates in the pool meet a "qualified" standard. A "highly qualified" or "qualified" recommendation is intended to be objective. Failure to recommend a candidate in any particular selection process is not a finding that the person is unqualified.~~

~~(b)~~ Prior to commencement of the appellate recommendation process, t~~The~~ Appellate Selection Committee shall establish policies and criteria for conducting its review of candidates for each position, which may ~~bar's review process will~~ include, but is not limited to, review of the written applications; interviews of each candidate~~s, unless waived~~; reports from judges or hearings officers ~~before whom the candidate has appeared~~; reports from opposing counsel in recent cases or other matters~~members of the legal and general community~~; reports from references supplied by the candidate; and review of writing samples.

~~(c)~~ Upon completion of the due diligence review, t~~The~~ Board's a~~Appellate Selection Committee~~ will recommend to the Board at least three candidates it believes are highly qualified, based on the statutory requirements of the position, as well as information obtained in the its review of candidates~~process~~, and based on at least the following criteria: integrity, legal knowledge and ability, professional experience, cultural competency, judicial temperament, diligence, health, financial responsibility, and public service. The Board will then determine the final list of highly qualified candidates to submit to the Governor. A "highly qualified" or "qualified" recommendation is intended to be objective. Failure to recommend a candidate in any particular selection process is not a finding that the person is unqualified.

~~(e) A lawyer who seeks appointment to the same position within two years of first having received a "highly qualified" rating will not be required to submit another application or to be re-interviewed. The Board will request that those candidates update the previously submitted information prior to deciding whether to resubmit the candidate's name to the Governor.~~

~~(b)~~ In addition to submitting its list of "highly qualified" candidates, the Board will respond to any specific request~~inquiry from~~ of the Governor as to whether certain other candidates in the pool meet a "qualified" standard. A "highly qualified" or "qualified" recommendation is intended to be objective. Failure to recommend a candidate in any particular selection process is not a finding that the person is unqualified.

(f) Meetings of the ~~committee~~Appellate Selection Committee, including interviews of candidates, are public meetings, except for portions of meetings during which reference reports are presented and

discussed. The term "reference reports," for purposes of this section, means information obtained by committee members and staff from persons listed as references by the candidates and information obtained by committee members and staff from other persons knowledgeable about candidates as part of the candidate ~~background check review~~ process. Discussion of reference reports by the committee and the Board will be in executive session pursuant to ORS 192.660(1)(f).

OREGON STATE BAR

Board of Governors

Meeting Date: June 24, 2016
Memo Date: June 14, 2016
From: Vanessa Nordyke, Board Development Committee Chair
Re: Oregon Law Commission Appointment

Action Recommended

Approve the committee's recommendation to appoint Nancy Cozine and reappoint Mark Comstock to the Oregon Law Commission.

Background

The legislature created the Oregon Law Commission to conduct a continuous program of law reform. In addition, the Commission proposes new substantive and procedural provisions to improve and fill gaps in Oregon law.

As provided in ORS 173.315(2)(f) the OSB Board of Governors appoints three members to the Oregon Law Commission for four-year terms. The Commission also includes four members appointed by the Senate President and Speaker of the House, the Chief Justice of the Oregon Supreme Court, the Chief Judge of the Court of Appeals, a circuit court judge, the Attorney General, a Governor's appointee, and the deans or representatives from each law school in Oregon.

During the May meeting, the Board Development Committee evaluated a request from Laura H. Handzel, Deputy Director of the Commission, and reviewed a list of interested volunteers willing to serve on the Commission. After a lengthy discussion the committee unanimously voted to recommend the appointment of Nancy Cozine and reappointment of Mark Comstock to the Commission.

Ms. Cozine is the Executive Director of the Office of Public Defense Services and has participated on several Oregon Law Commission workgroups throughout her 20 year legal career. She offers significant practice experience in a variety of practice areas but most importantly would fill the void created on the Commission in the juvenile law area.

Although Mr. Comstock has served on the Commission two full terms, his active involvement on the Commission continues. He was just recently appointed to serve as chair of the new Receivership Work Group and is seeking reappointment to continue his involvement in this area.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2016
Memo Date: June 10, 2016
From: Rod Wegener, CFO
Re: Revisions to Bylaw 7.4 Investment Policy and Creation of Investment Committee Policy

Action Recommended

Review recommendation from Budget & Finance Committee for changes to bylaw 7.4 Investment Policy and create Investment Committee Policy.

Background

Since last year the Budget & Finance Committee has been working on revising bylaw 7.4 Investment Policy. The original bylaw referenced an Investment Committee for which role the entire Budget & Finance Committee performed. The Committee believed a functional Investment Committee would provide more oversight of the bar's investment portfolio and the investment firms that manage the bar's long-term investments.

The revisions to the bylaws move much of the existing bylaw content to the newly developed Investment Committee Policy. The Committee also believed that much of the content in the bylaw was too much detail for a standard bylaw. The Investment Committee Policy will become part of a Policy Manual for the bar and the Budget & Finance Committee and include any future revisions to bylaws that also are deemed too detailed for standard bylaws.

The Investment Committee would consist of members of the Board of Governors and the bar's CFO. Currently the members acting as an Investment Committee are John Mansfield, Kerry Sharp, Charles Wilhoite, and the bar's CFO.

Here are the drafts of the revised bylaw and Investment Committee Policy for the Board to review (and approve if there are no changes and the one meeting notice is waived).

- The latest version of bylaw 7.4 Investment Policy with all changes.
- The revision of bylaw 7.4 with all changes red-lined.
- The latest draft of the Investment Committee Policy.

Budget & Finance Committee

OSB Bylaws on Investment Policy After Revisions (DRAFT)

June 24, 2016

Section 7.4 Investment Policy

Subsection 7.400 Purpose

This investment policy is established to provide direction and limits for the Bar's Chief Executive Officer and Chief Financial Officer and for any fee-for-service investment manager that have been engaged in investing financial assets held by the Bar. . The investment objectives are in order of importance: to ensure the safety of the assets, to ensure sufficient liquidity and to obtain the highest possible rate of return. The policy consists of objectives for the Bar's short-term and long-term investments.

The Bar's short-term investments consist of cash and cash equivalents anticipated to be needed and used within the Bar's current fiscal year, generally one year or less. The objective shall be to maximize liquidity and minimize or eliminate risk while achieving a reasonable yield within the range of short-term expectations.

The Bar's long-term investments include all reserve balances and designated funds. The objective of these investments is to provide for long-term growth and stability and to achieve reasonable yields while minimizing exposure to risk. The funds are invested to maximize the return on the investment, consistent with an appropriate level of risk and subject to the generation of adequate current income. The long-term investments shall be diversified to provide reasonable assurance that investment in a single security, a class of securities, or industry will not have an excessive impact on the preservation of capital or returns on investment to the Bar. .

Subsection 7.401 Investment Management

The Chief Executive Officer or the Chief Financial Officer is authorized and directed to deposit, sell, convert or withdraw cash on deposit in excess of that required for current operations and to invest those funds in accordance with the Bar's investment policy using expert advice and assistance as the officers may require. The Bar may engage one or more fee-for-service investment managers with varying styles and expertise and delegate individual investment decisions to such investment managers within the guidelines of the bar's Investment Policy and the specific direction of the Investment Committee.

Subsection 7.402 Management and Monitoring of Performance

The "Investment Committee" consisting of members of the Budget & Finance Committee and the Bar's Chief Financial Officer shall manage and monitor the investment policy and portfolio. All policy and bylaw changes will be reviewed and approved by the Budget & Finance Committee.

Subsection 7.403 Prudent Investor Rule

The standard of prudence to be applied by any fee-for-service investment manager that is engaged by the Bar in managing the overall portfolio will be the Prudent Investor Rule, which states: "Investments shall be made with judgment and care, under circumstances then prevailing, which persons of prudence, discretion and intelligence exercise in the management of their own affairs, not for speculation, but for investment, considering the probable safety of their capital as well as the probable income to be derived."

Budget & Finance Committee

Revisions to OSB Bylaws Related to the Investment Policy (DRAFT)

~~June~~ ~~April~~ 24~~2~~, 2016

CURRENT BYLAW WITH PROPOSED REVISIONS

Section 7.4 Investment Policy

Subsection 7.400 Purpose

This investment policy is established to provide direction and limits for the Bar's Chief Executive Officer and Chief Financial Officer and for any fee-for-service investment manager that have been engaged in investing financial assets held by the Bar. . The investment objectives are in order of importance: to ensure the safety of the assets, to ensure sufficient liquidity and to obtain the highest possible rate of return. The policy consists of objectives for the Bar's short-term and long-term investments.

The Bar's short-term investments consist of cash and cash equivalents anticipated to be needed and used within the Bar's current fiscal year, generally one year or less. The objective shall be to maximize liquidity and minimize or eliminate risk while achieving a reasonable yield within the range of short-term expectations.

The Bar's long-term investments include all reserve balances and designated funds. The objective of these investments is to provide for long-term growth and stability and to achieve reasonable yields while minimizing exposure to risk. The funds are invested to maximize the return on the investment, consistent with an appropriate level of risk and subject to the generation of adequate current income. The long-term investments shall be diversified to provide reasonable assurance that investment in a single security, a class of securities, or industry will not have an excessive impact on the preservation of capital or returns on investment to the Bar. .

Subsection 7.401 Investment Management

The Chief Executive Officer or the Chief Financial Officer is authorized and directed to deposit, sell, convert or withdraw cash on deposit in excess of that required for current operations and to invest those funds in accordance with the Bar's investment policy using expert advice and assistance as the officers he or she may require. ~~The Investment Committee will maintain a list of all institutions that are approved for purposes of this investment advice and assistance. The Bar may engage one or more fee-for-service investment managers with varying styles and expertise and delegate individual investment decisions to such investment managers within the guidelines of the bar's Investment Policy and the specific direction of the Investment Committee.~~

Management and Monitoring of Performance

Investment Committee. ~~The An~~ "Investment Committee" consisting of members of the Budget & Finance Committee and the Bar's Chief Financial Officer ~~(AND WHO ELSE? BOG MEMBERS ONLY? NON-BOG MEMBERS? LENGTH OF TERM? APPOINTED BY WHOM?)~~ shall manage and monitor the investment policy and portfolio. All policy and bylaw changes will be reviewed and approved by the Budget & Finance Committee.

The next deleted sections are included in the Investment Committee policy.

~~The Investment Committee will seek and receive guidance from the Budget and Finance Committee, CEO and CFO concerning anticipated cash needs/surpluses in amount and~~

timing, so as to insure the Bar's portfolio is managed to best support the Bar's requirements. This Investment Committee shall monitor the portfolios' asset allocation and performance of the Bar's investments, consistent with the purpose and objectives of this Investment Policy.

Investment(s). The Bar may engage one or more fee for service investment managers with varying styles and expertise and delegate individual investment decisions to such investment managers within the guidelines of this policy and the specific direction of the Investment Committee. The selection of and allocation of funds to the investment managers is approved by the Investment Committee. The investment managers are expected to communicate through the Bar's Chief Financial Officer between meetings of the Investment Committee to propose and or implement changes in investments or strategy. If necessary, the Investment Committee may meet by telephone to consider changes in investments or strategies.

Committee Meetings. The fee for service investment manager(s) shall prepare quarterly reports of the portfolio's performance. The Investment Committee will meet as needed, but at least quarterly to monitor the performance of the portfolio And to summarize and report results to the Budget & Finance Committee.

Performance Standards. The Investment Committee will evaluate the fee for service investment managers using a number of factors including performance relative to the most applicable market benchmarks, quality of communications with the Investment Committee, and adherence to the Bar's investment policy.

Annual Review. The Budget & Finance Committee shall review the investment policy including the investment objectives, approved investments, and limitations (??) at least annually.

Subsection 7.402 Approved Investments

Investments will be limited to the following obligations and subject to the portfolio limitations as to issuer:

- (a) The State of Oregon Local Government Investment Pool (LGIP) no percentage limit for this issuer.
- (b) U.S. Treasury obligations—no percentage limitation for this issuer.
- (c) Federal Agency Obligations—each issuer is limited to \$250,000, but not to exceed 25 percent of total invested assets.
- (d) U.S. Corporate Bond or Note—each issuer limited to \$100,000.
- (e) Commercial Paper—each issuer limited to \$100,000.
- (f) Mutual funds that commingle one or more of the approved types of investments, or securities meeting the minimum credit quality standards of this policy.
- (g) Mutual funds of U.S. and foreign equities.
- (h) Federal deposit insurance corporation insured accounts up to the amount insured by the FDIC.
- (i) Individual publicly traded stocks, excluding margin transactions, short sales, and derivatives.
- (j) Mutual funds investing in infrastructure, in commodities, and in instruments such as high yield bonds, adjustable rate bonds, derivatives, futures, currencies, mortgage backed securities, and ETFs, but not swaps or speculative instruments or mortgage backed securities, and only for the purpose of both managing risk and diversifying the portfolio and not at all for purposes of leveraging, with all such investments in total not to exceed 35% of the total invested assets.

Security	Minimum credit quality
Interest bearing deposits of banks, savings and loans and credit unions	The issuing financial institution must be rated "well capitalized" as defined by the financial institution's regulator. Those that are not "well capitalized" will be limited by the level of their deposit insurance.
Obligations issued or guaranteed by U.S., local, city and state governments and agencies	A-/A ₃ as defined by Standard & Poor's and Moody's
Money Market Funds	The issuing financial institution must be rated "well capitalized" as defined by the financial institution's regulator. Those that are not "well capitalized" will be limited by the level of their deposit insurance.
Money Market Mutual Accounts	The issuing financial institution must be rated "well capitalized" as defined by the financial institution's regulator. Those that are not "well capitalized" will be limited by the level of their deposit insurance.
Obligations issued or guaranteed by the U.S. Federal government	Not applicable
Obligations issued or guaranteed by U.S. Federal agencies	AAA/AAA as defined by Standard & Poor's and Moody's
Obligations issued or guaranteed by U.S. government-sponsored enterprises	AAA/AAA as defined by Standard & Poor's and Moody's
Obligations issued or guaranteed by local, city and state governments and agencies.	A-/A ₃ as defined by Standard & Poor's and Moody's
Obligations of U.S. corporations	A-/A ₃ as defined by Standard & Poor's and Moody's

Subsection 7.403 Limitations

At the discretion of the Budget & Finance Committee, the entire investment portfolio may be invested in any combination of the Local Government Investment Pool, U.S. Treasury obligations or federal agency obligations. The maturities of the investment obligations will be the investment manager's estimate of the Bar's cash needs, subject to the specific fund liquidity requirements. No maturity period will exceed 84 months.

Subsection 7.404 Prudent Investor Rule

The standard of prudence to be applied by any fee-for-service investment manager that is engaged by the Bar in managing the overall portfolio will be the Prudent Investor Rule, which states: "Investments shall be made with judgment and care, under circumstances then prevailing, which persons of prudence, discretion and intelligence exercise in the management of their own affairs, not for speculation, but for investment, considering the probable safety of their capital as well as the probable income to be derived."

Investment Committee *(Policy Draft 6/24/2016)*

1. **Members:** The Investment Committee (hereinafter "Committee") will consist of at least three members of the Board of Governors and the bar's CFO. Board of Governors' members may volunteer to be on the Committee and membership is nominated by the chair of the Budget & Finance Committee and approved by the bar President. The Committee members shall self-select the chair of the Committee.
2. **Advisory Members:** If deemed valuable the Committee can select a professional investment consultant to be as an advisory, non-voting member. The consultant cannot receive a fee for any services and cannot solicit business while a member of the IC.
3. **Terms:** Members are selected or volunteer on or before the first Budget & Finance Committee of each year
4. **Length of Term:** One year with no limit on the number of years a member can serve.
5. **Meetings:** The Committee will meet at least once each calendar quarter at a time and place agreeable to the Committee members and at least two will include meeting with the bar's fee-for-service investment management firms.
6. **Role of the Committee:** The Committee will:
 - a) maintain a list of all fee-for-service authorized institutions that are approved for purpose of investment advice and assistance;
 - b) monitor the portfolios' performance consistent with the purpose and objectives of the bar's Investment Policy and bylaws;
 - c) determine, review and approve the target asset allocation, the asset classes, **the approved investments**, and the investment structure;
 - d) allocate the amount of funds to the respective fee-for-service investment managers;
 - e) at the end of each quarter receive, review, and evaluate reports of the investment managers and the portfolio's performance;
 - f) evaluate the services, performance, and fees of the fee-for-service investment management firms using a number of factors including performance relative to the most applicable market benchmarks, quality of communication with the Committee, and adherence to the Investment Policy and bylaws;
 - g) at least once a year review the Investment Policy and the related bylaws for appropriateness and validity.
7. **Communication with and Reports to the Budget & Finance Committee:** The Committee will:
 - a) seek and receive guidance from the Budget and Finance Committee, CEO and CFO concerning anticipated amount and schedule of the bar's cash needs and surpluses to insure the bar's portfolio is managed to best support the bar's requirements;
 - b) summarize and report the results of the investment managers and the portfolio's performance;
 - c) recommend to the Budget & Finance Committee changes:

- to the target asset allocation, the asset classes, **the approved investments**, and the investment structure of the portfolio;
- in the fee-for-service management firms;
- in the Investment Policy and the related bylaws.

8. Approved Investments: Investments are limited to the following obligations and subject to the portfolio limitations as to issuer, **and must meet or exceed the credit quality standards.**

- a) The State of Oregon Local Government Investment Pool (LGIP) no percentage limit for this issuer.
- b) U.S. Treasury obligations - no percentage limitation for this issuer.
- c) Federal Agency Obligations - each issuer is limited to \$250,000, but not to exceed 25 percent of total invested assets.
- d) U.S. Corporate Bond or Note - each issuer limited to \$100,000.
- e) Commercial Paper - each issuer limited to \$100,000.
- f) Mutual funds that commingle one or more of the approved types of investments, or securities meeting the minimum credit quality standards of this policy.
- g) Mutual funds of U.S. and foreign equities.
- h) Federal deposit insurance corporation insured accounts up to the amount insured by the FDIC.
- i) Individual publicly-traded stocks, excluding margin transactions, short sales, and derivatives.
- j) Mutual funds investing in infrastructure, in commodities, and in instruments such as high yield bonds, adjustable rate bonds, derivatives, futures, currencies, mortgage-backed securities, and ETFs, but not swaps or speculative instruments or mortgage backed securities, and only for the purpose of both managing risk and diversifying the portfolio and not at all for purposes of leveraging, with all such investments in total not to exceed 35% of the total invested assets.

Security	Minimum Credit Quality
Interest bearing deposits of banks, savings and loans and credit unions	The issuing financial institution must be rated "well capitalized" as defined by the financial institution's regulator. Those not "well capitalized" will be limited by the level of their deposit insurance.
Obligations issued or guaranteed by U.S., local, city and state governments and agencies	A-/A3 as defined by Standard & Poor's and Moody's
Money Market Funds	The issuing financial institution must be rated "well capitalized" as defined by the financial institution's regulator. Those not "well capitalized" will be limited by the level of their deposit insurance.
Money Market Mutual Accounts	The issuing financial institution must be rated "well capitalized" as defined by the financial institution's regulator. Those not "well capitalized" will be limited by the level of their deposit insurance.
Obligations issued or guaranteed by the U.S. Federal government	Not applicable
Obligations issued or guaranteed by U.S. Federal agencies	AAA/AAA as defined by Standard & Poor's and Moody's
Obligations issued or guaranteed by U.S. government-sponsored enterprises	AAA/AAA as defined by Standard & Poor's and Moody's
Obligations issued or guaranteed by local, city and state governments and agencies.	A-/A3 as defined by Standard & Poor's and Moody's
Obligations of U.S. corporations	A-/A3 as defined by Standard & Poor's and Moody's

9. Limitations: Upon recommendation of the Committee, the Budget & Finance Committee may state the entire investment portfolio be invested in any combination of the Local Government Investment Pool, U.S. Treasury obligations or federal agency obligations. The maturities of the investment obligations will be the investment manager's estimate of the Bar's cash needs, subject to the specific fund liquidity requirements. No maturity period will exceed 84 months.

**Oregon State Bar
Professional Liability Fund
Financial Statements
4/30/2016**

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7	Combined Investment Schedule

**Oregon State Bar
Professional Liability Fund
Combined Primary and Excess Programs
Statement of Net Position
4/30/2016**

ASSETS

	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Cash	\$3,108,204.46	\$3,452,235.03
Investments at Fair Value	55,122,607.96	54,371,714.88
Assessment Installment Receivable	5,858,896.00	6,001,503.25
Due from Reinsurers	45,149.05	826,463.83
Other Current Assets	101,740.45	98,592.63
Net Fixed Assets	782,837.79	841,610.53
Claim Receivables	18,745.34	70,385.36
Other Long Term Assets	<u>6,400.00</u>	<u>7,089.44</u>
TOTAL ASSETS	<u>\$65,044,581.05</u>	<u>\$65,669,594.95</u>

LIABILITIES AND FUND POSITION

	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Liabilities:		
Accounts Payable and Other Current Liabilities	\$7,772.83	\$213,315.22
Due to Reinsurers	\$356,103.25	\$696,914.24
Liability for Compensated Absences	397,427.82	354,702.17
Liability for Indemnity	15,277,628.62	12,864,460.03
Liability for Claim Expense	15,018,268.99	15,298,278.20
Liability for Future ERC Claims	3,100,000.00	2,700,000.00
Liability for Suspense Files	1,600,000.00	1,500,000.00
Liability for Future Claims Administration (AOE)	2,400,000.00	2,500,000.00
Excess Ceding Commission Allocated for Rest of Year	519,485.20	507,511.95
Primary Assessment Allocated for Rest of Year	<u>16,247,387.33</u>	<u>16,296,302.45</u>
Total Liabilities	<u>\$54,924,074.04</u>	<u>\$52,931,484.26</u>
Change in Net Position:		
Retained Earnings (Deficit) Beginning of the Year	\$10,027,170.73	\$10,928,972.39
Year to Date Net Income (Loss)	<u>93,336.28</u>	<u>1,809,138.30</u>
Net Position	<u>\$10,120,507.01</u>	<u>\$12,738,110.69</u>
TOTAL LIABILITIES AND FUND POSITION	<u>\$65,044,581.05</u>	<u>\$65,669,594.95</u>

**Oregon State Bar
Professional Liability Fund
Primary Program
Statement of Revenues, Expenses, and Changes in Net Position
4 Months Ended 4/30/2016**

	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>
<u>REVENUE</u>					
Assessments	\$8,014,598.00	\$8,108,332.00	\$93,734.00	\$8,037,026.89	\$24,325,000.00
Installment Service Charge	109,095.67	109,333.32	237.65	111,156.33	328,000.00
Other Income	26,750.00	13,333.32	(13,416.68)	22,050.00	40,000.00
Investment Return	<u>1,020,794.84</u>	<u>1,115,832.00</u>	<u>95,037.16</u>	<u>1,558,026.68</u>	<u>3,347,495.00</u>
TOTAL REVENUE	<u>\$9,171,238.51</u>	<u>\$9,346,830.64</u>	<u>\$175,592.13</u>	<u>\$9,728,259.90</u>	<u>\$28,040,495.00</u>
<u>EXPENSE</u>					
Provision For Claims:					
New Claims at Average Cost	\$6,795,000.00			\$5,691,000.00	
Coverage Opinions	40,090.96			17,354.52	
General Expense	8,845.67			38,018.76	
Less Recoveries & Contributions	(18.36)			(44.17)	
Budget for Claims Expense		<u>\$6,255,000.00</u>			<u>\$18,765,000.00</u>
Total Provision For Claims	<u>\$6,843,918.27</u>	<u>\$6,255,000.00</u>	<u>(\$588,918.27)</u>	<u>\$5,746,329.11</u>	<u>\$18,765,000.00</u>
Expense from Operations:					
Administrative Department	\$787,669.12	\$927,386.04	\$139,716.92	\$785,949.43	\$2,719,948.00
Accounting Department	254,521.99	292,249.00	37,727.01	246,954.32	863,251.00
Loss Prevention Department	679,327.73	744,685.00	65,357.27	642,281.93	2,229,864.00
Claims Department	803,432.15	919,132.32	115,700.17	783,145.27	2,750,806.00
Allocated to Excess Program	<u>(355,326.64)</u>	<u>(355,324.00)</u>	<u>2.64</u>	<u>(316,138.60)</u>	<u>(1,065,980.00)</u>
Total Expense from Operations	<u>\$2,169,624.35</u>	<u>\$2,528,128.36</u>	<u>\$358,504.01</u>	<u>\$2,142,192.35</u>	<u>\$7,497,889.00</u>
Contingency (4% of Operating Exp)	\$0.00	\$42,460.00	\$42,460.00	\$0.00	\$127,382.00
Depreciation and Amortization	\$51,812.21	\$47,258.72	(\$4,553.49)	\$54,168.94	\$141,776.16
Allocated Depreciation	<u>(8,087.00)</u>	<u>(8,088.00)</u>	<u>(1.00)</u>	<u>(5,660.00)</u>	<u>(24,261.00)</u>
TOTAL EXPENSE	<u>\$9,057,267.83</u>	<u>\$8,864,759.08</u>	<u>(\$192,508.75)</u>	<u>\$7,937,030.40</u>	<u>\$26,507,786.16</u>
NET POSITION - INCOME (LOSS)	<u>\$113,970.68</u>	<u>\$134,571.56</u>	<u>\$20,600.88</u>	<u>\$1,791,229.50</u>	<u>\$490,208.84</u>

**Oregon State Bar
Professional Liability Fund
Primary Program
Statement of Operating Expense
4 Months Ended 4/30/2016**

EXPENSE:	CURRENT MONTH	YEAR TO DATE ACTUAL	YEAR TO DATE BUDGET	VARIANCE	YEAR TO DATE LAST YEAR	ANNUAL BUDGET
Salaries	\$355,150.11	\$1,348,874.41	\$1,536,032.00	\$187,157.59	\$1,295,201.12	\$4,608,093.00
Benefits and Payroll Taxes	130,165.17	514,178.83	554,140.00	39,961.17	523,365.08	1,647,119.00
Investment Services	0.00	10,793.25	10,000.00	(793.25)	9,560.00	40,000.00
Legal Services	11,842.50	11,842.50	3,332.00	(8,510.50)	10,194.92	10,000.00
Financial Audit Services	0.00	6,000.00	11,500.00	5,500.00	15,000.00	23,000.00
Actuarial Services	0.00	8,395.00	17,150.00	8,755.00	11,262.50	34,300.00
Information Services	4,652.00	9,240.51	25,333.32	16,092.81	14,519.50	76,000.00
Document Scanning Services	0.00	0.00	21,668.00	21,668.00	1,595.81	65,000.00
Other Professional Services	5,926.64	23,443.44	50,530.36	27,086.92	49,418.59	151,592.00
Staff Travel	2,176.71	4,726.37	9,832.00	5,105.63	3,271.71	29,500.00
Board Travel	1,224.04	3,541.16	20,666.68	17,125.52	10,290.07	62,000.00
NABRICO	0.00	250.00	0.00	(250.00)	677.75	13,750.00
Training	3,047.28	8,285.42	13,181.32	4,895.90	8,749.28	39,500.00
Rent	44,070.17	175,303.81	175,956.00	652.19	172,713.18	527,865.00
Printing and Supplies	2,353.31	24,773.12	27,500.00	2,726.88	23,070.01	82,500.00
Postage and Delivery	1,276.25	9,031.38	10,520.00	1,488.62	9,617.62	31,550.00
Equipment Rent & Maintenance	1,549.39	6,482.27	19,001.32	12,519.05	15,331.65	57,000.00
Telephone	4,434.06	16,515.95	17,168.00	652.05	16,122.76	51,500.00
L P Programs (less Salary & Benefits)	50,284.66	158,260.55	167,976.00	9,715.45	119,374.92	503,906.00
Defense Panel Training	0.00	0.00	0.00	0.00	1,029.52	0.00
Bar Books Grant	16,666.67	66,666.68	66,668.00	1.32	66,666.68	200,000.00
Insurance	3,655.25	15,408.53	13,964.00	(1,444.53)	14,251.79	41,894.00
Library	3,618.05	8,079.54	10,500.00	2,420.46	6,329.45	31,500.00
Subscriptions, Memberships & Other	5,862.74	94,858.27	100,165.36	5,307.09	60,717.04	234,300.00
Allocated to Excess Program	<u>(88,831.66)</u>	<u>(355,326.64)</u>	<u>(355,324.00)</u>	<u>2.64</u>	<u>(316,138.60)</u>	<u>(1,065,980.00)</u>
TOTAL EXPENSE	<u>\$559,123.34</u>	<u>\$2,169,624.35</u>	<u>\$2,527,460.36</u>	<u>\$357,836.01</u>	<u>\$2,142,192.35</u>	<u>\$7,495,889.00</u>

**Oregon State Bar
Professional Liability Fund
Excess Program
Statement of Revenue, Expenses, and Changes in Net Position
4 Months Ended 4/30/2016**

	<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>
<u>REVENUE</u>					
Ceding Commission	\$259,742.60	\$254,000.00	(\$5,742.60)	\$253,755.98	\$762,000.00
Prior Year Adj. (Net of Reins.)	0.00	2,300.00	2,300.00	887.07	6,900.00
Installment Service Charge	44,760.00	42,000.00	(2,760.00)	40,447.00	42,000.00
Investment Return	<u>63,777.04</u>	<u>56,960.00</u>	<u>(6,817.04)</u>	<u>62,657.85</u>	<u>170,879.00</u>
TOTAL REVENUE	<u>\$368,279.64</u>	<u>\$355,260.00</u>	<u>(\$13,019.64)</u>	<u>\$357,747.90</u>	<u>\$981,779.00</u>
<u>EXPENSE</u>					
Operating Expenses (See Page 6)	\$380,827.04	\$382,045.00	\$1,217.96	\$334,179.10	\$1,146,830.00
Allocated Depreciation	<u>\$8,087.00</u>	<u>\$8,088.00</u>	<u>\$1.00</u>	<u>\$5,660.00</u>	<u>\$24,261.00</u>
NET POSITION - INCOME (LOSS)	<u>(\$20,634.40)</u>	<u>(\$34,873.00)</u>	<u>(\$14,238.60)</u>	<u>\$17,908.80</u>	<u>(\$189,312.00)</u>

**Oregon State Bar
Professional Liability Fund
Excess Program
Statement of Operating Expense
4 Months Ended 4/30/2016**

	<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>
<u>EXPENSE:</u>						
Salaries	\$49,160.58	\$196,642.32	\$196,644.00	\$1.68	\$178,236.32	\$589,927.00
Benefits and Payroll Taxes	16,066.75	64,267.00	64,268.00	1.00	63,846.64	192,801.00
Investment Services	0.00	456.75	713.00	256.25	440.00	2,850.00
Office Expense	0.00	0.00	0.00	0.00	0.00	0.00
Allocation of Primary Overhead	23,604.33	94,417.32	94,416.00	(1.32)	74,055.64	283,252.00
Reinsurance Placement & Travel	0.00	1,317.04	6,668.00	5,350.96	2,103.55	20,000.00
Training	0.00	0.00	168.00	168.00	0.00	500.00
Printing and Mailing	0.00	3,644.76	3,500.00	(144.76)	3,713.65	10,500.00
Program Promotion	795.00	4,585.00	8,333.32	3,748.32	11,484.00	25,000.00
Other Professional Services	1,738.00	1,738.00	668.00	(1,070.00)	299.30	2,000.00
Software Development	<u>5,518.55</u>	<u>13,758.85</u>	<u>6,666.68</u>	<u>(7,092.17)</u>	<u>0.00</u>	<u>20,000.00</u>
TOTAL EXPENSE	<u>\$96,883.21</u>	<u>\$380,827.04</u>	<u>\$382,045.00</u>	<u>\$1,217.96</u>	<u>\$334,179.10</u>	<u>\$1,146,830.00</u>

**Oregon State Bar
Professional Liability Fund
Combined Investment Schedule
4 Months Ended 4/30/2016**

	CURRENT MONTH <u>THIS YEAR</u>	YEAR TO DATE <u>THIS YEAR</u>	CURRENT MONTH <u>LAST YEAR</u>	YEAR TO DATE <u>LAST YEAR</u>
Dividends and Interest:				
Short Term Bond Fund	\$16,174.14	\$45,246.49	\$13,188.65	\$45,494.88
Intermediate Term Bond Funds	25,170.99	104,819.25	36,660.07	131,998.35
Domestic Common Stock Funds	0.00	43,473.98	0.00	49,593.20
International Equity Fund	0.00	0.00	0.00	0.00
Real Estate	0.00	43,614.73	0.00	42,662.42
Hedge Fund of Funds	0.00	0.00	0.00	0.00
Real Return Strategy	<u>0.00</u>	<u>52,376.43</u>	<u>0.00</u>	<u>33,385.03</u>
Total Dividends and Interest	<u>\$41,345.13</u>	<u>\$289,530.88</u>	<u>\$49,848.72</u>	<u>\$303,133.88</u>
Gain (Loss) in Fair Value:				
Short Term Bond Fund	(\$10,394.03)	\$26,415.91	(\$7,158.95)	(\$7,734.74)
Intermediate Term Bond Funds	50,233.86	159,126.39	(35,161.99)	56,072.64
Domestic Common Stock Funds	59,741.36	105,278.92	62,336.12	198,388.88
International Equity Fund	186,627.18	(56,687.24)	282,541.75	733,813.85
Real Estate	0.00	63,171.24	0.00	123,392.54
Hedge Fund of Funds	0.00	0.00	0.00	0.00
Real Return Strategy	<u>165,333.42</u>	<u>497,735.78</u>	<u>223,571.98</u>	<u>213,617.48</u>
Total Gain (Loss) in Fair Value	<u>\$451,541.79</u>	<u>\$795,041.00</u>	<u>\$526,128.91</u>	<u>\$1,317,550.65</u>
TOTAL RETURN	<u>\$492,886.92</u>	<u>\$1,084,571.88</u>	<u>\$575,977.63</u>	<u>\$1,620,684.53</u>
Portions Allocated to Excess Program:				
Dividends and Interest	\$864.11	\$9,468.59	\$2,278.09	\$12,487.04
Gain (Loss) in Fair Value	<u>9,437.22</u>	<u>54,308.45</u>	<u>24,044.09</u>	<u>50,170.81</u>
TOTAL ALLOCATED TO EXCESS PROGRAM	<u>\$10,301.33</u>	<u>\$63,777.04</u>	<u>\$26,322.18</u>	<u>\$62,657.85</u>

**Oregon State Bar
Professional Liability Fund
Primary Program
Balance Sheet
4/30/2016**

ASSETS

	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Cash	\$973,922.39	\$3,078,820.78
Investments at Fair Value	54,833,001.91	52,422,698.86
Assessment Instalment Receivable	5,240,593.00	5,445,842.00
Due From Excess Fund	1,026.85	(16.59)
Other Current Assets	100,713.60	98,609.22
Net Fixed Assets	782,837.79	841,610.53
Claim Receivables	18,745.34	70,385.36
Other Long Term Assets	<u>6,400.00</u>	<u>7,089.44</u>
TOTAL ASSETS	<u>\$61,957,240.88</u>	<u>\$61,965,039.60</u>

LIABILITIES AND FUND EQUITY

	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Liabilities:		
Accounts Payable and Other Current Liabilities	\$4,857.61	\$211,923.74
Liability for Compensated Absences	397,427.82	354,702.17
Liability for Indemnity	15,277,628.62	12,864,460.03
Liability for Claim Expense	15,018,268.99	15,298,278.20
Liability for Future ERC Claims	3,100,000.00	2,700,000.00
Liability for Suspense Files	1,600,000.00	1,500,000.00
Liability for Future Claims Administration (ULAE)	2,400,000.00	2,500,000.00
Assessment and Instalment Service Charge Allocated for Remainder of Year	<u>16,247,387.33</u>	<u>16,296,302.45</u>
Total Liabilities	<u>\$54,045,570.37</u>	<u>\$51,725,666.59</u>
Net Position		
Net Position (Deficit) Beginning of the Year	\$7,797,699.83	\$8,448,143.51
Year to Date Net Income (Loss)	<u>113,970.68</u>	<u>1,791,229.50</u>
Total Net Position	<u>\$7,911,670.51</u>	<u>\$10,239,373.01</u>
TOTAL LIABILITIES AND FUND EQUITY	<u>\$61,957,240.88</u>	<u>\$61,965,039.60</u>

**Oregon State Bar
Professional Liability Fund
Excess Program
Balance Sheet
4/30/2016**

ASSETS

	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Cash	\$2,134,282.07	\$373,414.25
Assessment Installment Receivable	618,303.00	555,661.25
Due from Reinsurers	45,149.05	826,463.83
Investments at Fair Value	<u>289,606.05</u>	<u>1,949,016.02</u>
TOTAL ASSETS	<u>\$3,087,340.17</u>	<u>\$3,704,555.35</u>

LIABILITIES AND FUND EQUITY

	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Liabilities:		
Accounts Payable & Refunds Payable	\$1,888.37	\$1,408.07
Due to Primary Fund	\$1,026.85	(\$16.59)
Due to Reinsurers	356,103.25	696,914.24
Ceding Commission Allocated for Remainder of Year	<u>519,485.20</u>	<u>507,511.95</u>
Total Liabilities	<u>\$878,503.67</u>	<u>\$1,205,817.67</u>
Net Position		
Net Position (Deficit) Beginning of Year	\$2,229,470.90	\$2,480,828.88
Year to Date Net Income (Loss)	<u>(20,634.40)</u>	<u>17,908.80</u>
Total Net Position	<u>\$2,208,836.50</u>	<u>\$2,498,737.68</u>
TOTAL LIABILITIES AND FUND EQUITY	<u>\$3,087,340.17</u>	<u>\$3,704,555.35</u>

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2016

Memo Date: June 8, 2016

From: Carol J. Bernick, PLF CEO

Re: Changes for Installment Payments – PLF Policies 3.300 and 3.350

Action Recommended

On June 3, 2016, the PLF Board of Directors approved changes to PLF Policies 3.300 and 3.350 that now require BOG approval.

Background

A. Change in Assessment of Late Fee

1. Discussion

PLF Policy 3.200 states that payment of the basic assessment is due on or before January 1. The policy goes on to say that the “default date for all assessments will be 10 days after the due date, or on the first regular business day thereafter.” In other words, the effective due date to pay the full assessment is January 10 (assuming it is a business day).

January 10 is also the date an attorney must elect to pay in quarterly installments. On that day the attorney must pay the first quarterly installment and the installment service fee (\$10 plus a 7% finance charge totaling \$102). PLF Policy 3.300(A).

If the attorney fails to either pay the full assessment on January 10 or fails to elect installments and pay the first quarter and the full service fee by January 10, the attorney is charged an additional late payment of \$50, provided the attorney pays by January 24 (two weeks after the January 10 deadline). PLF Policy 3.350(A). If the attorney is later than January 24, the late charge is \$100 per month for each full or partial calendar month the attorney is in default. *Id.* Moreover, the attorney loses his or her right to pay in installment.

2. Action Requested

We recommend doing away with the first \$50 late fee. No other quarter has a \$50 late fee. Anyone who misses the January 10 deadline would be assessed \$100 assuming the attorney pays by February 10 (or the next business day). Therefore, each quarter is treated consistently.

For 2016, 433 attorneys did not pay anything by January 12 (which was the next business day this year). 182 did not pay by January 27. Of those, 173 filed exemptions

and 78 paid the \$50 late fee. If this change is adopted, those covered parties will now pay \$100.

B. Eliminate Loss of Installment Right

1. Discussion

As noted above, currently an attorney who fails to pay by January 24 loses her right to pay in installment. Similarly, if an attorney timely pays the first installment, but fails to timely pay the second or third installment (by the 10-day grace period following the due date), she loses the right to pay in installment and the full remaining assessment is due (with applicable late fees). PLF Policy 3.300(C).

Losing installment privileges is a strong hammer that hurts many covered parties. In the days following the quarterly due dates, accounting receives dozens of calls from covered parties who willingly agree to pay the late fee(s) but beg to be allowed to continue with installments. They have paid the installment service fee, which is not refunded when they lose their installment privilege.

2. Action Requested

We recommend changing the policy to allow attorneys to continue to pay installments even if they miss the quarterly deadline. Provided he pays the quarterly assessment and applicable fees by February 10, May 10 or August 10 (or next business day), the attorney may still pay in installments.

This year we had 3 covered parties who failed to either exempt themselves, pay in full or pay the first quarter installment by January 27. Those three lost their ability to pay in installments. In April, 124 covered parties who had paid their first quarter installment did not timely pay their second quarter installment. Of those, 24 either paid in full or filed an exemption. Thus, 100 covered parties lost the ability to pay in installments.

Proposed (red-line) changes to the Bylaws are attached.

Attachment: PLF Policy 3.300 and 3.350 (Redlined)

3.300 INSTALLMENT PRIVILEGES

(A) Installment payment of the annual assessment shall be allowed as follows: An attorney may elect to pay the annual assessment in four quarterly installments. The default date for the first installment is January 10 together with full payment of an installment service charge, and the default dates for the remaining installments are April 10, July 10, and October 10 or the first regular business day thereafter. The installment service charge shall be calculated as an administrative charge of \$10 plus a finance charge of 7% on the total assessment due. The service charge may be rounded up or down to the nearest whole dollar. Attorneys who fail to pay the first installment and full service charge together with any applicable late payment charges, reinstatement charges, and other amounts due to the Bar or the PLF by February 10 or the first regular business day thereafter ~~within two weeks after the applicable default date~~ may not thereafter elect to pay on the installment payment plan for the balance of the year.

(B) If the assessment default date is after January 10, the number of installments available will be fewer than four and will be equal to the number of full quarters left in the year after the default date. No installment payment plan is available if the default date is after June 30.

(C) Attorneys who elect to pay the annual assessment in installments but who fail to make any payment by one month following the applicable installment default date shall be required to pay the entire remaining assessment balance immediately and shall not be entitled to a partial or full refund of any installment service charge previously paid. The attorney shall be charged a late payment charge of \$100 per month for each partial or full calendar month the attorney is in default. The PLF will also begin the notice requirements pursuant to statute.

(D) Attorneys who elect to pay the annual assessment in installments and who subsequently choose to pay some or all of the remaining balance

before the default dates shall not be entitled to a partial or full refund of any installment service charge previously paid.

(E) Attorneys employed by OSB-certified pro bono programs may elect to pay the annual assessment in quarterly installments without paying the installment service charge described in subsection (A).

(BOD 4/10/92; BOG 5/1/92; BOD 7/16/93; BOG 8/16/93; BOD 2/18/94; BOG 3/12/94; BOD 8/9/96; BOG 9/25/96; BOD 4/25/97; BOG 5/31/97; BOD 2/20/04; BOG 4/02/04; BOD 10/11/13; BOG 11/23/13)

3.350 PAYMENT DEFAULT AND LATE PAYMENT CHARGES

(A) Late Payment Charges: The default date for assessment payment will be listed on assessment notices and will be at least 10 days after the start of coverage. In the event a payment which is due is not received by the initial default date, ~~the attorney shall be charged an additional late payment charge of \$50 for a default of up to two calendar weeks; if an attorney is in default for more than two calendar weeks,~~ the attorney shall be charged a late payment charge of \$100 per month for each partial or full calendar month the attorney is in default. Late payment charges shall be considered a part of the assessment which is in default.

(BOD 6/21/02; BOG 8/3/02; BOD 2/20/04; BOG 4/02/04)

(B) The chief executive officer may waive or reduce late payment charges for newly-admitted attorneys during the first partial year of PLF coverage upon a showing of good cause for the delay in payment.

(C) Attorneys Who Fail to Respond to Billing Statements: An active member of the Oregon State Bar whose official mailing address (as maintained by the member with the Oregon State Bar) is in Oregon is provisionally presumed to be engaging in the private practice of law in Oregon and shall be obliged to pay the annual assessment unless an appropriate Request for Exemption is filed with the PLF. A member who fails to pay either the required full or installment assessment amount (plus any applicable late payment

charges) or to file a Request for Exemption by the default date and who is suspended as a result shall be provided with coverage provisionally under the applicable Coverage Plan for claims arising from acts, errors, or omissions occurring during the period covered by the billing statement but prior to the date of suspension. Such provisional coverage shall be subject to verification that the member was, in fact, eligible and required to purchase coverage during the period from the PLF. The burden of establishing that the member was, in fact, eligible and required to purchase coverage during the period from the PLF shall be on the claimant and/or the member, and the PLF may challenge the member's right and obligation to obtain coverage based upon the facts. Once the claimant and/or the member has met this burden, (1) the PLF shall provide applicable coverage for the member (subject to all Coverage Plan terms and conditions) regardless of whether or not the member has paid for the coverage, (2) the member shall be required to pay the PLF immediately for the cost of the coverage, together with all applicable late payment charges, (3) if the member does not pay, the PLF shall pursue collection efforts against the member for payment of the assessment and other charges and interest, and (4) the PLF shall report the attorney to Bar Discipline for appropriate disciplinary action.

(D) Attorneys Who Incorrectly Claim Exemption: An attorney who claims exemption from participation in the PLF during any period when the attorney is not, in fact, eligible to claim exemption shall be subject to the following provisions:

(1) The PLF will provide coverage to the attorney (subject to all Coverage Plan terms and conditions) for the period when the attorney was not eligible to claim exemption.

(2) The attorney will be required to pay the PLF for coverage for the period when the attorney was not eligible to claim exemption, together with all applicable late payment charges to a maximum of three months' late payment charges. Payment will be due immediately upon billing. Failure to pay shall result in suspension

from membership according to the same procedures as apply to any other late payment of a PLF assessment.

(3) The coverage provided to the attorney under this Subsection (D) will be provisional, subject to verification that the attorney was, in fact, eligible and required to obtain PLF coverage for the period in question. The attorney will be required to provide the PLF with such information as the PLF may request in order to determine the attorney's eligibility for coverage, and the PLF shall have the sole authority to make that determination, subject to applicable statutes and policies governing eligibility. If the PLF provisionally provides coverage to an attorney and later determines that the attorney was not, in fact, eligible for coverage, the PLF shall not be estopped from withdrawing coverage and the attorney shall be required to reimburse the PLF for all expense and indemnity incurred during the period of provisional coverage.

(E) Emergency Provisions: The PLF CEO has the authority to take reasonable and necessary actions, including extending deadlines and suspending late fees, if national or statewide events occur that severely disrupt the normal course of business.

(BOD 2/18/94; BOG 3/12/94; BOD 4/25/97; BOG 5/31/97; BOD 6/30/97; BOG 7/26/97; BOD 11/21/97; BOD 2/6/98; BOG 4/4/98; BOD 11/9/01; BOG 11/17/01; BOD 6/21/02; BOG 8/3/02)

Thomas A. Balmer
Chief Justice



OREGON SUPREME COURT

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May 27, 2016

Via email

Helen Hirschbiel
Executive Director, Oregon State Bar
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Tigard, OR 97281-1935
HHirschbiel@osbar.org

Re: OSB Disciplinary System Review Committee Report, Board of Governors
Recommendations

Dear Helen,

Thank you for your presentation at the Supreme Court's public meeting on April 12, 2016, concerning the report of the OSB Disciplinary System Review Committee (DSRC), as well as the Board of Governor's (BOG's) recommendations on that report to the court. The court has considered and discussed the DSRC report and the BOG's recommendations, and I am writing to summarize the court's key discussion points for you. For the most part, the court agrees with the BOG's recommendations.

At the outset, I want to express my sincere thanks to the Bar, the BOG, and the DSRC for their careful and deliberate considerations of the 2015 ABA Study Group Recommendations. In our self-regulating system, it is important for the court and the Bar to periodically review our lawyer disciplinary procedures, to ensure that the system provides an appropriate venue for complainants, fair treatment for lawyers subject to complaints, and -- above all -- protection of clients and the public. It is apparent in reviewing the DSRC report that the DSRC, which commendably included broad representation from varying perspectives, undertook its work with great care and deliberation, as did the BOG in reviewing the DSRC report and in making recommendations to the court.

After reviewing the DSRC report and engaging in a lengthy discussion, which included additional information provided by the court's DSRC liaison members, Justice Martha Walters and Appellate Legal Counsel Lisa Norris-Lampe, the court approves the same DSRC recommendations that the BOG approved, and rejects the same recommendations that the BOG rejected, with a few caveats, as set out below.

DSRC Recommendation #4: Disciplinary Counsel's Office (DCO) should have sole authority to enter into mediation, agree to resolution, negotiate settlement by consent, and decide whether to request Supreme Court review. The BOG recommended rejecting this DSRC recommendation, and the court agrees with the BOG that the SPRB's current authority should continue in the identified areas. The court notes its understanding, however, that the DSRC initially made that recommendation in part out of concern about delay in moving such proceedings through the SPRB, but the Bar apparently does not maintain timeliness statistics or other data that shows the impact of the current processes on the timely disposition of cases by mediation and settlement, or on the decision to request review. The court requests that the Bar begin tracking time, for cases proceeding through various decision points at the SPRB, so that a more informed determination can be made at a future date about the impact of the current process on disposition timeliness. (For example, it would be useful to know the range of time that passes between when DCO and a respondent agree to settle, and the SPRB's final approval.) Gathering that type of data also would inform the question whether permitting a respondent to initially respond to the SPRB would have a negative impact on the timeliness of the decision whether to file a formal complaint, which was part of the DSRC's *Recommendation #30*. The BOG recommended rejecting Recommendation #30, and the court agrees, but the court thinks that gathering timeliness data would assist continuing evaluation of the SPRB's many decision points in the process. As you know, this and some other recommendations were driven, in part, by concerns over the length of time that some steps in the process take, and the court shares those concerns.

DSRC Recommendation #16: Oregon should establish a Professional Adjudicator (PA) position. The BOG recommended approving this DSRC recommendation, but the BOG conditioned its approval on making the new PA an employee of the court, rather than the Bar. The court approves the concept of the PA, but defers a determination about which entity should appoint or employ the PA, pending further discussions between representatives from the Oregon Judicial Department and the Bar about the practicality and cost of various options. The court understands the BOG's concerns about the appearance of impropriety if the PA were both employed by and housed at the Bar. But, in the court's view, the creation of the PA position -- which will benefit the disciplinary system in numerous ways, as outlined in the DSRC report -- must be accomplished in a manner that is most workable from an employer-employee and budgeting standpoint. Those issues are being discussed in detail now, and the court prefers to await further recommendation, once the details are evaluated, as to which entity should appoint and employ the PA.

DSRC Recommendation #19: DCO should have sole authority to initiate reciprocal disciplinary proceedings; there should be a rebuttable presumption that the sanction in Oregon will be of the same severity as in the original jurisdiction. Currently, DCO files reciprocal disciplinary proceedings with the SPRB, and the SPRB then makes a recommendation to this court, which in turn issues a dispositional decision. The DSRC recommendation would change that process, such that DCO would file a reciprocal discipline proceeding with the Disciplinary Board, and either party then may seek review of the Board's decision with the court. As part of that recommendation, the DSRC further recommended that a rebuttable presumption should apply in the assessment of appropriate reciprocal discipline, such that the sanction in Oregon should be of the same severity as in the original jurisdiction. The BOG recommended approving

all aspects of that recommendation. As to the process change, the court approves the recommendation. As to the rebuttable presumption, the court approves the change to the extent that the rebuttable presumption would apply to the Board's determination of discipline in Oregon that may be the subject of a request for court review. Once before the court on review, however, the court prefers not to be bound by the presumption, although the discipline imposed in the original jurisdiction certainly could operate as a factor to be considered as part of the court's review.

DSRC Recommendation #31: Permit respondent to waive trial panel at time of filing answer. Current rules permit a single Disciplinary Board member, rather than a three-person panel, to serve as the sole adjudicator on the merits, on stipulation of the parties. The DSRC recommended that a respondent have sole discretion to determine whether the case should be heard by a three-person panel or a single adjudicator; to avoid judge shopping, the DSRC further recommended that a respondent electing to have a single adjudicator must make that election at the time of filing his or her answer. The BOG recommended that the court reject this recommendation. It appears from the materials before the BOG that the BOG may have understood the recommendation to eliminate the *ability* of the parties to agree to a single adjudicator. The court is not sure whether that was the intent of the DSRC. Certainly the rule should permit the parties to agree to have the PA serve as a single adjudicator. However, the court understands the recommendation to also give the respondent the right to elect to proceed with the PA serving as the sole adjudicator even if the Bar does not agree, but only if the respondent makes that election before the other panel members are appointed. The court requests that the BOG clarify its position on this recommendation -- that is, whether the BOG indeed recommends that a respondent not be permitted to elect to proceed with a single adjudicator if the Bar objects and, if so, the reason for the BOG's position.

Bar Rules: Finally, it is my understanding that the Bar now is working on draft amendments to the Bar Rules that are consistent with the BOG's recommendations to this court, which will be submitted to the BOG for review and approval and then submitted to this court for final approval. The court's preference is that Lisa Norris-Lampe be involved in reviewing the draft Bar Rule amendments and proposing revisions as appropriate, before the proposed amendments are submitted to the BOG for review.

Please do not hesitate to contact either me or Lisa if you have any questions about the information set out in this letter. And again, my thanks to the Bar, the BOG, and the DSRC for the time and effort spent on this important improvement project.

Sincerely,


Thomas A. Balmer
Chief Justice

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2016
From: Helen Hirschbiel, Executive Director
Re: Disciplinary System Professional Adjudicator

Action Recommended

Review the options presented for engaging a disciplinary system professional adjudicator and provide feedback on a general direction.

Background

At its special meeting on March 11, 2016, the Board voted to recommend engaging a disciplinary system professional adjudicator, on the condition that the person be an employee of the Court.

The Court has expressed general enthusiasm about the prospect of creating a professional adjudicator position. The Court believes that creating a professional adjudicator position would support the Board's goals of improving the quality of disciplinary opinions and the efficiency of the disciplinary system.

Since March, bar staff has engaged in discussions with the Chief Justice, the State Court Administrator, and other representatives of the Oregon Judicial Department to delve into the logistics and statutory limitations of creating such a position.

At the request of the Court, bar staff and OJD staff researched the advantages and disadvantages of the following options for structuring the professional adjudicator position:

1. Professional Adjudicator Employed by Court/OJD
2. Professional Adjudicator who is an Independent Contractor Retained by Court/OJD
3. Professional Adjudicator Appointed by Court, but Employed/Retained by OSB
4. Professional Adjudicator who is an Independent Contractor Retained by OSB
5. Professional Adjudicator Employed by OSB

As a result of this collaborative process, it became apparent that if the Professional Adjudicator was an employee of the Court, there would be several additional challenges to implementation, which can be summarized as follows:

- The Oregon Judicial Department must have specific authority from the legislature to hire additional FTE. Any budget associated with that hire also requires legislative approval. See ORS 8.125(2)(b); ORS 8.105.

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- Any money paid by the bar to fund an OJD employee may need to be deposited in the General Fund and specially allocated by the legislature to the Court. *See* ORS 8.130.
 - If the Professional Adjudicator is supervised by the Chief Justice, the Chief Justice may be disqualified from hearing a disciplinary case before the Supreme Court. *See* ORS 14.275. Court staff acknowledged the Board's desire to avoid any appearance of an improper connection between an adjudicator and the bar, but pointed out that direct supervision by the Court would likely create significant conflicts.
 - The Professional Adjudicator would be prohibited from engaging in the private practice of law. ORS 8.160. As a result, it may be difficult to find a person interested in a part-time position, if that were what the position required.
 - The Oregon State Court Administrator's Office may be statutorily required to support the Professional Adjudicator's function, with potential added expense. ORS 8.125.

In addition, the Court has made it clear that from a policy perspective, regardless of what entity retains the Professional Adjudicator, the Professional Adjudicator position should be funded entirely out of bar funds rather than OJD funds (which are primarily general funds) in order to avoid shifting the costs of the disciplinary system to the public.

Options

- **Further Explore Options 3-5 (OSB Employee, OSB Independent Contractor, or Appointed by Court but Employed/Retained by OSB).** Given the challenges outlined above, staff recommends completing further research about these options.
- **Abandon proposal to establish position of professional adjudicator.** Given the Court's support for the idea of a professional adjudicator, staff would not recommend this option at this time.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2016
From: Helen M. Hirschbiel, CEO/Executive Director
Re: Oregon Incubator Program

Action Recommended

Review Oregon Incubator Status Report and consider whether and how to proceed.

Options

- 1) Discontinue exploring the feasibility of an Oregon based incubator program.
- 2) Add studying the feasibility of forming an Oregon based incubator program to the work of the BOG's Futures Task Force.

Background

On November 20, 2015 the BOG approved \$8,600 to fund an Oregon incubator-feasibility study. The BOG was interested in achieving a better understanding of how incubator programs can be a mechanism to address both the lack of access to legal services by low and moderate income Oregonians and the difficulty new lawyers face in training and employment. The request for the study and the funds was made by Oregon lawyer Don Friedman, and Mr. Friedman used the funds were to hire a research attorney to assist in preparing the study. To date approximately \$4,000 remains from the funds allocated to the study.

The results of the research conducted is summarized in a report called The Oregon Incubator Status Report June 2016, which is attached. The Report gives a valuable overview of the characteristics and goals of incubator programs generally and should be read in conjunction with this memo to understand what incubator programs are. The Report highlights the two basic forms of incubators; the two essential phases in the establishment of an incubator; the configuration of successful incubators; the participant requirements and expectations of an incubator graduate; an overview of the range of annual operating costs, and finally a summary of possible incubator program goals, which are restated here:

1. To expand access to affordable legal services for low and moderate income clients, thus addressing the increase in (of necessity) *pro se* representation;
2. To help participating new lawyers establish, maintain, and grow sustainable practices that meet demonstrated low and moderate income community needs;

3. To develop innovative service delivery models, relying on new technology opportunities, that will support successful practices while also being broadly replicable; and
4. To improve the capacity of newly minted lawyers to meet the professional demands of solo and small firm practice.

Summary of ABA Survey Results

An important piece of information gathered was the ABA's most recent incubator best practices survey called the Comprehensive Incubator Survey. The purpose of the survey was to collect and share data about incubator programs and their participants to gain an understanding of the current state of incubators. The ABA has not yet published a report summarizing the survey results; however, we were able to review the raw data from the survey. Forty-six (46) of the fifty-four (54) incubator programs responded to the survey. The survey is broken down into four major sections: (1) program characteristics; (2) resources and training; (3) client and community services; and (4) the future outlook. This portion of the memo highlights some of the findings of the survey.

Law school incubators are still the largest category of incubators with 35% operated by a law school. The next largest category of incubators are collaboration-based at 17%. A collaboration-based incubator is formed and supported by a group of interested parties. The remaining incubators are operated by other types of entities such as bar foundations, bar associations, legal aid and other nonprofits. The vast majority of incubator programs are in an urban setting.

Some incubators charge the participants a fee (such as monthly rent) which is a revenue generator for the program. Surprisingly, only 46% of incubators charge fees. Also surprising is that the most programs (18 out of 39 program answering) report annual costs for running the program at less than \$50,000. Startup costs for the majority of programs (22 out of 40 programs answering) were also low, at less than \$10,000.

The most likely reason for the low reported costs for most programs is that the largest category of incubator programs are operated by law schools with existing infrastructure that allows for contributions of office space, furniture, equipment and technical assistance at a relatively low cost. These law school incubators also tend to be more traditional clinic-type programs, with the primary training focus being substantive law. In addition, 80% of programs report volunteer participation, which helps to keep costs down.

Most incubators require the participant to engage in pro bono work (69%) and most programs focused on low to moderate income clients. Training on technology, different compensation arrangements, and alternative delivery models is very low for most programs, at 7%, 6%, and 5%, respectively.

One survey result of particular note: When asked the most pressing problem facing the incubator, the largest category was sustainability with 28 out of 45 programs indicating sustainability was either challenging or very challenging.

Incubator programs are relatively new, with the first one founded in New York City in 2007. There is not a lot of information to measure whether these programs are meeting the overarching goal to help new lawyers establish and maintain sustainable practices that meet low and moderate income community needs. In fact only 61% of the 46 programs surveyed had metrics in place for evaluating the success of the program. Of those, there has not been enough information gathered to draw conclusions on the effectiveness of meeting their goals.

Goals of Innovative Incubator Programs and Oregon’s Futures Task Force

Two recently-formed incubator programs stand out. They are more robust and have a deliberate focus on innovation, maximizing the use of technology and developing new models of law practice. The goals are for lawyers to provide affordable legal services, meet community needs, and do so on a sustainable basis. The two programs are the Chicago Bar Foundation’s (CBF) Justice Entrepreneur Project (JEP) and Georgia’s Lawyers for Equal Justice (LEJ). Georgia’s incubator is a collaboration of stakeholders including all five law schools, the State Bar, the Supreme Court and the legal aid providers. LEJ is in the process of becoming its own stand-alone nonprofit.

At the April 22, 2016 BOG meeting, Ray Heysell proposed—and the BOG approved—forming a Futures Task Force with the following charge:

Examine how the Oregon State Bar can best serve its members by supporting all aspects of their continuing development and better serve and protect the public in the face of a rapidly evolving profession facing potential changes in the delivery of legal services. Those changes include the influence of technology, the blurring of traditional jurisdictional borders, new models for regulating legal services and educating legal professionals, public expectations about how to seek and obtain affordable legal services, and innovations that expand the ability to offer legal services in dramatically different and financially viable ways.

Mr. Heysell’s memo went on to specify that the task force should study and evaluate the challenges and opportunities brought on by disruptive economic forces that affect 1) the affordability and delivery of legal services, 2) developing and maintaining professional excellence in a dynamic marketplace, and 3) the viability and relevance of the current regulatory framework. He asked that the Futures Task Force consider how the OSB might be involved in and contribute to innovations and initiatives that address one or more of a list of issues. Several of the issues listed for the Futures Task Force to consider are also emphasized by incubator programs such as:

- Increasing the availability of pro bono and low bono services
- Expanding access to justice in rural areas
- Promoting unbundling and alternative fee structures
- Improving practice skills of newly admitted lawyers
- Developing and maintaining practice skills of lawyers throughout a legal career in the face of rapid changes in the legal marketplace and technology

An incubator provides an opportunity to experiment with solutions to some of the challenges listed above. They can utilize new delivery models and concepts in real time with real clients and real lawyers while also serving clients whose legal needs are currently going unmet.¹ The more robust incubator programs such as the CBF and Georgia models were created specifically to address many of the challenges to be considered by the Futures Task Force.

If the Board wants to continue study of the potential feasibility of an incubator program in Oregon, it should consider assigning responsibility to the Futures Task Force. In assessing the feasibility of an incubator in Oregon, the Task Force should:

- Clarify the overall goals for an incubator program in Oregon and how those goals might further the goals contemplated by the Futures Task Force;
- Identify stakeholders and what role they would play in terms of funding and implementation;
- Assess likely structure, costs, benefits and sustainability of an incubator program in Oregon;
- Consider alternative projects, initiatives or means that the OSB might pursue to further the task force goals outlined above;
- Evaluate and prioritize options for achieving those goals in light of relative projected costs, benefits, ongoing projects, and the capacity of the OSB and other entities;
- Develop recommendations for the Board regarding whether and how to proceed with establishing an incubator in Oregon and whether to proceed with alternative projects or initiatives.

¹ Incubator as Laboratory, Hulett H. Askew Visiting Professor Georgia State University College of Law

OREGON INCUBATOR STATUS REPORT

SUBMITTED BY: DON FRIEDMAN

JUNE 2016

INTRODUCTION

A legal incubator is a post-graduate training and support program for recent law school graduates who are interested in solo or small firm practice and are committed to serving low and moderate income clients who would otherwise have limited or no access to legal services. Between 2007, when the first legal incubator was established at University of Missouri Kansas City (UMKC) School of Law, and 2016, more than 54 legal incubators have been established across all U.S. jurisdictions. With each successive year the number of incubators are expected to increase. The ABA employs a full-time staff person (Sara Smith, ABA Division for Legal Services' Research and Policy Analyst) to manage an incubator listserv, act as a national level informational clearinghouse, and in general provide technical support to legal incubators from all jurisdictions.

This status report summarizes the characteristics of incubators generally; and provides a recommendation for consideration of an Oregon incubator program.

BACKGROUND

In the February/March 2015 Oregon State Bar Bulletin, then-OSB president Richard Spier wrote an article regarding the lack of access to legal services suffered by low and moderate income Oregonians and the difficulty new lawyers face in training and employment. Spier observed that connecting these two groups – newly minted Oregon lawyers and legally underserved Oregonians – would make inroads into the dilemmas suffered by both:

“[T]he greatest opportunities lie at the intersection of [this connection], and we should focus our efforts on that intersection – developing mechanisms to help new lawyers find opportunities to build careers by serving the unmet legal needs of Oregonians.”¹

Donald Friedman, former President/CEO of an Oregon financial services company, active member of the OSB, and Spier's former law partner, offered to work pro bono with Spier and the OSB to evaluate whether forming an Oregon incubator would be feasible. At that time, Theresa Wright, a then-OSB staff person (and former Lewis & Clark law professor with 25+ years' experience training Oregon lawyers through her work at Lewis & Clark's Legal Clinic) was evaluating how the OSB could impact the issues raised in Spier's OSB Bulletin article. Wright,

¹“The Justice Gap, Oregon State Bar Bulletin, Vol. 75, (Feb/March 2015), p. 36.

Friedman, and Spier met with Sylvia Stephens, then OSB CEO, and Helen Hirschbiel, former OSB General Counsel and current OSB CEO, to discuss the potential for forming an Oregon legal incubator. Part of that discussion revolved around the importance of partnering with Oregon's three ABA-accredited law schools: Lewis & Clark Law School, Willamette University College of Law, and University of Oregon School of Law.

At the OSB's Governance and Strategic Planning Committee meeting on November 20, 2015, Friedman presented data on various nationwide incubator programs, and requested that the OSB provide funding to hire a Research Attorney to assist in preparing an Oregon incubator-feasibility study. The OSB's Board of Governors approved this request, and in February, 2016, Lisa Kenn, a recent Lewis & Clark Law School graduate and newly admitted OSB member, was hired for the position. The OSB provided up to \$8,600 for the Research Attorney position and each Oregon law school committed an up to an additional \$1,000 for additional student research support.

RESEARCH SUMMARY

Since February, 2016, Kenn, Wright, and Friedman have conducted in-depth research of several prominent and highly successful legal incubators in New York City, the San Francisco bay area, Chicago, Georgia, San Diego, New Jersey (Rutgers School of Law), and Los Angeles. In April, 2016, Kenn, Wright, and Friedman attended the 3rd Annual Access to Justice through Incubators and Non-Profit Law Firms conference, hosted by UMKC School of Law. The conference was well attended, with representatives from a majority of the 54+ established U.S. legal incubators present. In addition, Sara Smith, the ABA incubator Research and Policy Analyst, presented the ABA's most recent incubator best practices survey titled the Comprehensive Incubator Survey.

Kenn, Wright, and Friedman's research, as well as the presentations at the UMKC conference, highlighted the two basic forms of incubators:

1. Law School Based Legal Incubator. This type of incubator is wholly formed and supported by an ABA-accredited law school. The law school operates and funds the incubator, the incubator is not a separate financial or organizational entity, and it is managed by a member of the law school's faculty. Such incubators are often located at the law school or in space provided by the law school.
2. Collaborative/Consortium based Legal Incubator. This type of incubator is formed and supported by a collaboration or consortium of interested parties. These parties can be any combination of state or county bar associations, legal aid organizations, non-profit startups, for-profit law firms, ABA accredited law schools, etc. These are typically separate financial entities, most with their own nonprofit status. They are typically managed by a limited staff often including an executive director, pro bono coordinator and support person. The State Bar of Georgia (which requires mandatory membership), in collaboration with the five ABA-accredited Georgia law schools,

recently launched a highly comprehensive collaborative model legal incubator program, called Lawyers for Equal Justice (LEJ).

Regardless of whether an incubator is launched by a law school or a consortium of stakeholders, there are two essential phases to the establishment of any incubator program - these are (1) formation, and (2) ongoing operations. Each phase has unique demands that require separate financial impact studies. In many existing incubator programs, in-kind contributions of office space, furniture, equipment, and technical assistance help keep start-up costs to a minimum. Incubators typically require funding at formation for fixed start-up and operation costs, but the majority are expected to become financially self-sustaining within 2-3 years

Successful legal incubators also tend to share a common office arrangement. Participants are housed in one central location, but operate solo practices. Many of these locations start off as large, open area working spaces, and participants' "offices" usually consist of smaller sectioned spaces with movable walls. This model makes a virtue of necessity, allowing each participant private space to work, while enabling participants to share resources and receive substantive legal and practice management training in an affordable and collegial setting.

Incubator program requirements for participants can vary widely, but many have certain requirements in common. Most incubator programs restrict participation to recent law school graduates who are committed to representing low and moderate income clients in solo, small firm, or public interest practices. Most require participants to also commit to a certain number of *pro bono* representation hours each month, particularly during the first three to six months of program participation. Additionally, most incubators require participants to pay an office rental fee each month. In exchange, incubator programs provide participants with ongoing practice management training and support, as well as substantive guidance in areas of civil law most relevant to low and moderate income clients, such as family law, basic estate planning, landlord/tenant law, bankruptcy, immigration law, and basic business law.

Incubators enable new lawyers to build sustainable practices while mastering necessary core professional competencies and conduct and providing high quality and affordable legal services to low and moderate income clients. They provide innovative practice environments, with access to the latest practice management software, legal research technology, opportunities to utilize alternative fee structures (such as flat fee and unbundled legal services). Participants are exposed to newer models of legal practice that allow for more efficient delivery of legal services to a larger client base – many with current unmet legal needs.

When an incubator participant "graduates" from an incubator program (usually within 24 months), the new lawyer is expected to have all the tools and training necessary to continue to operate their solo or small firm practice. As noted however, the target clients for an incubator program participant are low and moderate income persons who cannot afford market rate legal services, but who are not poor enough to qualify for legal aid (most such clients fall within 125% to 400% of legal aid poverty guidelines). The expectation is that the new incubator graduate will

continue to operate a solo or small firm practice, and that a substantial percentage of that practice will consist of providing affordable legal services to low and moderate income clients.

Any evaluation of moving forward would include an analysis of the cost and benefit of such a program. Because legal incubators are a relatively recent attempt to provide low and pro-bono legal services to low and moderate income citizens, data regarding the number of clients served is relatively sparse, as is data assessing recruitment of new lawyers to any individual incubator program. Thus at this point it is difficult to assess the overall success of these programs. Anecdotally, each incubator typically recruits at least three new lawyers from each participating ABA-accredited law school. While the programs seem generally able to recruit the desired number of candidates there are also some programs that have not reached their target. Having noted the lack of certainty in the short and long term benefits, the programs and student participants all report a high level of enthusiasm for the efforts and successes to date and for the plans to move forward.

Annual operating costs for any one incubator program range widely from less than \$50,000 per year to \$300,000+ per year. Start up and operating costs typically include the following:

- Initial administrative staffing (organizes a steering/planning committee);
- Law school support for program promotion, screening, application and curricula;
- Nonprofit evaluation and related compliance;
- Office space;
- Staffing (incubator executive director, pro bono coordinator, administrative support);
- Marketing and fundraising;
- Technology advisor (optimizes innovative service delivery, creates tracking methodology to capture assessment data);
- Legal and practice management training.

In summary the basic goals of an incubator program are:

1. To expand access to affordable legal services for low and moderate income clients, thus addressing the increase in (of necessity) *pro se* representation;
2. To help participating new lawyers establish, maintain, and grow sustainable practices that meet demonstrated low and moderate income community needs;
3. To develop innovative and service delivery models, relying on new technology opportunities, that will support successful practices while also being broadly replicable; and
4. To improve the capacity of newly minted lawyers to meet the professional demands of solo and small firm practice.

OSB SERVICES FOR NEW LAWYERS

1. Loan Repayment Assistance Program (LRAP): In 2016 the program will disburse \$142,400 in grants to help public service lawyers repay their educational debt. The award amounts vary, with a maximum of \$7,500, and will be granted to 22 Oregon lawyers, 18 of whom were admitted between 2010 and 2016.

2016 revenue: \$152,000 (member fees and interests)

2016 expense: \$142,400 (no staff support or ICA costs allocated to this budget)

2. The New Lawyer Mentor Program (NLMP): Established in 2011, the program recruits experienced lawyers to mentor lawyers in their first year of practice through the completion of an individualized curriculum. The curriculum covers public service and bar service, professionalism, ethics, law office management, working with clients, career satisfaction and work/life balance, and practice area activities.

2016 revenue: \$20,000 (mandatory fees for new lawyers)

2016 expense: \$248,300 (does not include ICA)

3. Oregon New Lawyers Division (ONLD): Offers a variety of programs to assist new lawyers with the transition from law student to lawyer. Every OSB member who is age 36 or younger or has practiced for six years or less is automatically a member of the ONLD. The ONLD sponsors free and low-cost CLEs and networking events, encourages new lawyers to engage in pro bono, public service and bar activities, and sponsors the Practical Skills Through Public Service internship program.

2016 revenue: \$5,350 (CLE and event registrations; sponsorships)

2016 expense: \$148,680 (does not include ICA)

4. Diversity & Inclusion Department: Most programs support professional development for law students and new lawyers. The figures below reflect 2016 expenses specifically dedicated to scholarships and employment opportunities for law students and new lawyers (OLIO expenses excluded). These programs are available to any law student who can assist the D&I Department in advancing its mission.

Employment retreat: \$2,500

Fellowships: \$56,720 (public honors, access to justice and rural opportunities)

Grants: \$5,400 (bar exam preparation courses)

Law clerk stipends: \$47,040 (attorney-supervised employment in Oregon)

Scholarships: \$24,000 (need-based scholarships for Oregon law students; LSAT prep)

5. **Other OSB benefits:** The following is a list of other bar programs that provide special services or discounts to new lawyers.

Bar fees: Rate for lawyers active two years or less in any jurisdiction is \$470 (regular rate \$557)

CLE: Tuition assistance (half-price or less) available for unemployed/underemployed lawyers, new sole practitioners, legal aid lawyers and students; substantially discounted ONLD rate for live programs (full-day regular rate is \$200, new lawyer rate is \$125)

Lawyer Referral Service: Half-price (\$50) basic registration for members admitted less than 3 years

Sections: A total of 31 bar sections offer free membership to newly admitted lawyers; many sections offer free or discounted CLE to new lawyers.

6. **Professional Liability Fund (PLF):** The PLF offers a range of free and confidential services to all lawyers, many that directly benefit new lawyers in setting up and managing their practices.

- Practice Management Advisors: One-on-one help with setting up a law practice, office management, client relations, financial management, office systems, time management, technology and closing a law practice
- Extensive library of free CLE seminars, focused on practice management and malpractice avoidance; annual three-day “Learning the Ropes” offered at minimal cost for live attendance, no cost for dvd/audio products (2015 package offers 20 MCLE credits)
- Discounts on software for practice management software, conflict checking, legal editing, business productivity and client relationship management
- Publications offered free of charge: *Guide to Setting Up & Running Your Law Office*, *Guide to Setting Up & Using your Trust Account*, “Law Practice Today” monthly newsletter, access to multiple practice management blogs and other resources
- Oregon Lawyers’ Conference Room: Free use of a conference room in downtown Portland

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2016
Memo Date: June 9, 2016
From: Colin Andries, Oregon New Lawyers Division Chair
Re: ONLD Report

The following is a list of the activities and events the ONLD conducted since the last BOG meeting:

- The ONLD, and specifically, Jennifer Nicholls, ONLD Treasurer, have been asked to present a Resolution to amend ABA model rule 8.4 during the Young Lawyers Division annual assembly. The ONLD submitted a similar resolution, and Ms. Nicholls presented the resolution, last year but the issue was tabled to allow the larger ABA Standing Committee on Ethics and Professional Responsibility the opportunity to continue their consideration of the topic. In preparing their Report supporting this year's Resolution, the Standing Committee on Ethics and Professional Responsibility specifically acknowledged the ONLD's efforts and quoted from our report.
- Cassie Jones, Andrew Gust, and Vincci Lam represented Oregon during the ABA Young Lawyers Division Spring Conference. They participated in the affiliate showcase to highlight our Rural Opportunities Task Force, the Immigration Counsel Project, and our affordable CLE lineup.
 - The ONLD Members brought back many ideas, including an idea from the Arkansas State Bar for producing a handbook to guide members of the bar representing survivors of domestic violence. Past-Chair Karen Clevering, Andrew Gust and Jaimie Fender have begun the process of researching how the ONLD can adapt the Arkansas handbook into something that benefits Oregon survivors.
- Youth Immigration Training Program – Working with Immigration Counseling Service the Pro Bono, CLE, and Practical Skills Subcommittees are putting together a one day CLE program. There will be an overview of immigration law followed by presentations from a Family Law attorney, Juvenile Law attorney, and Probate attorney.
- The CLE Subcommittee held 2 brown bag CLE programs in Portland focusing on access to justice and ethics.
- The Member Services Subcommittee sponsored a social at Raven & Rose in April and a May social at Green Dragon Bistro & Pub. On September 8, 2016, it will be sponsoring an event on board the Portland Spirit for judges and ONLD members. We encourage any available BOG members to join us.
- The ONLD is assisting the American Immigration Lawyers Association, who in conjunction with Catholic Charities, are sponsoring Refugee Adjustment Day ("RAD") currently scheduled for July 30th. The one-day clinic helps refugees living in Portland apply for green cards.
- The executive committee will hold their June meeting in Bend on Saturday, June 25. Following the meeting we will participate in a public service project with Action Through Advocacy, a group providing services and support to foster and adoptive families in Eastern Oregon.

OREGON STATE BAR

Board of Governors

Meeting Date: June 24, 2016
Memo Date: June 14, 2016
From: Colin Andries, Chair, Oregon New Lawyers Division
Re: Support for the ABA Standing Committee on Ethics and Professional Responsibility's Amendment to Model Rule of Professional Responsibility 8.4

Action Recommended

The Oregon New Lawyers Division (ONLD) requests approval to introduce the ABA Standing Committee on Ethics and Professional Responsibility's Resolution and Report to the ABA Young Lawyer's Division General Assembly at the annual meeting in August. The Standing Committee on Ethics and Professional Responsibility's Resolution and Report is attached to this memo.

The proposed resolution would amend the definition of "professional misconduct" in the Model Rules of Professional Conduct. The definition of professional misconduct would be amended to include;

"harass or discriminate on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16."

Additionally, the following language would be added to the comments of Model Rule 8.4:

"[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others because of their membership or perceived membership in one or more of the groups listed in paragraph (g). Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct towards a person who is, or is perceived to be, a member of one of the groups. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and

others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Paragraph (g) does not prohibit conduct undertaken to promote diversity.

[5] Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation. A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b)."

Background

In 2015, the ONLD requested and received permission from the Board of Governors to introduce a Resolution to the ABA YLD General Assembly encouraging the ABA to amend Rule 8.4 of the Model Rules of Professional Responsibility. The ONLD's proposal encouraged the ABA to take steps to amend the Model Rules with the same language that Oregon recently adopted amending ORPC 8.4(7). Specifically, Oregon's recent amendment made it professional misconduct to include **"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."**

At the 2015 ABA YLD General Assembly, the ONLD introduced a Resolution advocating for the adoption of this amendment. The ABA Standing Committee on Ethics and Professional Responsibility (the "Standing Committee") was simultaneously planning a roundtable discussion of this issue, and specifically to explore how various states (including Oregon) have adopted similar rules. Accordingly, a motion was brought, and sustained, to table the Resolution introduced by the ONLD. Based on the floor debate at the ABA YLD General Assembly, it was clear that the YLD thought it best to present a united front and wait for the Standing Committee's recommendation of an amendment. While the Standing Committee was in the process of researching and investigating this issue, they did not yet have recommended language for an amendment.

The Standing Committee is now moving forward and presenting the attached Resolution to the American Bar Association's House of Delegates at this August's

Annual Meeting. If adopted by the House of Delegates, the Model Rules of Professional Responsibility will be amended accordingly.

However, in preparation for presenting the Resolution to the House of Delegates, the Standing Committee has taken the extraordinary step of requesting the ONLD introduce the Resolution to the ABA YLD General Assembly in an effort to gather the YLD's support for the Resolution. If the YLD votes in favor of this resolution, then the YLD will be able to actively participate in the debate on this rule during the ABA General Assembly. In making this request, the Standing Committee has recognized the hard work and efforts the ONLD and the Oregon State Bar took to push this issue forward in 2015. In addition, the Standing Committee has acknowledged the ONLD's efforts and used language from our 2015 report in its report supporting the Resolution (see page 3 of the Standing Committee's Report).

Request

The ONLD respectfully requests the Board of Governors' permission to introduce this resolution at the ABA Young Lawyers Division General Assembly in August 2016. The ONLD is honored to have this opportunity to represent the Oregon State Bar.

Next Steps

If the Board of Governors approves this request, the ONLD will present the Standing Committee's Resolution to the ABA YLD General Assembly at the August Annual Meeting. The ONLD will also work with the Standing Committee to educate the ABA General Assembly and the ABA YLD General Assembly Delegates on this rule.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

AMERICAN BAR ASSOCIATION

**STANDING COMMITTEE ON ETHICS
AND PROFESSIONAL RESPONSIBILITY
SECTION ON CIVIL RIGHTS AND SOCIAL JUSTICE
COMMISSION ON DISABILITY RIGHTS
DIVERSITY & INCLUSION 360 COMMISSION
COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY
COMMISSION ON WOMEN IN THE PROFESSION**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association amends Rule 8.4 and Comment of the ABA
2 Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck~~
3 ~~through~~):

4
5 Rule 8.4: Misconduct

6
7 It is professional misconduct for a lawyer to:

8
9 (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or
10 induce another to do so, or do so through the acts of another;

11
12 (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness
13 or fitness as a lawyer in other respects;

14
15 (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

16
17 (d) engage in conduct that is prejudicial to the administration of justice;

18
19 (e) state or imply an ability to influence improperly a government agency or official or to
20 achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~

21
22 (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable
23 rules of judicial conduct or other law; or

24
25 (g) harass or discriminate on the basis of race, sex, religion, national origin, ethnicity,
26 disability, age, sexual orientation, gender identity, marital status or socioeconomic status in

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27 conduct related to the practice of law. This Rule does not limit the ability of a lawyer to accept,
28 decline, or withdraw from a representation in accordance with Rule 1.16.

29

30 Comment

31

32 [1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of
33 Professional Conduct, knowingly assist or induce another to do so or do so through the acts of
34 another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a),
35 however, does not prohibit a lawyer from advising a client concerning action the client is legally
36 entitled to take.

37

38 [2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses
39 involving fraud and the offense of willful failure to file an income tax return. However, some
40 kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of
41 offenses involving "moral turpitude." That concept can be construed to include offenses
42 concerning some matters of personal morality, such as adultery and comparable offenses, that
43 have no specific connection to fitness for the practice of law. Although a lawyer is personally
44 answerable to the entire criminal law, a lawyer should be professionally answerable only for
45 offenses that indicate lack of those characteristics relevant to law practice. Offenses involving
46 violence, dishonesty, breach of trust, or serious interference with the administration of justice are
47 in that category. A pattern of repeated offenses, even ones of minor significance when
48 considered separately, can indicate indifference to legal obligation.

49

50 ~~[3] A lawyer who, in the course of representing a client, knowingly manifests by words or~~
51 ~~conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual~~
52 ~~orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to~~
53 ~~the administration of justice. Legitimate advocacy respecting the foregoing factors does not~~
54 ~~violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a~~
55 ~~discriminatory basis does not alone establish a violation of this rule.~~

56

57 [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines
58 confidence in the legal profession and the legal system. Such discrimination includes harmful
59 verbal or physical conduct that manifests bias or prejudice towards others because of their
60 membership or perceived membership in one or more of the groups listed in paragraph (g).
61 Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct
62 towards a person who is, or is perceived to be, a member of one of the groups. Sexual
63 harassment includes unwelcome sexual advances, requests for sexual favors, and other
64 unwelcome verbal or physical conduct of a sexual nature. The substantive law of
65 antidiscrimination and anti-harassment statutes and case law may guide application of paragraph
66 (g).

67

68 [4] Conduct related to the practice of law includes representing clients; interacting with
69 witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law;
70 operating or managing a law firm or law practice; and participating in bar association, business

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71 or social activities in connection with the practice of law. Paragraph (g) does not prohibit
72 conduct undertaken to promote diversity.

73
74 [5] Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or
75 legal issues or arguments in a representation. A lawyer does not violate paragraph (g) by
76 limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice
77 to members of underserved populations in accordance with these Rules and other law. A lawyer
78 may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers
79 also should be mindful of their professional obligations under Rule 6.1 to provide legal services
80 to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments
81 from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of
82 a client does not constitute an endorsement by the lawyer of the client's views or activities. See
83 Rule 1.2(b).

84
85 ~~[4]~~ [6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith
86 belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith
87 challenge to the validity, scope, meaning or application of the law apply to challenges of legal
88 regulation of the practice of law.

89
90 ~~[5]~~ [7] Lawyers holding public office assume legal responsibilities going beyond those of other
91 citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role
92 of lawyers. The same is true of abuse of positions of private trust such as trustee, executor,
93 administrator, guardian, agent and officer, director or manager of a corporation or other
94 organization.

95

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REPORT

“Lawyers have a unique position in society as professionals responsible for making our society better. Our rules of professional conduct require more than mere compliance with the law. Because of our unique position as licensed professionals and the power that it brings, we are the standard by which all should aspire. Discrimination and harassment . . . is, and unfortunately continues to be, a problem in our profession and in society. Existing steps have not been enough to end such discrimination and harassment.”

ABA President Paulette Brown, February 7, 2016 public hearing on amendments to ABA Model Rule 8.4, San Diego, California.

I. Introduction and Background

The American Bar Association has long recognized its responsibility to represent the legal profession and promote the public’s interest in equal justice for all. Since 1983, when the Model Rules of Professional Conduct (“Model Rules”) were first adopted by the Association, they have been an invaluable tool through which the Association has met these dual responsibilities and led the way toward a more just, diverse and fair legal system. Lawyers, judges, law students and the public across the country and around the world look to the ABA for this leadership.

Since 1983, the Association has also spearheaded other efforts to promote diversity and fairness. In 2008 ABA President Bill Neukum led the Association to reformulate its objectives into four major “Goals” that were adopted by the House of Delegates.¹ Goal III is entitled, “Eliminate Bias and Enhance Diversity.” It includes the following two objectives:

1. Promote full and equal participation in the association, our profession, and the justice system by all persons.
2. Eliminate bias in the legal profession and the justice system.

A year before the adoption of Goal III the Association had already taken steps to address the second Goal III objective. In 2007 the House of Delegates adopted revisions to the Model Code of Judicial Conduct to include Rule 2.3, entitled, “Bias, Prejudice and Harassment.” This rule prohibits judges from speaking or behaving in a way that manifests, “bias or prejudice,” and from engaging in harassment, “based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.” It also calls upon judges to require lawyers to refrain from these activities in proceedings before the court.² This current proposal now before the House will further implement the Association’s Goal III objectives by placing a similar provision into the Model Rules for lawyers.

¹ ABA MISSION AND GOALS, http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited May 9, 2016).

² Rule 2.3(C) of the ABA Model Code of Judicial Conduct reads: “A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.”

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When the Model Rules were first adopted in 1983 they did not include any mention of or reference to bias, prejudice, harassment or discrimination. An effort was made in 1994 to correct this omission; the Young Lawyers Division and the Standing Committee on Ethics and Professional Responsibility (SCEPR³) each proposed language to add a new paragraph (g) to Rule 8.4, “Professional Misconduct,” to specifically identify bias and prejudice as professional misconduct. However, in the face of opposition these proposals were withdrawn before being voted on in the House. But many members of the Association realized that something needed to be done to address this omission from the Model Rules. Thus, four years later, in February 1998, the Criminal Justice Section and SCEPR developed separate proposals to add a new anti-discrimination provision into the Model Rules. These proposals were then combined into Comment [3] to Model Rule 8.4, which was adopted by the House at the Association’s Annual Meeting in August 1998. This Comment [3] is discussed in more detail below. Hereinafter this Report refers to current Comment [3] to 8.4 as “the current provision.”

It is important to acknowledge that the current provision was a necessary and significant first step to address the issues of bias, prejudice, discrimination and harassment in the Model Rules. But it should not be the last step for the following reasons. It was adopted before the Association adopted Goal III as Association policy and does not fully implement the Association’s Goal III objectives. It was also adopted before the establishment of the Commission on Sexual Orientation and Gender Identity, one of the co-sponsors of this Resolution, and the record does not disclose the participation of any of the other Goal III Commissions—the Commission on Women in the Profession, Commission on Racial and Ethnic Diversity in the Profession, and the Commission on Disability Rights—that are the catalysts for these current amendments to the Model Rules.

Second, Comments are not Rules; they have no authority as such. Authority is found only in the language of the Rules. “The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”³

Third, even if the text of the current provision were in a Rule it would be severely limited in scope: It applies (i) only to conduct by a lawyer that occurs in the course of representing a client, and (ii) *only* if such conduct is also determined to be “prejudicial to the administration of justice.” As the Association’s Goal III Commissions noted in their May 2014 letter to SCEPR:

It [the current provision] addresses bias and prejudice only within the scope of legal representation and only when it is prejudicial to the administration of justice. This limitation fails to cover bias or prejudice in other professional capacities (including attorneys as advisors, counselors, and lobbyists) or other professional settings (such as law schools, corporate law departments, and employer-employee relationships within law firms). The comment also does not address harassment at all, even though the judicial rules do so.

In addition, despite the fact that Comments are not Rules, a false perception has developed over the years that the current provision is equivalent to a Rule. In fact, this is the only example in the

³ MODEL RULES OF PROF’L CONDUCT, Preamble & Scope [21] (2016).

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Model Rules where a Comment is purported to “solve” an ethical issue that otherwise would require resolution through a Rule. Now—thirty-three years after the Model Rules were first adopted and eighteen years after the first step was taken to address this issue—it is time to address this concern in the black letter of the Rules themselves. In the words of ABA President Paulette Brown: “The fact is that skin color, gender, age, sexual orientation, various forms of ability and religion still have a huge effect on how people are treated.”⁴ As the Recommendation and Report of the Oregon New Lawyers to the Assembly of the Young Lawyers Division at the Annual Meeting 2015 stated: “The current Model Rules of Professional Conduct (the “Model Rules”), however, do not yet reflect the monumental achievements that have been accomplished to protect clients and the public against harassment and intimidation.”⁵ The Association should now correct this omission. It is in the public’s interest. It is in the profession’s interest. It makes it clear that discrimination, harassment, bias and prejudice do not belong in conduct related to the practice of law.

II. Process

Over the past two years, SCEPR has publicly engaged in a transparent investigation to determine, first whether, and then how, the Model Rules should be amended to reflect the changes in law and practice since 1998. The emphasis has been on open discussion and publishing drafts of proposals to solicit feedback, suggestions and comments. SCEPR painstakingly took that feedback into account in subsequent drafts, until a final proposal was prepared.

This process began on May 13, 2014 when SCEPR received a joint letter from the Association’s four Goal III Commissions: the Commission on Women in the Profession, Commission on Racial and Ethnic Diversity in the Profession, Commission on Disability Rights, and the Commission on Sexual Orientation and Gender Identify. The Chairs of these Commissions wrote to the SCEPR asking it to develop a proposal to amend the Model Rules of Professional Conduct to better address issues of harassment and discrimination and to implement Goal III. These Commissions explained that the current provision is insufficient because it “does not facially address bias, discrimination, or harassment and does not thoroughly address the scope of the issue in the legal profession or legal system.”⁶

In the fall of 2014 a Working Group was formed under the auspices of SCEPR and chaired by immediate past SCEPR chair Paula Frederick, chief disciplinary counsel for the State Bar of

⁴ Paulette Brown, *Inclusion Not Exclusion: Understanding Implicit Bias is Key to Ensuring An Inclusive Profession*, ABA J. (Jan. 1, 2016, 4:00 AM),

http://www.abajournal.com/magazine/article/inclusion_exclusion_understanding_implicit_bias_is_key_to_ensuring.

⁵ In August 2015, unaware that the Standing Committee on Ethics and Professional Responsibility was researching this issue at the request of the Goal III Commissions, the Oregon State Bar New Lawyers Division drafted a proposal to amend the Model Rules of Professional Conduct to include an anti-harassment provision in the black letter. They submitted their proposal to the Young Lawyers Division Assembly for consideration. The Young Lawyers Division deferred on the Oregon proposal after learning of the work of the Standing Committee on Ethics and Professional Responsibility and the Goal III Commissions.

⁶ Letter to Paula J. Frederick, Chair, ABA Standing Committee on Ethics and Professional Responsibility 2011-2014.

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Georgia. The Working Group members consisted of one representative each from SCEPR, the Association of Professional Responsibility Lawyers (“APRL”), the National Organization of Bar Counsel (“NOBC”) and each of the Goal III Commissions. The Working Group held many teleconference meetings and two in-person meetings. After a year of work Chair Frederick presented a memorandum of the Working Group’s deliberations and conclusions to SCEPR in May 2015. In it, the Working Group concluded that there was a need to amend Model Rule 8.4 to provide a comprehensive anti-discrimination provision that was nonetheless limited to the practice of law, in the black letter of the rule itself, and not just in a Comment.

On July 8, 2015, after receipt and consideration of this memorandum, SCEPR prepared, released for comment and posted on its website a Working Discussion Draft of a proposal to amend Model Rule of Professional Conduct 8.4. SCEPR also announced and hosted an open invitation Roundtable discussion on this Draft at the Annual Meeting in Chicago on July 31, 2015.

At the Roundtable and in subsequent written communications SCEPR received numerous comments about the Working Discussion Draft. After studying the comments and input from the Roundtable, SCEPR published in December 2015 a revised draft of a proposal to amend Rule 8.4(g), together with proposed new Comments to Rule 8.4. SCEPR also announced to the Association, including on the House of Delegates listserv, that it would host a Public Hearing at the Midyear Meeting in San Diego in February 2016.⁷ Written comments were also invited.⁸ President Brown and past President Laurel Bellows were among those who testified at the hearing in support of adding an anti-discrimination provision to the black letter Rule 8.4.

After further study and consideration SCEPR made substantial and significant changes to its proposal, taking into account the many comments it received on its earlier drafts.

III. Need for this Amendment to the Model Rules

As noted above, in August 1998 the American Bar Association House of Delegates adopted the current provision: Comment [3] to Model Rule of Professional Conduct 8.4, *Misconduct* which explains that certain conduct may be considered “conduct prejudicial to the administration of justice,” in violation of paragraph (d) to Rule 8.4, including when a lawyer knowingly manifests, by words or conduct, bias or prejudice against certain groups of persons, while in the course of representing a client *but only* when those words or conduct are also “prejudicial to the administration of justice.”

Yet as the Preamble and Scope of the Model Rules makes clear, “Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”⁹ Thus, the ABA did not squarely and forthrightly address prejudice, bias, discrimination and

⁷ *American Bar Association Public Hearing* (Feb. 7, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.authcheckdam.pdf.

⁸ MODEL RULE OF PROFESSIONAL CONDUCT 8.4 DEC. 22 DRAFT PROPOSAL COMMENTS RECEIVED, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4.html (last visited May 9, 2016).

⁹ MODEL RULES OF PROF'L CONDUCT, Preamble & Scope [14] & [21] (2016).

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harassment as would have been the case if this conduct were addressed in the text of a Model Rule. Changing the Comment to a black letter rule makes an important statement to our profession and the public that the profession does not tolerate prejudice, bias, discrimination and harassment. It also clearly puts lawyers on notice that refraining from such conduct is more than an illustration in a comment to a rule about the administration of justice. It is a specific requirement.

Therefore, SCEPR, along with our co-sponsors, propose amending ABA Model Rule of Professional Conduct 8.4 to further implement Goal III by bringing into the black letter of the Rules an anti-discrimination and anti-harassment provision. This action is consistent with other actions taken by the Association to implement Goal III and to eliminate bias in the legal profession and the justice system.

For example, in February 2015, the ABA House of Delegates adopted revised *ABA Standards for Criminal Justice: Prosecution Function and Defense Function* which now include anti-bias provisions. These provisions appear in Standards 3-1.6 of the Prosecution Function Standards, and Standard 4.16 of the Defense Function Standards.¹⁰ The Standards explain that prosecutors and defense counsel should not, “manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status.” This statement appears in the black letter of the Standards, not in a comment. And, as noted above, one year before the adoption of Goal III, the Association directly addressed prejudice, bias and harassment in the black letter of Model Rule 2.3 in the 2007 Model Code of Judicial Conduct.

Some opponents to bringing an anti-discrimination and anti-harassment provision into the black letter of the Model Rules have suggested that the amendment is not necessary—that the current provision provides the proper level of guidance to lawyers. Evidence from the ABA and around the country suggests otherwise. For example:

- Twenty-two states and the District of Columbia have not waited for the Association to act. They already concluded that the current Comment to an ABA Model Rule does not adequately address discriminatory or harassing behavior by lawyers. As a result, they have adopted anti-discrimination and/or anti-harassment provisions into the black letter of their rules of professional conduct.¹¹ By contrast, only thirteen jurisdictions have

¹⁰ ABA FOURTH EDITION CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, http://www.americanbar.org/groups/criminal_justice/standards.html (last visited May 9, 2016); ABA FOURTH EDITION CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html (last visited May 9, 2016).

¹¹ See California Rule of Prof'l Conduct 2-400; Colorado Rule of Professional Conduct 8.4(g); Florida Rule of Professional Conduct 4-8.4(d); Illinois Rule of Prof'l Conduct 8.4(j); Indiana Rule of Prof'l Conduct 8.4(g); Iowa Rule of Prof'l Conduct 8.4(g); Maryland Lawyers' Rules of Prof'l Conduct 8.4(e); Massachusetts Rule of Prof'l Conduct 3.4(i); Minnesota Rule of Prof'l Conduct 8.4(h); Missouri Rule of Prof'l Conduct 4-8.4(g); Nebraska Rule of Prof'l Conduct 8.4(d); New Jersey Rule of Prof'l Conduct 8.4(g); New Mexico Rule of Prof'l Conduct 16-300; New York Rule of Prof'l Conduct 8.4(g); North Dakota Rule of Prof'l Conduct 8.4(f); Ohio Rule of Prof'l Conduct 8.4(g); Oregon Rule of Prof'l Conduct 8.4(a)(7); Rhode Island Rule of Prof'l Conduct 8.4(d); Texas Rule of Prof'l

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decided to address this issue in a Comment similar to the current Comment in the Model Rules.¹² Fourteen states do not address this issue at all in their Rules of Professional Conduct.¹³

- As noted above, the ABA has already brought anti-discrimination and anti-harassment provisions into the black letter of other conduct codes like the *ABA Standards for Criminal Justice: Prosecution Function and Defense Function* and the 2007 ABA Model Code of Judicial Conduct, Rule 2.3.
- The Florida Bar’s Young Lawyer’s Division reported this year that in a survey of its female members, 43% of respondents reported they had experienced gender bias in their career.¹⁴
- The supreme courts of the jurisdictions that have black letter rules with anti-discrimination and anti-harassment provisions have not seen a surge in complaints based on these provisions. Where appropriate, they are disciplining lawyers for discriminatory and harassing conduct.¹⁵

IV. Summary of Proposed Amendments

Conduct 5.08; Vermont Rule of Prof’l Conduct 8.4(g); Washington Rule of Prof’l Conduct 8.4(g); Wisconsin Rule of Prof’l Conduct 8.4(i); D.C. Rule of Prof’l Conduct 9.1.

¹² See Arizona Rule of Prof’l Conduct 8.4, cmt.; Arkansas Rule of Prof’l Conduct 8.4, cmt. [3]; Connecticut Rule of Prof’l Conduct 8.4, Commentary; Delaware Lawyers’ Rule of Prof’l Conduct 8.4, cmt. [3]; Idaho Rule of Prof’l Conduct 8.4, cmt. [3]; Maine Rule of Prof’l Conduct 8.4, cmt. [3]; North Carolina Rule of Prof’l Conduct 8.4, cmt. [5]; South Carolina Rule of Prof’l Conduct 8.4, cmt. [3]; South Dakota Rule of Prof’l Conduct 8.4, cmt. [3]; Tennessee Rule of Prof’l Conduct 8.4, cmt. [3]; Utah Rule of Prof’l Conduct 8.4, cmt. [3]; Wyoming Rule of Prof’l Conduct 8.4, cmt. [3]; West Virginia Rule of Prof’l Conduct 8.4, cmt. [3].

¹³ The states that do not address this issue in their rules include Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Hampshire, Oklahoma, Pennsylvania, and Virginia.

¹⁴ The Florida Bar, *Results of the 2015 YLD Survey on Women in the Legal Profession* (Dec. 2015), [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/13AC70483401E7C785257F640064CF63/\\$FILE/RESULTS%20OF%202015%20SURVEY.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/13AC70483401E7C785257F640064CF63/$FILE/RESULTS%20OF%202015%20SURVEY.pdf?OpenElement).

¹⁵ In 2015 the Iowa Supreme Court disciplined a lawyer for sexually harassing four female clients and one female employee. *In re Moothart*, 860 N.W.2d 598 (2015). The Wisconsin Supreme Court in 2014 disciplined a district attorney for texting the victim of domestic abuse writing that he wished the victim was not a client because she was “a cool person to know.” On one day, the lawyer sent 19 text messages asking whether the victim was the “kind of girl who likes secret contact with an older married elected DA . . . the riskier the better.” One day later, the lawyer sent the victim 8 text messages telling the victim that she was pretty and beautiful and that he had a \$350,000 home. *In re Kratz*, 851 N.W.2d 219 (2014). The Minnesota Supreme Court in 2013 disciplined a lawyer who, while acting as an adjunct professor and supervising law students in a clinic, made unwelcome comments about the student’s appearance; engaged in unwelcome physical contact of a sexual nature with the student; and attempted to convince the student to recant complaints she had made to authorities about him. *In re Griffith*, 838 N.W.2d 792 (2013). The Washington Supreme Court in 2012 disciplined a lawyer, who was representing his wife and her business in dispute with employee who was Canadian. The lawyer sent two ex parte communications to the trial judge asking questions like: are you going to believe an alien or a U.S. citizen? *In re McGrath*, 280 P.3d 1091 (2012). The Indiana Supreme Court in 2009 disciplined a lawyer who, while representing a father at a child support modification hearing, made repeated disparaging references to the facts that the mother was not a U.S. citizen and was receiving legal services at no charge. *In re Campiti*, 937 N.E.2d 340 (2009). The Indiana Supreme Court in 2005 disciplined a lawyer who represented a husband in an action for dissolution of marriage. Throughout the custody proceedings the lawyer referred to the wife being seen around town in the presence of a “black male” and that such association was placing the children in harm’s way. During a hearing, the lawyer referred to the African-American man as “the black guy” and “the black man.” *In re Thomsen*, 837 N.E.2d 1011 (2005).

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A. Prohibited Activity

SCEPR’s proposal adds a new paragraph (g) to Rule 8.4, to prohibit conduct by a lawyer related to the practice of law that harasses or discriminates against members of specified groups. New Comment [3] defines the prohibited behavior.

Proposed new black letter Rule 8.4(g) does not use the terms “manifests . . . bias or prejudice”¹⁶ which appear in the current provision. Instead, the new rule adopts the terms “harass or discriminate” which are based on the words “harassment” and “discrimination” that already appear in a large body of substantive law, antidiscrimination and anti-harassment statutes, and case law nationwide and in the Model Judicial Code. For example, in new Comment [3], “harass” is defined as including “sexual harassment and derogatory or demeaning language towards a person who is, or is perceived to be, a member of one of the groups. . . . unwelcome sexual advances, requests for sexual favors, and or other unwelcome verbal or physical conduct of a sexual nature.” This definition is based on the language of Rule 2.3(C) of the ABA Model Code of Judicial Conduct and its Comment [4], adopted by the House in 2007 and applicable to lawyers in proceedings before a court.¹⁷

Discrimination is defined in new Comment [3] as “harmful verbal or physical conduct that manifests bias or prejudice towards others because of their membership or perceived membership in one or more of the groups listed in paragraph (g).” This is based in part on ABA Model Code of Judicial Conduct, Rule 2.3, Comment [3], which notes that harassment, one form of discrimination, includes “verbal or physical conduct,” and on the current rule, which prohibits lawyers from manifesting bias or prejudice while representing clients.

Proposed new Comment [3] also explains, “The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).” This provision makes clear that the substantive law on antidiscrimination and anti-harassment is not necessarily dispositive in the disciplinary context. Thus, conduct that has a discriminatory impact alone, while possibly dispositive elsewhere, would not necessarily result in discipline under new Rule 8.4(g). But, substantive law regarding discrimination and harassment can also guide a lawyer’s conduct. As the Preamble to the Model Rules explains, “A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs.”¹⁸

B. Mens Rea Requirement

Proposed new Rule 8.4(g) does not use the term “knowingly.” SCEPR received many comments about whether new paragraph (g) should include a specifically stated requirement that the misconduct be “knowing” discrimination or harassment. SCEPR concluded that a “knowing” or “knowingly” requirement in new paragraph (g) is neither necessary nor appropriate.

¹⁶ The phrase, “manifestations of bias or prejudice” is utilized in proposed new Comment [3].

¹⁷ ABA Model Code of Judicial Conduct Rule 2.3, Comment [4] reads: “Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.”

¹⁸ MODEL RULES OF PROF’L CONDUCT, Preamble & Scope [5] (2016).

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Rule 8.4(d), which current Comment [3] illuminates, prohibits “conduct that is prejudicial to the administration of justice.” It does not include an additional requirement that such conduct be “knowing.” Current Rule 8.4(d) does not require one to “knowingly” engage in conduct that is prejudicial to the administration of justice.

Some commentators suggested that the term “knowingly” should be preserved from the current Comment, which explains that “a lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice ... violates paragraph (d) when such actions are prejudicial to the administration of justice.” As noted above, Comments provide interpretive guidance but are not elements of the Rule.

“Knowingly” as used in the Model Rules denotes “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” Rule 1.0(f).¹⁹ And the use of the term “knowingly” in the current provision makes sense in the context of that comment, which deals with bias and prejudice. Bias and prejudice are states of mind that can only be observed when they are made manifest by knowing acts (words or conduct). So it was appropriate to require a “knowing” manifestation as the basis for discipline.

By contrast, “harassment” and “discrimination” are terms that denote actual conduct. As explained in proposed new Comment [3], both “harassment” and “discrimination” are defined to include verbal and physical conduct against others. The proposed rule would not expand on what would be considered harassment and discrimination under federal and state law. Thus, the terms used in the rule—“harass and discriminate”—by their nature incorporate a measure of intentionality while also setting a minimum standard of acceptable conduct. This does not mean that complainants should have to establish their claims in civil courts before bringing disciplinary claims. Rather, it means that the rule intends that these words have the meaning established at law. The well-developed meaning and well-delineated boundaries of these terms in legal doctrine rebuts any notion that the standard imposes strict liability based on a vague and subjective proscription.

Also, the mens rea of the respondent, as well as the harm caused by the conduct, are factors that could be taken into account under the Standards for Imposing Lawyer Sanctions, for example, when determining what sanctions, if any, would be appropriate for the conduct.

C. Scope of the Rule

Proposed Rule 8.4(g) makes it professional misconduct for a lawyer to harass or discriminate while engaged in “conduct related to the practice of law.” The rule is constitutionally limited; it does not seek to regulate harassment or discrimination by a lawyer that occurs outside the scope of the lawyer’s practice of law, nor does it limit a lawyer’s representational role in our legal system. It does not limit the scope of the legal advice a lawyer may render to clients, which is addressed in Model Rule 1.2. It permits legitimate advocacy. It does not change the

¹⁹ Thus, for example, where the word “knowingly” is used elsewhere in the Model Rules—in paragraphs (a) and (f) to Rule 8.4 and in Rule 3.3(a) for example—the lawyer’s state of mind and knowledge or lack thereof can readily be inferred from the conduct involved and the circumstances surrounding that conduct.

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circumstances under which a lawyer may accept, decline or withdraw from a representation. To the contrary, the proposal makes clear that Model Rule 1.16 addresses such conduct. The proposal also does not limit a lawyer's ability to charge and collect a reasonable fee for legal services, which remains governed by Rule 1.5. And, as new Comment [4] makes clear, the proposed Rule does not impose limits or requirements on the scope of a lawyer's professional expertise.

Note also that while the provision in current Comment [3] limits the scope of Rule 8.4(d) to situations where the lawyer is representing clients, Rule 8.4(d) itself is not so limited. In fact, lawyers have been disciplined under Rule 8.4(d) for conduct that does not involve the representation of clients.²⁰

Some commenters expressed concern that the phrase, "conduct related to the practice of law," is vague. "The definition of the practice of law is established by law and varies from one jurisdiction to another."²¹ The phrase "conduct related to" is elucidated in the proposed new Comments and is consistent with other terms and phrases used in the Rules that have been upheld against vagueness challenges.²² The proposed scope of Rule 8.4(g) is similar to the scope of existing anti-discrimination provisions in many states.²³

Proposed new Comment [4] explains that conduct related to the practice of law includes, "representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities *in connection with the practice of law.*" (Emphasis added.) The nexus of the conduct regulated by the rule is that it is conduct lawyers are permitted or required to engage in because of their work as a lawyer.

²⁰ See, e.g., *Neal v. Clinton*, 2001 WL 34355768 (Ark. Cir. Ct. Jan. 19, 2001).

²¹ MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. [2].

²² See, e.g., *Grievance Adm'r v. Fieger*, 719 N.E.2d 123 (Mich. 2016) (rejecting a vagueness challenge to rules requiring lawyers to "treat with courtesy and respect all person involved in the legal process" and prohibiting "undignified or discourteous conduct toward [a] tribunal"); *Chief Disciplinary Counsel v. Zelotes*, 98 A.3d 852 (Conn. 2014) (rejecting a vagueness challenge to "conduct prejudicial to the administration of justice"); *Florida Bar v. Von Zamft*, 814 So. 2d 385 (2002); *In re Anonymous Member of South Carolina Bar*, 709 S.E.2d 633 (2011) (rejecting a vagueness challenge to the following required civility clause: "To opposing parties and their counsel, I pledge fairness, integrity, and civility . . ."); *Canatella v. Stovitz*, 365 F.Supp.2d 1064 (N.D. Cal. 2005) (rejecting a vagueness challenge to these terms regulating lawyers in the California Business and Profession Code: "willful," "moral turpitude," "dishonesty," and "corruption"); *Motley v. Virginia State Bar*, 536 S.E.2d 97 (Va. 2000) (rejecting a vagueness challenge to a rule requiring lawyers to keep client's "reasonably informed about matters in which the lawyer's services are being rendered"); *In re Disciplinary Proceedings Against Beaver*, 510 N.W.2d 129 (Wis. 1994) (rejecting a vagueness challenge to a rule against "offensive personality").

²³ See Florida Rule of Professional Conduct 4-8.4(d) which addresses conduct "in connection with the practice of law"; Indiana Rule of Prof'l Conduct 8.4(g) which addresses conduct a lawyer undertakes in the lawyer's "professional capacity"; Iowa Rule of Prof'l Conduct 8.4(g) which addresses conduct "in the practice of law"; Maryland Lawyers' Rules of Prof'l Conduct 8.4(e) with the scope of "when acting in a professional capacity"; Minnesota Rule of Prof'l Conduct 8.4(h) addressing conduct "in connection with a lawyer's professional activities"; New Jersey Rule of Prof'l Conduct 8.4(g) addressing when a lawyer's conduct is performed "in a professional capacity"; New York Rule of Prof'l Conduct 8.4(g) covering conduct "in the practice of law"; Ohio Rule of Prof'l Conduct 8.4(g) addressing when lawyer "engage, in a professional capacity, in conduct"; Washington Rule of Prof'l Conduct 8.4(g) covering "connection with the lawyer's professional activities"; and Wisconsin Rule of Prof'l Conduct 8.4(i) with a scope of conduct "in connection with the lawyer's professional activities."

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The scope of proposed 8.4(g) is actually narrower and more limited than is the scope of other Model Rules. “[T]here are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity.”²⁴ For example, paragraph (c) to Rule 8.4 declares that it is professional misconduct for a lawyer to engage in conduct “involving dishonesty, fraud, deceit or misrepresentation.” Such conduct need not be related to the lawyer’s practice of law, but may reflect adversely on the lawyer’s fitness to practice law or involve moral turpitude.²⁵

However, insofar as proposed Rule 8.4(g) applies to “conduct related to the practice of law,” it is broader than the current provision. This change is necessary. The professional roles of lawyers include conduct that goes well beyond the representation of clients before tribunals. Lawyers are also officers of the court, managers of their law practices and public citizens having a special responsibility for the administration justice.²⁶ Lawyers routinely engage in organized bar-related activities to promote access to the legal system and improvements in the law. Lawyers engage in mentoring and social activities related to the practice of law. And, of course, lawyers are licensed by a jurisdiction’s highest court with the privilege of practicing law. The ethics rules should make clear that the profession will not tolerate harassment and discrimination in all conduct related to the practice of law.

Therefore, proposed Comment [4] explains that operating or managing a law firm is conduct related to the practice of law. This includes the terms and conditions of employment. Some commentators objected to the inclusion of workplace harassment and discrimination within the scope of the Rule on the ground that it would bring employment law into the Model Rules. This objection is misplaced. First, in at least two jurisdictions which have adopted an anti-discrimination Rule, the provision is focused entirely on employment and the workplace.²⁷ Other jurisdictions have also included workplace harassment and discrimination among the conduct prohibited in their Rules.²⁸ Second, professional misconduct under the Model Rules already applies to substantive areas of the law such as fraud and misrepresentation. Third, that part of the management of a law practice which includes the solicitation of clients and

²⁴ MODEL RULES OF PROF’L CONDUCT, Preamble [3].

²⁵ MODEL RULES OF PROF’L CONDUCT R. 8.4 cmt. [2].

²⁶ MODEL RULES OF PROF’L CONDUCT, Preamble [1] & [6].

²⁷ See D.C. Rule of Prof’l Conduct 9.1 & Vermont Rule of Prof’l Conduct 8.4(g). The lawyer population for Washington DC is 52,711 and Vermont is 2,326. Additional lawyer demographic information is available on the American Bar Association website: http://www.americanbar.org/resources_for_lawyers/profession_statistics.html.

²⁸ Other jurisdictions have specifically included workplace harassment and discrimination among the conduct prohibited in their Rules. Some jurisdictions that have included workplace harassment and discrimination as professional misconduct require a prior finding of employment discrimination by another tribunal. See California Rule of Prof’l Conduct 2-400 (lawyer population 167,690); Illinois Rule of Prof’l conduct 8.4(j) (lawyer population 63,060); New Jersey Rule of Prof’l Conduct 8.4(g) (lawyer population 41,569); and New York Rule of Prof’l Conduct 8.4(g) (lawyer population 175,195). Some jurisdictions that have included workplace harassment and discrimination as professional misconduct require that the conduct be unlawful. See, e.g., Iowa Rule of Prof’l Conduct 8.4(g) (lawyer population of 7,560); Ohio Rule of Prof’l Conduct 8.4(g) (lawyer population 38,237); and Minnesota Rule of Prof’l Conduct 8.4(h) (lawyer population 24,952). Maryland has included workplace harassment and discrimination as professional misconduct when the conduct is prejudicial to the administration of justice. Maryland Lawyers’ Rules of Prof’l Conduct 8.4(e), cmt. [3] (lawyer population 24,142).

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advertising of legal services are already subjects of regulation under the Model Rules.²⁹ And fourth, this would not be the first time the House of Delegates adopted policy on the terms and conditions of lawyer employment. In 2007, the House of Delegates adopted as ABA policy a recommendation that law firms should discontinue mandatory age-based retirement policies,³⁰ and earlier, in 1992, the House recognized that “sexual harassment is a serious problem in all types of workplace settings, including the legal profession, and constitutes a discriminatory and unprofessional practice that must not be tolerated in any work environment.”³¹ When such conduct is engaged in by lawyers it is appropriate and necessary to identify it for what it is; professional misconduct.

This Rule, however, is not intended to replace employment discrimination law. The many jurisdictions which already have adopted similar rules have not experienced a mass influx of complaints based on employment discrimination or harassment. There is also no evidence from these jurisdictions that disciplinary counsel became the tribunal of first resort for workplace harassment or discrimination claims against lawyers. This Rule would not prohibit disciplinary counsel from deferring action on complaints, pending other investigations or actions.

Equally important, the ABA should not adopt a rule that would apply only to lawyers acting outside of their own law firms or law practices but not to lawyers acting within their offices, toward each other and subordinates. Such a dichotomy is unreasonable and unsupportable.

As also explained in proposed new Comment [4], conduct related to the practice of law includes activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law. SCEPR was presented with substantial anecdotal information that sexual harassment takes place at such events. “Conduct related to the practice of law” includes these activities.

Finally with respect to the scope of the rule, some commentators suggested that because legal remedies are available for discrimination and harassment in other forums, the bar should not permit an ethics claim to be brought on that basis until the claim has first been presented to a legal tribunal and the tribunal has found the lawyer guilty of or liable for harassment or discrimination.

SCEPR has considered and rejected this approach for a number of reasons. Such a requirement is without precedent in the Model Rules. There is no such limitation in the current provision. Legal ethics rules are not dependent upon or limited by statutory or common law claims. The ABA takes pride in the fact that “the legal profession is largely self-governing.”³² As such, “a lawyer’s failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process,” not the civil legal system.³³ The two systems run on separate tracks.

²⁹ See MODEL RULES OF PROFESSIONAL CONDUCT R. 7.1 - 7.6.

³⁰ ABA HOUSE OF DELEGATES RESOLUTION 10A (Aug. 2007).

³¹ ABA HOUSE OF DELEGATES RESOLUTION 117 (Feb. 1992).

³² MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [10].

³³ MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [19].

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The Association has never before required that a party first invoke the civil legal system before filing a grievance through the disciplinary system. In fact, as a self-governing profession we have made it clear that “[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.”³⁴ Thus, legal remedies are available for conduct, such as fraud, deceit or misrepresentation, which also are prohibited by paragraph (c) to Rule 8.4, but a claimant is not required as a condition of filing a grievance based on fraud, deceit or misrepresentation to have brought and won a civil action against the respondent lawyer, or for the lawyer to have been charged with and convicted of a crime.³⁵ To now impose such a requirement, only for claims based on harassment and discrimination, would set a terrible precedent and send the wrong message to the public.

In addition, the Model Rules of Professional Conduct reflect ABA policy. Since 1989, the ABA House of Delegates has adopted policies promoting the equal treatment of all persons regardless of sexual orientation or gender identity.³⁶ Many states, however, have not extended protection in areas like employment to lesbian, gay, or transgender persons.³⁷ A Model Rule should not be limited by such restrictions that do not reflect ABA policy. Of course, states and other jurisdictions may adapt ABA policy to meet their individual and particular circumstances.

D. Protected Groups

New Rule 8.4(g) would retain the groups protected by the current provision.³⁸ In addition, new 8.4(g) would also include “ethnicity,” “gender identity,” and “marital status.” The anti-discrimination provision in the ABA Model Code of Judicial Conduct, revised and adopted by the House of Delegates in 2007, already requires judges to ensure that lawyers in proceedings before the court refrain from manifesting bias or prejudice and from harassing another based on that person’s marital status and ethnicity. The drafters believe that this same prohibition also should be applicable to lawyers in conduct related to the practice of law not merely to lawyers in proceedings before the court.

“Gender identity” is added as a protected group at the request of the ABA’s Goal III Commissions. As used in the Rule this term includes “gender expression” which is as a form of gender identify. These terms encompass persons whose current gender identity and expression

³⁴ MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [20].

³⁵ *E.g.*, *People v. Odom*, 941 P.2d 919 (Colo. 1997) (lawyer disciplined for committing a crime for which he was never charged).

³⁶ A list of ABA policies supporting the expansion of civil rights to and protection of persons based on their sexual orientation and gender identity can be found here:

http://www.americanbar.org/groups/sexual_orientation/policy.html.

³⁷ For a list of states that have not extended protection in areas like employment to LGBT individuals see:

<https://www.aclu.org/map/non-discrimination-laws-state-state-information-map>.

³⁸ Some commenters advised eliminating references to any specific groups from the Rule. SCEPR concluded that this would risk including within the scope of the Rule appropriate distinctions that are properly made in professional life. For example, a law firm or lawyer may display “geographic bias” by interviewing for employment only persons who have expressed a willingness to relocate to a particular state or city. It was thought preferable to specifically identify the groups to be covered under the Rule.

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are different from their designations at birth.³⁹ The Equal Employment Opportunities Commission interprets Title VII as prohibiting discrimination against employees on the basis of sexual orientation and gender identity.⁴⁰ In 2015, the ABA House adopted revised Criminal Justice Standards for the Defense Function and the Prosecution Function. Both sets of Standards explains that defense counsel and prosecutors should not manifest bias or prejudice based on another's gender identity. To ensure notice to lawyers and to make these provisions more parallel, the Goal III Commission on Sexual Orientation and Gender Identity recommended that gender identity be added to the black letter of paragraph (g). New Comment [3] notes that applicable law may be used as a guide to interpreting paragraph (g). Under the Americans with Disabilities Act discrimination against persons with disabilities includes the failure to make the reasonable accommodations necessary for such person to function in a work environment.⁴¹

Some commenters objected to retaining the term “socioeconomic status” in new paragraph (g). This term is included in the current provision and also is in the Model Judicial Code. The term has not been applied indiscriminately or irrationally in any jurisdiction which has adopted it. The Indiana disciplinary case *In re Campiti*, 937 N.E.2d 340 (2009) provides guidance as to the meaning of the term. In that matter, a lawyer was reprimanded for disparaging references he made at trial about a litigant's socioeconomic status: the litigant was receiving free legal services. SCEPR concluded that the unintended consequences of removing this group would be more detrimental than the consequences of keeping it in.

Discrimination against persons based on their source of income or acceptance of free or low-cost legal services would be examples of discrimination based on socioeconomic status. However, new Comment [5] makes clear that the Rule does not limit a lawyer's ability to charge and collect a reasonable fee and reimbursement of expenses, nor does it affect a lawyer's ability to limit the scope of his or her practice.

SCEPR was concerned, however, that this Rule not be read as undermining a lawyer's pro bono obligations or duty to accept court-appointed clients. Therefore, proposed Comment [5] does encourage lawyers to be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 to not avoid appointments from a tribunal except for “good cause.”

E. Promoting Diversity

³⁹ The U.S. Office of Personnel Management Diversity & Inclusion Reference Materials defines gender identity as “the individual's internal sense of being male or female. The way an individual expresses his or her gender identity is frequently called ‘gender expression,’ and may or may not conform to social stereotypes associated with a particular gender.” See *Diversity & Inclusion Reference Materials*, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/> (last visited May 9, 2016).

⁴⁰ https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

⁴¹ A reasonable accommodation is a modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity. Examples of reasonable accommodations include making existing facilities accessible; job restructuring; part-time or modified work schedules; acquiring or modifying equipment; changing tests, training materials, or policies; providing qualified readers or interpreters; and reassignment to a vacant position.

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Proposed new Comment [4] to Rule 8.4 makes clear that paragraph (g) does not prohibit conduct undertaken by lawyers to promote diversity. As stated in the first Goal III Objective, the Association is committed to promoting full and equal participation in the Association, our profession and the justice system by all persons. According to the ABA Lawyer Demographics for 2016, the legal profession is 64% male and 36% female.⁴² The most recent figures for racial demographics are from the 2010 census showing 88% White, 5% Black, 4% Hispanic, and 3% Asian Pacific American, with all other ethnicities less than one percent.⁴³ Goal III guides the ABA toward greater diversity in our profession and the justice system, and Rule 8.4(g) seeks to further that goal.

F. How New Rule 8.4(g) Affects Other Model Rules of Professional Conduct

When SCEPR released a draft proposal in December 2015 to amend Model Rule 8.4, some commenters expressed concern about how proposed new Rule 8.4(g) would affect other Rules of Professional Conduct. As a result, SCEPR's proposal to create new Rule 8.4(g) now includes a discussion of its effect on certain other Model Rules.

For example, commenters questioned how new Rule 8.4(g) would affect a lawyer's ability to accept, refuse or withdraw from a representation. To make it clear that proposed new Rule 8.4(g) is not intended to change the ethics rules affecting those decisions, the drafters included in paragraph (g) a sentence from Washington State's Rule 8.4(g), which reads: "This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16." Rule 1.16 defines when a lawyer shall and when a lawyer may decline or withdraw from a representation. Rule 1.16(a) explains that a lawyer shall not represent a client or must withdraw from representing a client if: "(1) the representation will result in violation of the rules of professional conduct or other law." Examples of a representation that would violate the Rules of Professional Conduct are representing a client when the lawyer does not have the legal competence to do so (*See* Rule 1.1) and representing a client with whom the lawyer has a conflict of interest (*See* Rules 1.7, 1.9, 1.10, 1.11, 1.12).

To address concerns that this proposal would cause lawyers to reject clients with unpopular views or controversial positions, SCEPR included in proposed new Comment [5] a statement reminding lawyers that a lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities, with a citation to Model Rule 1.2(b). That Rule reads: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."

Also, with respect to this rule as with respect to all the ethics Rules, Rule 5.1 provides that a managing or supervisory lawyer shall make reasonable efforts to insure that the lawyer's firm or practice has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. Such efforts will build upon efforts already being made to

⁴² American Bar Association, *Lawyer Demographics Year 2016* (2016), http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf.

⁴³ *Id.*

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give reasonable assurance that lawyers in a firm conform to Rule 8.4(d) and are not manifesting bias or prejudice in the course of representing a client that is prejudicial to the administration of justice.

G. Legitimate Advocacy

New Comment [5] to Rule 8.4 includes the following sentence: “Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation.” This retains and updates the statement on legitimate advocacy that is contained in the current provision. The current provision reads: “Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).”

H. Peremptory Challenges

The following sentence appears in the current provision: “A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.” This statement is analogous to a statement in Disciplinary Rule 4-101 of the 1969 Model Code of Professional Responsibility, where the ethical obligation of confidentiality was linked to the legal evidentiary standard of attorney-client privilege.⁴⁴ Just as the Model Rules subsequently separated the evidentiary standard from the ethical standard, so too SCEPR determined to separate a determination by a trial judge on peremptory challenges from a decision as to whether there has been discrimination under the Model Rules. The weight given to the trial judge’s determination should be decided as part of the disciplinary process, not determined by a comment in the Model Rules of Professional Conduct. Thus, SCEPR concluded that this question might more appropriately be addressed under the Model Rules for Lawyer Disciplinary Enforcement or the Standards for Imposing Lawyer Sanctions.

V. CONCLUSION

As noted at the beginning of this Report the Association has a responsibility to lead the profession in promoting equal justice under law. This includes working to eliminate bias in the legal profession. In 2007 the Model Judicial Code was amended to do just that. Twenty-three jurisdictions have also acted to amend their rules of professional conduct to address this issue directly. It is time to follow suit and amend the Model Rules. The Association needs to address such an important and substantive issue in a Rule itself, not just in a Comment.

Proposed new paragraph (g) to Rule 8.4 is a reasonable, limited and necessary addition to the Model Rules of Professional Conduct. It will make it clear that it is professional misconduct to harass or discriminate while engaged in conduct related to the practice of law. And as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers.

⁴⁴ A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013 114 (Art Garwin ed., 2013).

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As the premier association of attorneys in the world, the ABA should lead anti-discrimination, anti-harassment, and diversity efforts not just in the courtroom, but wherever it occurs in conduct by lawyers related to the practice of law. The public expects no less of us. Adopting the Resolution will advance this most important goal.

Respectfully submitted,

Myles V. Lynk, Chair
Standing Committee on Ethics and Professional Responsibility
August 2016

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Ethics and Professional Responsibility

Submitted By: Dennis Rendleman, Ethics Counsel

1. Summary of Resolution(s). The resolution would amend Model Rule of Professional Conduct 8.4, *Misconduct*, to create new paragraph (g) that would create in the black letter of the Rules an anti-discrimination and anti-harassment provision. The resolution also amends Comment [3], creates new Comments [4] and [5] to Rule 8.4 and renumbers current Comments [4] and [5].
2. Approval by Submitting Entity. The Standing Committee on Ethics and Professional Responsibility approved filing this resolution in April 2016. Co-sponsors, the Civil Rights & Social Justice Section, the Commission on Disability Rights, the Diversity & Inclusion 360 Commission, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Sexual Orientation and Gender Identity, and the Commission on Women in the Profession signed on during the months of April and May 2016. The Commission on Hispanic Legal Rights & Responsibilities and the Center for Racial and Ethnic Diversity voted to support the resolution in May 2016.
3. Has this or a similar resolution been submitted to the House or Board previously? This resolution is new. But, the House has acted on similar resolutions. For example, in February 1994 the Young Lawyers Division authored a resolution to bring an anti-discrimination and anti-harassment provision into the black letter of the ABA Model Rules of Professional Conduct. It was withdrawn. Also in February 1994, the Standing Committee on Ethics and Professional Responsibility authored a similar provision. It, too, was withdrawn.

In February 1995, the House adopted Resolution 116C submitted by the Young Lawyers Division. Through that resolution the Association condemned lawyer bias and prejudice in the course of the lawyer's professional activities and opposed unlawful discrimination by lawyers in the management or operation of a law practice.

In February 1998, the Criminal Justice Section recommended that the Model Rules of Professional Conduct include within the black letter an anti-discrimination provision. At the same meeting, the Standing Committee on Ethics and Professional Responsibility submitted a resolution recommending a Comment that included an anti-discrimination provision. Both resolutions were withdrawn.

In August 1998, a joint resolution of the Standing Committee on Ethics and Professional Responsibility and the Criminal Justice Section was submitted and was adopted. The resolution created Comment [3] to Rule 8.4 suggesting that it could be misconduct that is prejudicial to the administration of justice when a lawyer, in the course of representing a client, knowingly manifest by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.

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4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The adoption of this resolution would result in amendments to the ABA Model Rules of Professional Conduct. Goal III of the Association—to promote full and equal participation in the Association, the profession, and the justice system by all persons and to eliminate bias in the legal profession and the justice system—would be advanced by the adoption of this resolution.
5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
6. Status of Legislation. (If applicable) N/A
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments, and also will publish electronically other newly adopted policies. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to successfully implement any policies proposed that are adopted by the House of Delegates.
8. Cost to the Association. (Both direct and indirect costs) None.
9. Disclosure of Interest. (If applicable) N/A
10. Referrals. The Standing Committee on Ethics and Professional Responsibility has been transparent in its research and drafting process for this resolution. First, the Committee appointed a Working Group to research and craft a proposal. The Working Group included representatives from the following Goal III Commissions: Disability, Racial and Ethnic Diversity in the Profession, Sexual Orientation and Gender Identity, and Women in the Profession. The Ethics Committee then hosted two public events—an informal Roundtable in July 2015 at the ABA Annual Meeting in Chicago on its summer 2015 Working Discussion Draft and a formal public hearing in February 2016 at the ABA MidYear Meeting in San Diego on its draft proposal. At these two events, the Ethics Committee accepted written and verbal comments on two different discussion drafts.

The Ethics Committee developed a Rule 8.4 website to communicate information about its work. Drafts and comments received were posted. Through this website, the Committee received more than 450 comments to its December 2015 draft rule.

Using email, the Ethics Committee reached out directly to numerous sections and committees communicating with both the entity's chairman and the entity's staff person about the public hearings and procedure for providing comments. Groups solicited included: the Standing Committees on Professional Discipline, Professionalism, Client Protection, Specialization, Legal Aid and Indigent Defendants, the Commissions on Law and Aging and Hispanic

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Rights and Responsibilities, the Sections on Business Law, Litigation, Criminal Justice, Family Law, Trial Tort and Insurance Practice, and the Judicial Division, the Solo, Small Firm and General Practice Section, the Senior Lawyers Division, and the Young Lawyers Division.

The Ethics Committee's work on this issue was the subject of news articles in the Lawyers' Manual on Professional Conduct and the ABA Journal.

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

Dennis Rendleman, Ethics Counsel
American Bar Association
321 N. Clark Street
Chicago, IL 60654
W: 312-988-5307
C: 312.753.9518
Dennis.rendleman@americanbar.org

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

Myles V. Lynk, Chair
Standing Committee on Ethics and Professional Responsibility
Arizona State University College of Law
Armstrong Hall
P.O. Box 877906
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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution amends Model Rule of Professional Conduct 8.4, *Misconduct*, to create new paragraph (g) that establishes a black letter rule prohibiting discrimination and harassment. The resolution also amends Comment [3], creates new Comments [4] and [5] to Rule 8.4 and renumbers current Comments [4] and [5].

Discriminate and harass are both defined in amended Comment [3]. Discrimination is harmful verbal or physical conduct that manifests bias or prejudice towards others because of their membership or perceived membership in one or more of the groups listed in paragraph (g). Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct towards a person who is, or is perceived to be, a member of one of the groups. Protected persons include those listed in current Comment [3] (persons discriminated on the basis of race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status) and also includes persons discriminated on the basis of ethnicity, gender identity, and marital status. This brings the Model Rules more into line with the Model Code of Judicial Conduct and the Criminal Justice Standards for the Prosecution Function and Standards for the Defense Function.

The scope of new paragraph (g) is “conduct related to the practice of law.” The resolution defines covered conduct as “representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.” Adoption of policy on the terms and conditions of lawyer employment is not foreign to the House of Delegates.

New Rule 8.4(g) includes the statement, “This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.” ABA Model Rule of Professional Conduct 1.16(a) explains that a lawyer shall not represent a client or must withdraw from representing a client if “the representation will result in violation of the rules of professional conduct or other law.” Examples of a representation that would violate the Rules of Professional Conduct is representing a client when the lawyer does not have the legal competence to do so (Rule 1.1) and representing a client with whom the lawyer has a conflict of interest under the Rules including Rule 1.7 (current client) and Rule 1.9 (former client).

2. Summary of the Issue that the Resolution Addresses

This Resolution is a reasonable and rational implementation of ABA’s Goal III: to eliminate bias in the justice system. The ABA has adopted anti-discrimination and anti-bias provisions in the black letter of the Model Code of Judicial Conduct and in the black letter of the Criminal Justice Standards for the Prosecution Function and the Defense Function. Twenty-three jurisdictions have already adopted anti-discrimination or anti-harassment provisions in the black letter of their ethics rules. It is time for the Association to now address bias and prejudice squarely in the black letter of the Model Rules of Professional Conduct.

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

In the 23 jurisdictions that have adopted a black letter rule that provides it is misconduct for a lawyer to discriminate or harass another, disciplinary agencies have investigated and successfully prosecuted lawyers for discriminatory and harassing behavior.

For example, in 2015 the Iowa Supreme Court disciplined a lawyer for sexually harassing four women clients and one female employee. In Wisconsin, the Supreme Court disciplined a district attorney for texting the victim of domestic abuse writing that he wished the victim was not a client because she was “a cool person to know.” On one day, the lawyer sent 19 text messages asking whether the victim was the “kind of girl who likes secret contact with an older married elected DA . . . the riskier the better.” One day later, the lawyer sent the victim 8 text messages telling the victim that she was pretty and beautiful and that he had a \$350,000 home. The victim reported she felt that if she did not respond, the district attorney would not prosecute the domestic violence complaint.

The Minnesota Supreme Court in 2013 disciplined a lawyer who, while acting as an adjunct professor and supervising law students in a clinic, made unwelcome comments about the student’s appearance; engaged in unwelcome physical contact of a sexual nature with the student; and attempted to convince the student to recant complaints she had made to authorities about him.

The Washington Supreme Court in 2012 disciplined a lawyer, who was representing his wife and her business in dispute with employee who was Canadian. The lawyer sent two ex parte communications to the trial judge asking questions like: are you going to believe an alien or a U.S. citizen? The Indiana Supreme Court in 2005 disciplined a lawyer who represented a husband in an action for dissolution of marriage. Throughout the custody proceedings the lawyer referred to the wife being seen around town in the presence of a “black male” and that such association was placing the children in harm’s way. During a hearing, the lawyer referred to the African-American man as “the black guy” and “the black man.”

Those states are leading while the ABA has not kept pace.

This proposal is a measured response to a need for a revised Model Rule of Professional Conduct that implements the Association’s Goal III – to eliminate bias in the legal profession and the justice system.

4. Summary of Minority Views

As explained in the Report, over the past two years, SCEPR has publicly engaged in a transparent investigation to determine, first whether, and then how, the Model Rules should be amended to reflect the changes in law and practice since 1998.

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In December 2015, SCEPR published a revised draft of a proposal to amend Rule 8.4(g), together with proposed new Comments to Rule 8.4. SCEPR also announced to the Association, including on the House of Delegates listserv, that it would host a Public Hearing at the Midyear Meeting in San Diego in February 2016. Written comments were also invited.

After the comment period closed in March 2016, SCEPR made substantial and significant changes to the Resolution based on minority views submitted. Changes include:

- At the request of the ABA Section of Real Property, Trust and Estate Law, the Resolution now defines discriminate in Comment [3]; it explains that disciplinary counsel may use the substantive law of antidiscrimination and anti-harassment to guide application of paragraph (g) in Comment [3]; and provides additional guidance including a statement that lawyers who charge and collect reasonable fees do so without violating paragraph (g)'s prohibition on discrimination based on socioeconomic status in Comment [5].
- At the request of the ABA Labor and Employment Law Section, this Report now explains that the terms and conditions of employment are included within the scope of "operating or managing a law firm." Labor and Employment Law requested that the proposal include a statement that the Rule be interpreted and implemented in accordance with Title VII case law. This Report explains why the Sponsors rejected this recommendation and the Sponsors' position that legal ethics rules are not dependent upon or limited by statutory or common law claims.
- At the request of the ABA Business Law Section Professional Responsibility Committee, the Resolution defines "conduct related to the practice of law" in Comment [4]; it includes guidance on how lawyers may ethically limit their practice under Model Rule 1.16; and it explains that paragraph (g) does not prohibit conduct to promote diversity.

In response to the language released April 12, 2016, concerns have been expressed to the Sponsors about the following:

- That paragraph (g) should include a mens rea of "knowing." The Report addresses this issue and explains why the Sponsors did not include a mens rea.
- That the Comment should retain the statement, "A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule." This Report addressed this issue and explains why the Sponsors did not want to mix evidentiary law with the professional responsibility rules.
- That current Comment language, "Legitimate advocacy respecting the foregoing factors does not violate paragraph (d)," should be retained. The Report addresses this issue and explains why the Sponsors did retain this sentence, as amended.

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- That social activities in connection with the practice of law should be more clearly defined. The Sponsors concluded that the definition provided in the Comment is sufficient for the variety of activities addressed. The critical common factor of such activities is their relationship to the practice of law.
- That Sponsors delete “operating and managing a law firm” from the scope of the Rule or that the Rule require a prior adjudication of discrimination or harassment by a competent tribunal. The Report addresses this issue and explains why the Sponsors determined that creating two separate spheres of conduct, one inside the law firm and one outside the law firm, was inappropriate.
- Finally, some opponents express the opinion that no black letter rule is necessary.⁴⁵

⁴⁵ Not every concern raised is listed here but we have identified the significant concerns that were expressed.

OREGON STATE BAR

Board of Governors

Meeting Date: June 25, 2016
Memo Date: June 13, 2016
From: Legal Services Program Committee
Re: Disbursement of General Fund Revenue to Legal Aid Providers

Action Recommended

Approve the following recommendation forwarded from the Legal Services Program (LSP) Committee for disbursement of the \$200,000 general fund revenue held by the Oregon State Bar.

Background

During the 2016 Legislative Session, Senate Bill 5701 awarded \$200,000 in general fund dollars to the Oregon State Bar's Legal Services Program to be distributed to the four legal aid programs for services relating to housing issues. The LSP Committee reviewed and agree with the legal aid providers' recommendation that the funds be distributed to each organization by poverty population. The legal aid providers include the two statewide programs Legal Aid Services of Oregon (LASO) and the Oregon Law Center (OLC) and the two county programs Lane County Legal Aid and Advocacy Center (LCLAC) and Center for Nonprofit Legal Services (CNPLS). The poverty population for each Oregon County is determined using the American Community Survey (ACS) data which provides the most reliable population estimates. According to the ACS data, 11.34% of the individuals who are financially eligible for legal aid, live in Lane County. Therefore, 11.34% of the \$200,000 should be sent to LCLAC. Similarly, 5.76% of the \$200,000 should be sent to CNPLS because that is the percentage of people who are eligible for legal aid who live in Jackson County. LASO and OLC serve the remainder of the state and should receive 82.9% of the \$200,000 to serve the low-income people living in the regions where they have primary responsibility. LASO and OLC will divide their share equally. This would breakout as follows:

- LCLAC \$22,680 ($\$200,000 \times .1134 = \$22,680$)
- CNPLC \$11,520 ($\$200,000 \times .0576 = \$11,520$)
- LASO \$82,900 ($\$200,000 \times .82.9 = \$165,800/2 = \$82,900$)
- OLC \$82,900 ($\$200,000 \times .82.9 = \$165,800/2 = \$82,900$)

To assure these funds are spent as intended by the legislature, all the programs will use their timekeeping and accounting software systems for allocating costs to this funding source when working on housing issues. Each program has multiple funding sources, including some government and private grants that only fund services related to particular issues. When attorneys provide grant-eligible services, they code their time in the timekeeping and case management system to the appropriate funding source. Attorneys will be instructed to code their time to this funding source when working on housing issues.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2016
From: Helen Hirschbiel, CEO/Executive Director
Re: CSF Awards Recommended for Payment

Action Requested

The Client Security Fund Committee recommends reimbursement of \$8,500 to Kenneth Middleton for his loss resulting from the conduct of attorney Susan Gerber.

Discussion

Background

Beginning sometime in 2010, Susan Gerber practiced in Ontario, Oregon, first with the Rader Stoddard Perez firm, then in a brief partnership with Vicki Vernon in early 2014, and by March 2014 on her own. She represented clients in post-conviction relief cases and criminal appeals. In the spring and summer of 2014, the bar received several complaints from Ms. Gerber's clients and a Malheur County judge alleging that Gerber was missing court dates and not attending to her clients' matters. In response to the bar's investigation, Gerber explained that she had become overwhelmed by her workload starting in December 2013. She also attributed her conduct to her addiction to prescription pain medication following knee surgery. In October 2014, Gerber stipulated to an involuntary transfer to inactive status on the ground that her addiction disabled her from "assisting and cooperating with her attorney and from participating in her defense" of disciplinary matters.

In anticipation of her change of status, Gerber entered into an agreement with Vicki Vernon pursuant to which Vernon would take over 12 of Gerber's pending matters in exchange for \$5,000. The agreement contemplated that Gerber would be reinstated to active practice in 30 days and in the interim would assist Vernon with the transferred cases as a legal assistant or law clerk. If Gerber was not reinstated in 30 days, the agreement provided for an additional \$10,000 payment to be deposited in Vernon's trust account and from which she could withdraw funds at the rate of \$150 hour for her services to the clients whose matters were transferred.

Gerber was not reinstated in 30 days and remains on disability inactive status. She never paid Vernon the promised \$10,000, but Vernon received that amount from the PLF.

Kenneth Middleton

On April 26, 2011, Mr. Middleton was sentenced to 12 years for several convictions in connection with a motor vehicle accident: Manslaughter I, Assault II, Reckless Driving, DUII, and

three counts of Reckless Endangering. Mr. Middleton hired Ms. Gerber in March of 2013. His mother, Donna Violette paid her a flat fee in the amount of \$13,000 to prepare a petition for post-conviction relief (PCR). Ms. Gerber did not provide a retainer or fee agreement, although she confirmed receipt of payment in a letter dated March 20, 2013 to Ms. Violette.

Mr. Middleton lost contact with Ms. Gerber and she stopped returning his phone calls. Ms. Vernon contacted him in October of 2014 and filed a petition in November or December 2015. Dissatisfied with Ms. Vernon's representation, Mr. Middleton hired attorney Larry Rolof in December 2015 to handle his PCR case for a flat fee of \$7500.00.

According to Ms. Gerber's records, she spent approximately 42.4 hours on the case; however, other evidence suggests those records may overstate her time. Much of the work provided no value to the client and Ms. Gerber never completed or filed the petition for PCR.

Analysis

In order to be eligible for reimbursement, the loss must be caused by the lawyer's dishonest conduct. Generally, a lawyer's failure to perform or complete a legal engagement is not, in itself, evidence of dishonest conduct. CSF Rule 2.2.2. Further, reimbursement of a legal fee will be allowed only if the services the lawyer actually provided were minimal or insignificant. CSF Rule 2.2.3. However, a claim may be approved if there are unusual circumstances that justify payment despite noncompliance with one or more rule. The Committee found such circumstances in this case.

Ms. Gerber's fee agreement stated the fee was earned upon receipt and non-refundable, and allowed her to put the fee directly into her general account; however, the agreement also provided for reimbursement of the unearned fee if the object of the representation was not completed. In this case, it was not. In fact, the fee charged was substantially higher than the amount of work she provided. No petition for post-conviction relief was ever filed. Moreover, Ms. Gerber told Mr. Middleton that she had experts lined up, but never actually spoke with them.

The Committee credited Ms. Gerber for 20 hours of work at \$150 per hour, which is the same rate used in prior claims against Ms. Gerber. Ms. Gerber also hired an investigator whom she paid \$1500. Thus, the Committee concluded that the value of services totals \$3,000 and the value of the investigator \$1500, for a total of \$4,500. Deducting that amount from the \$13,000 paid, the Committee found a total unearned fee of \$8500.00, and recommends payment of that amount.

In addition, the Committee recommends waiving the requirement that Mr. Middleton demand repayment. Ms. Gerber was essentially unavailable after she became inactive and being incarcerated leaves Mr. Middleton with limited ability to seek restitution directly from Ms. Gerber.

2/29/16

CLIENT SECURITY FUND
INVESTIGATION REPORT

Re : Client Security Fund Claim No.: 2015-43
Claimant : Kenneth E. Middleton
Lawyer : Susan Gerber
Investigators : Ronald W. Atwood; Gregory A. Reinert

RECOMMENDATION

We recommend payment of Mr. Middleton's claim in the amount of \$8500.00.

CLAIM INVESTIGATION SUMMARY

The claimant, Kenneth Middleton, hired Ms. Gerber in March of 2013. His mother, Donna Violette paid her a flat fee in the amount of \$13,000.00 to prepare a petition for post conviction relief (PCR). Ms. Gerber did not provide a retainer or fee agreement, although she confirmed receipt of payment in her March 20, 2013 letter to Ms. Violette. Ms. Violette does not have a copy of the check, which was issued from Columbia Bank, because the bank no longer has records after a merger.

On December 21, 2015, the CSF acknowledged receipt of Mr. Middleton's claim against Susan Gerber. We interviewed Mr. Middleton, his mother, Ms. Violette, and his sisters, Delilah Anderson Loesch, and Jasmine Anderson. We also spoke the attorney currently handling Mr. Middleton's PCR case, Larry Rolof. Finally, we corresponded with Vicki Vernon using e-mail. Ms. Gerber was contacted by the CSF on December 21, 2015, but did not respond. We have left messages via her cel phone and email.

Kenneth Middleton Background

On April 26, 2011, Mr. Middleton was sentenced to 12 years for several convictions, in connection with a motor vehicle accident: Manslaughter I, Assault II, Reckless Driving, DUI, and three counts of Reckless Endangering. He was later transferred to the Snake River Correctional Institute where he is currently incarcerated.

Susan Gerber Background

Ms. Gerber began practice in 1999; at all times material to this matter, she primarily represented convicts seeking PCR. According to Ms. Gerber's representations to disciplinary counsel, she had become overwhelmed by her workload starting in December of 2013. On March 24, 2014, Ms. Gerber was notified of a disciplinary complaint against

her. In April of 2014, Ms. Gerber formed a partnership with Vicki Vernon to handle PCR cases. On May 30, 2014, Ms. Gerber requested additional time to respond to the disciplinary allegations. Ms. Vernon left the partnership on June 9, 2014. Ms. Gerber said this dissolution added to her existing personal and professional turmoil.

A transfer of cases agreement was signed October 29, 2014; Ms. Vernon was to take over the cases with the consent of the client. Ms. Gerber could continue to work on the cases as a legal assistant. Ms. Gerber was also required to pay Ms. Vernon up to \$15,000.00, depending on the amount of time she was suspended; she only paid \$5,000.00 and the PLF contributed \$10,000.00 to cover all cases. Ms. Gerber eventually moved to Illinois.

This matter is on the list. However, Mr. Middleton was unhappy with Ms. Vernon's representation. He had no understanding as to how Ms. Vernon was being compensated and suspected Ms. Vernon would not be motivated to do a good job without payment. In January of 2016, Mr. Middleton informed Ms. Vernon he planned to hire a different attorney to handle his PCR case.

Mr. Middleton is currently represented by Larry Roloff; he is paying Mr. Roloff for her services.

Post Conviction Relief

Mr. Middleton learned about Ms. Gerber's criminal defense work from other inmates at the Snake River institution. He believes he heard about her sometime around Fall 2012, and shortly thereafter, Ms. Gerber set up a telephone interview. After learning more about his case, Ms. Gerber told Mr. Middleton he had a good case for relief. She was very positive and confident. Mr. Middleton's mother, Donna Violette, paid a flat fee in the amount of \$13,000.00 for her services related to PCR. Ms. Gerber confirmed receipt of payment on March 20, 2013.

Mr. Middleton recalled he felt positive about Ms. Gerber's competence after she started working on his case. She talked about consulting and retaining two experts to testify regarding Mr. Middleton's motor vehicle accident. Mr. Middleton later learned Ms. Gerber never contacted those experts, David Karlin, and Ken McNeely. Mr. Middleton soon noticed Ms. Gerber would not follow-up on plans. They continued to meet on a regular basis, but Mr. Middleton felt Ms. Gerber would repeat the same plans over and over without actually doing anything. Eventually, Ms. Gerber's conduct raised alarms with Mr. Middleton. She would be late for appointments, or miss them altogether. He also recalled at least one meeting where Ms. Gerber focused the discussion mainly on issues in her personal life rather than Mr. Middleton's case. Ms. Violette, Ms. Loesch, and Ms. Anderson gave similar accounts regarding Ms. Gerber's conduct. Mr. Middleton also was unhappy with Ms. Gerber's failure to look into a trial issue involving one of his jurors, who was allegedly a staff member in his jail. Mr. Middleton said Ms. Gerber never investigated the juror issue, despite his requests.

According to Ms. Gerber's records, she spent approximately 42.4 hours on this matter. We use that number as a baseline, but some questions were raised as to whether Ms. Gerber did all the tasks she claimed to do. Ms. Vernon described a letter from Ms. Gerber to Mr. Middleton, which was dated April 3, 2014. In that letter, Ms. Gerber said Mr. Middleton had a great case and she said she would be ready to file his PCR petition by the coming Friday. However, we know Ms. Gerber never completed the petition¹. Further, Ms. Vernon told us Mr. Middleton's PCR case was very challenging in her estimation. Ms. Gerber also made statements to Mr. Middleton about retaining experts such as David Karlin, but he later learned she had not even spoken to him. In other words, Ms. Gerber's records may overstate her time; much of the work provided no value to the client.

Eventually, Mr. Middleton lost contact with Ms. Gerber and she stopped returning his phone calls. Sometime around October of 2014, Mr. Middleton was contacted by Vicki Vernon about taking over for Ms. Gerber. Mr. Middleton was not satisfied with Ms. Vernon's representation. He talked to her about the trial juror issue, but he was frustrated by her failure to investigate that issue. His family members corroborated him on the latter point, and Ms. Violette even offered to help obtain records. Mr. Middleton recalled there was some difficulty in getting his file transferred from Ms. Gerber to Ms. Vernon, but eventually the transfer occurred. Around November or December of 2015, Ms. Vernon filed some kind of petition related to Mr. Middleton's PCR case.

In December of 2015, Mr. Middleton hired a new attorney, Larry Rolof, to handle his PCR case for a flat fee in the amount of \$7,500.00. At the time of this investigation, Mr. Rolof had been paid \$5,000.00. Half that money came from the family of Mr. Middleton's ex-wife and the other half came from Mr. Middleton's savings. Mr. Rolof said the PCR petition filed by Ms. Vernon was not complete and had some deficiencies. Mr. Rolof said there was a hearing scheduled in February of 2016, but he had spoken with the assistant attorney general on the case, Doug Marshall, who said the State would not oppose a postponement. We spoke to Mr. Rolof on January 22, 2016, and he had not yet received Mr. Middleton's file from Ms. Vernon. However, he had communicated with Ms. Vernon and expected to receive the file shortly.

Analysis

Generally, a lawyer's failure to perform or complete a legal engagement is not, in itself, evidence of dishonest conduct. CSF Rule 2.2.2. Further, reimbursement of a legal fee will be allowed only if the services the lawyer actually provided were minimal or insignificant. CSF Rule 2.2.3. However, a claim may be approved if there are unusual circumstances justify payment despite noncompliance with one or more rule.

We do not have a fee agreement here. However, the other fee agreements we have seen involving Ms. Gerber state the fee is earned upon receipt and the fee may be deposited in the general business account. However, it also states a refund is required if the representation is terminated early and the entire fee has not yet been earned.

¹ According to Mr. Roloff, the petition was filed by Ms. Vernon and was substandard.

In this case, the fee charged by Ms. Gerber was substantially higher than the amount of work she provided. We understand the billing rate charged was in the \$150 to \$200 range. If she actually worked those hours, using the \$200 rate, she only earned \$8480. She charged and received \$13,000. Our investigation also shows serious communication issues. Mr. Middleton expressed concern about a jury issue at trial, but Ms. Gerber essentially ignored his request for further investigation. Also, Ms. Gerber allegedly told Mr. Middleton she had experts lined up but never actually spoke with them. She also did not effectively communicate with Mr. Middleton when her bar status became inactive, causing additional delay and concern. No petition for post conviction relief was ever filed.

The value of Ms. Gerber's work is difficult to determine. Ms. Vernon advised us her rate is in the \$150 to \$200 range. We used the lower rate². Only a portion of Ms. Gerber's work was useful for Mr. Middleton's subsequent attorneys, so we gave her credit for 20 hours. Using a rate of \$150.00 per hour, we calculated a total of \$3000.00 for the value of Ms. Gerber's work. We also know Ms. Gerber hired an investigator and a portion of the fee was paid to the investigation. When we talked to Mr. Garcia, he thought he received \$1500 to \$2000.00. He was not sure of the amount. Thus, we will give credit for the lower amount. Thus, it is our conclusion the value of services totals \$3000.00 and the value of the investigator was \$1500.00 for a total of \$4500.00. If we deduct that amount from the total fee of \$13,000.00, we get a total unearned fee in the amount of \$8500.00. We recommend payment of his claim in the amount of \$8500.00.

FINDINGS AND CONCLUSIONS

1. Ms. Gerber was admitted to the Oregon State Bar on September 30, 2009.
2. On March 24, 2014, Ms. Gerber was notified of a disciplinary complaint against her.
3. Kenneth Middleton was a client of Susan Gerber. She was hired in March of 2013.
4. Mr. Middleton's mother, Ms. Violette, paid Ms. Gerber a flat fee in the amount of \$13,000.00 to represent Mr. Middleton in connection with his PCR. There was no fee agreement.
5. On October 9, 2014, Ms. Gerber petitioned for her bar status to become inactive, based upon a disability, which was approved by the Supreme Court on November 20, 2014.
6. Ms. Gerber became overwhelmed starting in December of 2013 due to a combination of personal and professional issues. She developed a pattern of untimeliness.
7. Ms. Gerber claimed she spent over 42.4 hours on Mr. Middleton's case; however, only a portion of the work she performed was usable by subsequent counsel. No more than 20 hours have any value for Mr. Middleton. Further, Ms. Gerber spent at least \$1500 on an investigator.
8. Ultimately, Vicki Vernon took over Mr. Middleton's case and filed a PCR petition on his behalf in November or December of 2015.
9. Vicki Vernon estimates an applicable rate is in the range of \$150 to \$200 hourly.

² We see no reason to use the higher rate under the circumstances.

10. Mr. Middleton did not demand repayment from Ms. Gerber but his communication with her was limited after she became inactive and he felt he never had an opportunity to demand repayment.
11. Considering the hours spent on this matter by Ms. Gerber and a fair hourly rate, the value of work performed by Ms. Gerber does not exceed \$3000.00.
12. Mr. Middleton should be reimbursed \$8500.00.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2016
From: Helen Hirschbiel, Executive Director
Re: CSF Claim No. 2016-01 ECKREM (Smith) Request for BOG Review

Action Requested

Consider claimant's request for BOG review of the CSF Committee's denial of his claim for reimbursement.

Discussion

Summary of Facts

In June 2015, Sheri Smith retained John Eckrem to represent her in defense of domestic violence charges. She paid him \$3,000 and signed a written fee agreement. Although Ms. Smith did not submit a copy of the fee agreement, fee agreements provided by other Eckrem clients state that the fees are earned upon receipt, and it is likely that Claimant's agreement with Eckrem was the same.

Claimant contends that Eckrem knew he was going to be suspended at the time he took her money. The evidence does not support this. At the time Eckrem agreed to represent Ms. Smith, he was on probation with the bar for a prior disciplinary matter. His probation was revoked on October 21, 2015 for failure to submit the quarterly compliance report that was due on July 1, 2015. Mr. Eckrem was given notice of the bar's intent to pursue revocation when the bar's motion for order to show cause was filed on August 17, 2015. An executed Order to Show Cause was sent to Eckrem on August 21 and he acknowledged receipt on August 23, 2015. Eckrem was ultimately suspended for 60 days effective November 19, 2015.

Claimant also contends that Eckrem did nothing for her, but at the same time admits that Eckrem attended at least two court appearances on her behalf and asked for several continuances on the case. Delaying the proceedings appeared to be a strategy, because the criminal case was ultimately dismissed in early 2016 without further action.

CSF Committee Analysis

This is one of approximately one dozen claims for CSF reimbursement stemming from John Eckrem's representation of clients and his failure to return unearned fees. In order for a loss to be eligible for reimbursement, it must result from a lawyer's dishonest conduct. CSF Rule 2.2.1. The CSF Committee has found dishonest conduct in several of the cases handled by Eckrem and approved those claims. The Client Security Fund Committee denied this claim because it found no evidence of dishonesty by Eckrem; instead it determined that this was a dispute over the value of the services provided by Eckrem. Oregon Supreme Court case law does not automatically equate the failure to return unearned fees with dishonesty.



Client Security Fund Application for Reimbursement

201601

Return completed form to:

Oregon State Bar
Client Security Fund
PO Box 231935
Tigard, OR 97281-1935

Payments from the Client Security Fund are entirely within the discretion of the Oregon State Bar.
Submission of this claim does not guarantee payment.
The Oregon State Bar is not responsible for the acts of individual lawyers.

Please note that this form and all documents received in connection with your claim are public records.
Please attach additional sheets if necessary to give a full explanation.

RECEIVED

JAN 05 2016

Oregon State Bar
Executive Director

1. Information about the client(s) making the claim:

a. Full Name: Sheri Kay Smith
b. Street Address: 6369 Chapparel St.
c. City, State, Zip: Central Point OREGON.
d. Phone: (Home) _____ (Cell) 541-890-8897
(Work) _____ (Other) _____
e. Email: SheriSmith0734@yahoo.com

2. Information about the lawyer whose conduct caused your claim (also check box 10A on page 3):

a. Lawyer's Name John P. Eckrem
b. Firm Name Eckrem Law Group
c. Street Address: 1175 E. Main St. Ste. 1B
d. City, State, Zip: Medford Oregon 97504
d. Phone: 541-326-0006
e. Email: _____

3. Information about the representation:

a. When did you hire the lawyer? JUNE 2015
b. What did you hire the lawyer to do? Criminal Defence

c. What was your agreement for payment of fees to the lawyer? (attach a copy of any written fee agreement)
3000.00 verbal

d. Did anyone else pay the lawyer to represent you? NO EXCEPT ALL MY CREDIT CARDS

e. If yes, explain the circumstances (and complete item 10B on page 3).

f. How much was actually paid to the lawyer? 3000.00

g. What services did the lawyer perform? Court Appearance x 2

h. Was there any other relationship (personal, family, business or other) between you and the lawyer?

HE SAID HE WOULD DO MY DIVORCE FOR 800⁰⁰

4. Information about your loss:

a. When did your loss occur? December 2015

b. When did you discover the loss? December 2015

c. Please describe what the lawyer did that caused your loss HE DID NOT PERFORM HIS DUTIES AS MY ATTORNEY. HE WAS SUSPENDED FOR A MULTIPLE OF EVENTS.

d. How did you calculate your loss? Nothing has been Done to Represent me.

5. Information about your efforts to recover your loss:

a. Have you been reimbursed for any part of your loss? If yes, please explain: NO.

b. Do you have any insurance, indemnity or a bond that might cover your loss? If yes, please explain: NO.

c. Have you made demand on the lawyer to repay your loss? When? Please attach a copy of any written demand.

NO. NOT ACCEPTING PHONE CALLS.

d. Has the lawyer admitted that he or she owes you money or has he or she agreed to repay you? If yes, please explain: CANT REACH HIM.

e. Have you sued the lawyer or made any other claim? If yes, please provide the name of the court and a copy of the complaint. Emailed it TO OSB

f. Have you obtained a judgment? If yes, please provide a copy

g. Have you made attempts to locate assets or recover on a judgment? If yes, please explain what you found: NONE

6. Information about where you have reported your loss:

District attorney

Police

Oregon State Bar Professional Liability Fund

If yes to any of the above, please provide copies of your complaint, if available.

Oregon State Bar Client Assistance Office or Disciplinary Counsel

7. Did you hire another lawyer to complete any of the work? If yes, please provide the name and telephone number of the new lawyer.

NO CANT AFFORD ANOTHER ATTORNEY. I MAXED OUT ALL MY CREDIT CARDS.

8. Please give the name and the telephone number of any other person who may have information about this claim: Peter Carini Attorney at Law,
1555 E. Mc Andrews Road, Suite 302 Medford OR, 97504.
541-779-5000

9. Agreement and Understanding

The claimant agrees that, in exchange for any award from the Oregon State Bar Client Security Fund (OSB CSF), the claimant will:

- a. Transfer to the Oregon State Bar all rights the claimant has against the lawyer or anyone else responsible for the claimant's loss, up to the amount of the CSF award.
- b. Cooperate with the OSB CSF in its efforts to collect from the lawyer, including providing information and testimony in any legal proceeding initiated by the OSB CSF.
- c. Notify the OSB CSF if the claimant receives notice that the lawyer has filed for bankruptcy relief.
- d. Notify the OSB CSF if the claimant receives any payment from or otherwise recovers any portion of the loss from the lawyer or any other person on entity and reimburse the OSB CSF to the extent of such payment

10. Claimant's Authorization

- a. Release of Files: I hereby authorize the release to the OSB Client Security Fund, upon request, of any records or files relating to the representation of me by the lawyer named in Question 2.
- b. Payment to Third Party: I hereby authorize the OSB Client Security Fund to pay all amounts awarded to me to:

Name Sheri Kay Smith
 Address: 6369 Chapparel St. Central Point OREGON 97502.
 Phone: 541-890-8897

11. Claimant's Signature and Verification

(Each claimant must have a notarized signature page. Please photocopy this page for each person listed in question 1.)

State of OREGON)
 County of JEFFERSON) ss

Upon oath or affirmation, I certify the following to be true:

I have reviewed the Rules of the Client Security Fund and the foregoing Application for Reimbursement; and submit this claim subject to the conditions stated therein; and the information which I have provided in this Application is complete and true, to the best of my knowledge and belief.

Sheri Kay Smith
 Claimant's Signature

Signed and sworn (or affirmed) before me this 5th day of January 2016



Cynthia Gail McDonald
 Notary's Signature
 Notary Public for OREGON
 My Commission Expires 3-31-18

Please complete page 4 if an attorney is representing you for this claim.

12-30-15

To whom it may concern:

My name is Sheri Kay Smith. I retained Attorney John P. Eckrem Back in June 2015. For A Criminal Case I was involved in. We had An agreement of 3000 dollars Total. I maxed out my credit cards to Do this. Christmas Did not happen this year. My Court Date has Been pushed Further Every time I turn around. He knowingly ~~that~~ HE WAS going to be Suspended

Sheri Kay Smith

ps. I Emailed this To the Complaint Department. January 1st 2016. to The Oregon State Bar.

To Camille Green



Just the **FAX**

250 East Pine Street • Central Point OR 97502 • (541) 664-5228 • FAX (541) 664-3878

DATE 1-5-2016

THIS FAX IS FOR: Client Security Fund COMPANY: Oregon State Bar

FAX NUMBER: 503-598-6986 PHONE NUMBER: 1-800-452-8260 #386

FROM: Sheri Kay Smith

PAGE 1 of 5

MESSAGE: Here are the Documents. Thank you

Sheri Kay Smith

541-890-8897

RECEIVED

JAN 05 2016

**Oregon State Bar
Executive Director**

CLIENT SECURITY FUND INVESTIGATIVE REPORT

FROM: Nancy M. Cooper
DATE: April 27, 2016
RE: CSF Claim No. 2016-01
CLAIMANT: Sheri Kay Smith
ATTORNEY: John Eckrem

INVESTIGATOR'S RECOMMENDATION

Recommend denial of the claim.

STATEMENT OF CLAIM

Claimant seeks reimbursement of \$3,000 paid to John Eckrem in a criminal defense matter.

Material dates:

Date	Explanation
7/1/2014	Imposition of a 90-day suspension with all but 30 days stayed and 2 years' probation
June 2015	Retained by S. Smith for criminal defense
8/19/2015	Order to show cause regarding revocation of probation signed by State Disciplinary Chair
9/28/2015	Petition to Revoke Probation filed
10/12/2015	Order of Probation Revocation signed by State Disciplinary Chair immediately stayed due to response by Eckrem
11/9/2015	Probation revoked and 60 days' suspension imposed effective 11/19/2015
12/7/2015	Suspended in accordance with BR 7.1
3/24/2016	Suspended by the Supreme Court

This is one of multiple claims against John Eckrem. To investigate this claim I attempted to reach John Eckrem by e-mail twice, using an e-mail address he provided to me early in the process. He initially responded asking what I was investigating. I explained I was investigating

a series of CSF claims and would like to hear his side and gain input regarding the claims. He has failed to respond to my inquiries.

I also interviewed the Claimant, who confirmed the basic facts of her claim as noted on the initial application.

John Eckrem was admitted to the Bar in 1996. Sheri Smith retained services in June of 2015 to represent her in a criminal defense matter. She paid him \$3,000 as a retainer deposit. Ms. Smith represented that she signed a written fee agreement with John Eckrem, though she never submitted one in support of her claim. Other claimants have submitted copies of the fee agreement. They are identical with only the client name changed. The fee agreement is earned upon receipt. There is a statement that “if attorney’s representation of client should terminate prior to the conclusion of the matter, the client may be entitled to a partial refund, depending on the services rendered.” At no point in the fee agreement is an hourly rate specified.

Ms. Smith complains that Mr. Eckrem did not perform his duties as her attorney. However, she admits that he attended at least two court appearances on her behalf. He also asked for continuances in her case (she believes approximately eight). Repeated continuances is not uncommon in criminal defense work. Smith says she was very unhappy with his work.

In her complaint Smith says he knew he was going to be suspended. When asked how she was sure of that she said he just had to know. This statement is not supported by the facts. Ms. Smith retained Eckrem in June of 2015. In June of 2015 Eckrem was on a two-year probation which included 90 days’ suspension with all but 30 days stayed. This probation was not revoked until November 19, 2015.

Ms. Smith indicates she has not hired other representation. John Eckrem did perform certain legal services for Ms. Smith. The services were more than de minimus. By her own statement he appeared on two different court hearings for her and obtained numerous continuances, a common defense tactic. There is no direct evidence of actual dishonesty on Mr. Eckrem’s part. Smith has not pursued other avenues of repayment, such as small claims.

FINDINGS AND CONCLUSIONS

1. Claimant was the client of the accused.
2. The accused was an active attorney and a member of the Oregon State Bar at the time of the loss.
3. The accused maintained an office in Medford, Oregon, at the onset of the engagement.
4. Claimant engaged Eckrem and his office to represent her in a criminal proceeding.
5. After the initial consultation, Claimant appeared in court with Eckrem on at least two occasions, and Eckrem performed certain valuable services for the benefit of Claimant, including obtaining numerous continuances.

6. Claimant paid Eckrem \$3,000 in advance as a flat fee for services. The fee agreement, while not provided, was reviewed from other claims. The fee agreement states all fees are earned upon receipt.
7. There is no indication that at the time of engagement Eckrem had any indication of pending suspension.
8. There is no indication of dishonest conduct under the terms of the Client Security Fund.
9. This is a fee dispute between the parties.

5-20-16.

Dear Helen Hierschbiel:

I am Requesting A Review by The Oregon State Bar Board of Governors.

I Dont Feel I was represented fairly. Attorney Peter Carini called me and told me He Learned of his Suspension Long Before He Took my money.

There was no wage Dispute ~~Either~~.

Reg. John P. Eckrem
Claim # 2016-01

RECEIVED
MAY 25 2016
Oregon State Bar
Executive Director

Sheri Kay Smith
6369 Chapparel St.
Central Point OR
97502.

541-890-8897.

SheriSmith0724@yahoo.
com

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2016
From: Helen Hierschbiel, Executive Director
Re: CSF Claim No. 2015-19 WIESELMAN (Lowry) Request for BOG Review

Action Requested

Consider claimant's request for BOG review of the CSF Committee's denial of his claim for reimbursement.

Discussion

Summary of Facts

In the early 00's, Shaun D. Lowry ("Claimant") worked as a software salesman for Omniture. While employed at Omniture, Claimant negotiated a large deal, for which he felt Omniture owed him a commission of \$4.5 million. Omniture disagreed about the amount of the commission. Sometime in 2004, Claimant hired Matthew Samwick to represent him in litigation against Omniture (*Omniture I*).

In late 2004, the bar began prosecution of Samwick for mishandling of client funds. In May 2008, Samwick tendered a Form B resignation and sought to sell his law firm. Sometime in late 2008, Jacob Wieselmann entered into a contract with Samwick for the purchase of Samwick's firm ("Firm.") Samwick continued to be employed by the Firm as a paralegal and to exercise control over the Firm's IOLTA account.

Wieselmann took over the *Omniture I* litigation and settled the case on December 31, 2008. Under the terms of the settlement, Omniture was to pay Claimant \$990,000 within ten days. Bank records show this amount was wired into the Firm's IOLTA account at Northwest Bank on January 14, 2009. All parties agree that none of the \$990,000 was disbursed to claimant. What exactly happened to the funds, however, is hotly contested and unclear.

In March 2009, Omniture filed a declaratory action against Claimant (*Omniture II*). Claimant signed a new engagement letter with Wieselmann the following month, agreeing to pay Wieselmann on an hourly basis for representation in the *Omniture II* matter. Claimant agreed to leave the Omniture settlement funds in trust to cover the litigation fees. Omniture eventually dismissed the suit in December 2012. Thereafter, in early 2013, Claimant began asking for an accounting and refund of his retainer. He received neither.

Wieselmann says that at the time the *Omniture I* case settled, Claimant owed the Firm \$444,841.62, which was paid to the Firm from the settlement proceeds. The *Omniture I* settlement agreement also recited that \$400,000 of the settlement was attributable to attorney's fees and costs. Further, Wieselmann alleges that Claimant agreed to retain the Firm on the *Omniture II* matter for a flat fee of \$400,000.

Claimant disputes these allegations. In addition, bank records and the engagement letter don't support Wieselman's version of events. On the other hand, Claimant himself signed a declaration on January 26, 2010—which he submitted during his divorce proceedings—that is completely in line with Wieselman's story.¹ That said, even assuming that Wieselman's story is accurate, it does not fully account for the \$990,000 settlement funds—approximately \$124,000 remains unaccounted for which Claimant did not receive.

Claimant filed a claim with the Client Security Fund for the full \$990,000. Claimant also filed a civil suit against Wieselman and the Firm on June 4, 2015, alleging legal malpractice, fraud, and negligence. On January 22, 2016, Wieselman entered into an Agreement for Stipulation to Judgment (“Settlement Agreement”) that includes a stipulated judgment (“Judgment”) against Wieselman and the Firm. Notably, the Judgment specifically provides for judgment only on the malpractice and negligence actions; the fraud claim is dismissed with prejudice.

In addition to the Settlement Agreement and Judgment, the parties executed an Assignment of Claims and Covenant Not to Execute (“Assignment”). Two provisions in the Assignment are worth noting. First, to the extent that Wieselman or the Firm have any claims against the PLF, such claims are assigned to Claimant. Second, Claimant agrees not to execute on or otherwise enforce the Judgment against Wieselman or the Firm. The covenant not to execute is not limited in duration.

Finally, the Settlement Agreement includes a declaration by Wieselman stating that he never knowingly converted or directed others to convert Claimant's funds. The clear implication is that Samwick and the legal assistant were responsible for any misappropriation. Interestingly, although Wieselman had filed a third-party claim (for contribution and indemnity) against Samwick, that claim was not assigned to Claimant and was instead dismissed with prejudice. Claimant and Samwick did enter into a separate Settlement Agreement, Mutual Release, and Covenant Not to Sue (the “Samwick Agreement”). The Samwick Agreement contains the following releases: (1) both parties mutually release any and all claims arising from or related to the *Lowry v. Wieselman* litigation, and (2) Claimant covenants not to sue Samwick for “any act, omission, or claim whatsoever, known or unknown, that exists as of the date of this Agreement.” The agreement further calls for Samwick to pay Claimant \$25,000, which he has done.

CSF Committee Analysis

The CSF investigator noted, and the Committee agreed, that settlement of the civil suit was notable for several reasons. First, without any evidentiary hearings or dispositive motions,

¹Wieselman has argued that this declaration was a strategy for Claimant to hide money from his wife during the divorce, although at the same time Wieselman relies heavily on the validity of the Declaration (in fact, he admits that the Declaration is the only written memorialization of the alleged flat-fee agreement for *Omniture II*). Claimant insists that he fully disclosed the settlement funds to his ex-wife, and that the Declaration was not an attempt to hide assets. Claimant's explanation of the declaration is essentially that he signed it based on the trust he placed in his counsel.

it is unlikely the bar could establish the facts with any certainty. Second, the Judgment against Wieselmann is for malpractice and negligence, not for dishonest conduct. In fact, in his Declaration attached to the Settlement Agreement Wieselmann continues to assert that he never knowingly converted Claimant's funds.² Third, Claimant has effectively extinguished all of the rights that he could have assigned to the OSB. CSF Rule 5.1.1 states that in exchange for receiving an award, a claimant must assign to the OSB any rights he holds against the lawyer and "the person or entity who may be liable for the claimant's loss." Although Rule 5.1.1 does not require claimant to give any value in exchange for an award, it is notable that Claimant is seeking compensation from CSF and PLF after having helped to insulate the two most likely wrongdoers from liability.

In order for a loss to be eligible for reimbursement, it must result from a lawyer's dishonest conduct. CSF Rule 2.2.1. In the end, the CSF Committee simply was unable to conclude with any certainty that Claimant's loss resulted from Wieselmann's dishonesty. In addition, the CSF Committee was mindful of the fact that awards from the Fund are discretionary. CSF Rule 4.12. Given the unresolved disputed facts and the settlement agreements between Claimant and Wieselmann and Samwick, the CSF Committee did not believe an award from the Fund was appropriate.

² The bar initiated formal disciplinary proceedings against Wieselmann in February 2016. The formal complaint includes a charge of dishonesty related to the alleged misappropriation of Claimant's funds. However, Wieselmann submitted a Form B resignation shortly thereafter, which was accepted by the Court on March 24, 2016. Consequently, the disciplinary proceedings also did not result in any finding of dishonesty by Wieselmann.



Client Security Fund Application for Reimbursement

Return completed form to:

Oregon State Bar
Client Security Fund
PO Box 231935
Tigard, OR 97281-1935

2015-19

Payments from the Client Security Fund are entirely within the discretion of the Oregon State Bar. Submission of this claim does not guarantee payment. The Oregon State Bar is not responsible for the acts of individual lawyers.

Please note that this form and all documents received in connection with your claim are public records. Please attach additional sheets if necessary to give a full explanation.

RECEIVED

JUL 10 2015

Oregon State Bar
Executive Director

1. Information about the client(s) making the claim:

- a. Full Name: Shaun DeLynn Lowry
- b. Street Address: 23775 SW Stonehaven St.
- c. City, State, Zip: Sherwood, OR, 97140
- d. Phone: (Home) (503) 822-5280 (Cell) (503) 899-7900
(Work) (503) 899-7900 (Other) (503) 899-9366 - wife (Ashley Lowry)
- e. Email: shaun.lowry@gmail.com

2. Information about the lawyer whose conduct caused your claim (also check box 10A on page 3):

- a. Lawyer's Name Jacob Wieselmann
- b. Firm Name Oswego Law Group, LLC ---> Wieselmann Law Group, LLC (successor to Oswego Law Group, LLC.)
- c. Street Address: 312 NW 10th Ave.
- d. City, State, Zip: Portland, OR 97209
- d. Phone: (503) 697-7277
- e. Email: jackw@wgroup-law.com

3. Information about the representation:

- a. When did you hire the lawyer? J. Wieselmann acquired Oswego Law Group, LLC. ~ May 2008
- b. What did you hire the lawyer to do? Mr. Wieselmann assumed responsibility for the cases Matthew Samwick was actively managing prior to his Form B resignation. Wieselmann took over the litigation with Utah company, Omniture, and myself. He was then hired to defend me in a 2nd case filed by Omniture in March 2009.
- c. What was your agreement for payment of fees to the lawyer? (attach a copy of any written fee agreement)
I would pay an hourly rate per Wieselmann's Fee Agreement from the funds held in Wieselmann's IOLTA account.
- d. Did anyone else pay the lawyer to represent you? No
- e. If yes, explain the circumstances (and complete item 10B on page 3):
N/A
- f. How much was actually paid to the lawyer? Wieselmann withdrew/allowed to be withdrawn \$990,000 from IOLTA
- g. What services did the lawyer perform? Almost Nothing. Motion to Remove (unsuccessful) then NOTHING for over 3 years. A statement received in 2013 shows withdrawals of my funds held in the IOLTA on nearly a daily basis throughout 2009 until a \$0 balance of my funds in the IOLTA in November 2009.

h. Was there any other relationship (personal, family, business or other) between you and the lawyer?
No. I only met Wieselman upon his acquisition of Oswego Law Group, llc.

4. Information about your loss:

- a. When did your loss occur? 2009 - according to statement received on 2/25/2013
- b. When did you discover the loss? in meeting with Wieselman on 2/25/2013. That was the first I was given an accounting of my funds held in Wieselman's IOLTA account. Wieselman was unable to return the unearned funds.
- c. Please describe what the lawyer did that caused your loss Wieselman failed to appear in above case. A statement received in 2013 shows withdrawals of my funds held in the IOLTA on nearly a daily basis throughout 2009 until a \$0 balance of my funds in the IOLTA in November 2009. Wieselman withdrew, or allowed his staff to withdraw \$990,000 of my funds held in Wieselman's IOLTA without approval or performing services.
- d. How did you calculate your loss? \$990,000 wired to IOLTA in 1/2009. All funds removed by Nov. 2009.

5. Information about your efforts to recover your loss:

- a. Have you been reimbursed for any part of your loss? *If yes, please explain:* No. Wieselman long ago depleted the funds I had deposited into Wieselman's IOLTA. He is unable to repay any of the \$990,000 taken and unearned.
- b. Do you have any insurance, indemnity or a bond that might cover your loss? *If yes, please explain:* No. I have filed an initial Complaint and 1st Amended Complaint in Clackamas County - Case # CV15020613, acting Pro Se.
- c. Have you made demand on the lawyer to repay your loss? When? *Please attach a copy of any written demand.* Yes. Please see above. Also numerous emails exchanges between Wieselman and I beginning in 2013.
- d. Has the lawyer admitted that he or she owes you money or has he or she agreed to repay you? *If yes, please explain:* Yes. Initially - but blamed his employee and former attorney, Matthew Samwick, and office staff members. Wieselman now denies any wrongdoing. I have numerous emails from Wieselman acknowledging above and loss. Wieselman admits that his Fee Agreement requires the return of any unearned/unused fees paid by Client.
- e. Have you sued the lawyer or made any other claim? *If yes, please provide the name of the court and a copy of the complaint.* Filed PLF claim in 2013. Filed Complaint in Clackamas County, Case # CV15020613. Pro Se.
- f. Have you obtained a judgment? *If yes, please provide a copy* No. Case has just began. ORCP Hearing on 6/20/15.
- g. Have you made attempts to locate assets or recover on a judgment? *If yes, please explain what you found:* Yes. I extended much effort and energy working directly with Wieselman on the recovery of all or any of the amount he legally, contractually, and rightfully owed me, to no avail.

6. Information about where you have reported your loss:

- District attorney
- Police
- Oregon State Bar Professional Liability Fund
- If yes to any of the above, please provide copies of your complaint, if available.*
- Oregon State Bar Client Assistance Office or Disciplinary Counsel

7. Did you hire another lawyer to complete any of the work? *If yes, please provide the name and telephone number of the new lawyer:* No. I am not in a financial position to be able to afford an attorney to represent me in this matter. I am acting Pro Se in this action.

8. Please give the name and the telephone number of any other person who may have information about this claim: Leslie Calgano (sec. at firm) - work # (503) 233-2177 / Bette Douglas (Legal Asst./Paralegal) Utah Atty Todd Shaughnessy (801) 257-1900, Utah Atty Chris Martinez ?

9. Agreement and Understanding

The claimant agrees that, in exchange for any award from the Oregon State Bar Client Security Fund (OSB CSF), the claimant will:

- a. Transfer to the Oregon State Bar all rights the claimant has against the lawyer or anyone else responsible for the claimant's loss, up to the amount of the CSF award.
- b. Cooperate with the OSB CSF in its efforts to collect from the lawyer, including providing information and testimony in any legal proceeding initiated by the OSB CSF.
- c. Notify the OSB CSF if the claimant receives notice that the lawyer has filed for bankruptcy relief.
- d. Notify the OSB CSF if the claimant receives any payment from or otherwise recovers any portion of the loss from the lawyer or any other person on entity and reimburse the OSB CSF to the extent of such payment.

10. Claimant's Authorization

- a. Release of Files: I hereby authorize the release to the OSB Client Security Fund, upon request, of any records or files relating to the representation of me by the lawyer named in Question 2.
- b. Payment to Third Party: I hereby authorize the OSB Client Security Fund to pay all amounts awarded to me to:

Name: _____

Address: _____

Phone: _____

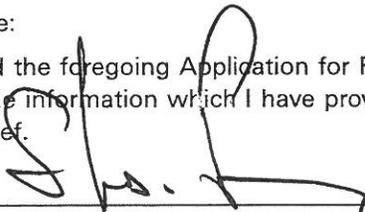
11. Claimant's Signature and Verification

(Each claimant must have a notarized signature page. Please photocopy this page for each person listed in question 1.)

State of Oregon)
)ss
 County of Washington)

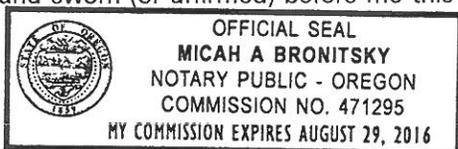
Upon oath or affirmation, I certify the following to be true:

I have reviewed the Rules of the Client Security Fund and the foregoing Application for Reimbursement; and submit this claim subject to the conditions stated therein; and the information which I have provided in this Application is complete and true, to the best of my knowledge and belief.



 Claimant's Signature

Signed and sworn (or affirmed) before me this 7th day of July, 2015.



Notary's Signature Micah Bronitsky
 Notary Public for State of Oregon
 My Commission Expires 8/29/16

Please complete page 4 if an attorney is representing you for this claim.

You are not required to have an attorney in order to file this claim. The CSF encourages lawyers to assist claimants in presenting their claims without charge. A lawyer may charge a fee for such work only if the following information is provided.

1. I authorize _____ *(print name of attorney)*
to act as my attorney in presenting my claim.

Claimant's Signature

2. I have agreed to act as the claimant's attorney: *(check one below)*

Without charge

Under the attached fee agreement

Attorney's Signature

Attorney's Bar No.

Attorney's Phone

Attorney's Address

WIESELMAN GROUP

ATTORNEY FEE AGREEMENT

DATE: April 2, 2009
PARTIES: WebForensics, Inc. and ("Client")
Shaun Lowry, 460 5th St.,
Suite D, Lake Oswego, OR
97034
Wieselmann Group ("Firm")

460 FIFTH STREET
SUITE C
LAKE OSWEGO, OR 97034

(503) 697-7277
(503) 697-9299 fax
jackw@wgroup-law.com

AGREEMENTS:

SECTION 1. SCOPE OF WORK

1.1. *Client's Matter.* The Client retains the Firm to provide legal services in connection with the following matter: *Omniature, Inc. v. Shaun Lowry and WebForensics, Inc.* This matter is referred to throughout this agreement as the Client's matter.

1.2. *Performance of Services.* The Firm will provide the legal services that are reasonably required to represent the Client in connection with the Client's matter. The Firm will keep the Client reasonably informed of the progress of the work done on the Client's matter. The Firm agrees to provide conscientious, competent, and diligent legal services and will seek to achieve a resolution of the Client's matter that is reasonable given the Client's resources and the Client's expressed goals and expectations. However, the Firm cannot and do not warrant a guaranteed result or final outcome in the Client's matter and there are no implied warranties of result or outcome.

SECTION 2. ATTORNEYS' CHARGES

2.1. *Attorney Fees.* As compensation for the legal services to be provided by the Firm, the Client agrees to pay the Firm a fee computed based upon the time devoted to the Client's matter at the following rates:

Jacob Wieselmann, Sole Practitioner	\$350.00 per hour
Matthew D. Samwick, Legal Assistant	\$250.00 per hour
Bette S. Douglas, Legal Assistant	\$150.00 per hour
Staff	\$75.00 per hour

Work will be allocated among the sole attorney and staff of the Firm as deemed appropriate by the Firm to provide the Client with quality, economical, and efficient service.

2.3. *Statements.* The Firm will send the Client a monthly statement for fees and costs and expenses. Each statement shall contain a summary of services rendered, the amount of the fees for services rendered, and a summary of costs and expenses incurred. All sums paid to Firm shall be deemed earned upon receipt by Firm.

2.2 *Costs and Expenses.* The Client agrees to pay all costs and expenses incurred by the Firm in connection with the Client's matter, including but not limited to: filing fees, photocopying costs, long-distance telephone charges, excessive postage, mileage fees, and other similar items.

SECTION 3. INITIAL DEPOSIT

3.1. *Deposit.* The Client agrees to pay \$100,000 as an initial deposit for fees. The Firm have no obligation to perform any services for the Client until such deposit has been made.

3.2. *Withdrawal and Refund.* If the Client has amounts on deposit in the Firm's trust account to cover future fees and costs incurred (funds received for the payment of fees are earned upon receipt), the statement shall set forth the balance in the trust account held for the Client. Upon written approval from the Client, the Firm may withdraw amounts from the Client's deposit in the Firm's trust account for the payment of fees, costs and expenses so approved by the Client. The Firm shall refund any unused deposit to the Client upon conclusion of the work by the Firm on the Client's matter.

SECTION 4. DISCHARGE AND WITHDRAWAL

4.1. *Discharge.* The Client may discharge the Firm at any time with or without cause.

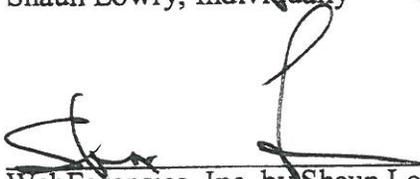
4.2. *Withdrawal.* The Firm may withdraw from representation of the Client prior to completion of the Client's matter only for good cause. Good cause shall include, without limitation, the failure of the Client to meet the Client's financial obligations under this agreement, including deposit and maintenance of any required retainer and timely payment of statements, and failure to cooperate with the Firm in connection with their work on the Client's matter. Nothing contained in this agreement shall be deemed to obligate the Firm to provide services to the Client beyond those necessary to complete the Client's matter.

SECTION 5. CONCLUSION OF SERVICES

Upon conclusion of the work by the Firm on the Client's matter and payment in full of all unpaid fees and costs and expenses, the Firm will deliver to the Client, upon request, a copy of the Client's file and all money or property of the Client in possession of the Firm. The conclusion of services includes discharge of the Firm by the Client, withdrawal by the Firm from representation of the Client, and completion of the work by the Firm on the Client's matter.

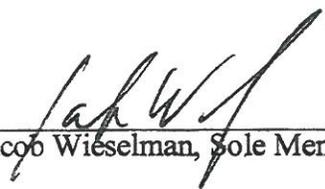


Shaun Lowry, Individually



WebForensics, Inc. by Shaun Lowry, President

Wieselman Group

By 

Jacob Wieselman, Sole Member

Olgile Trust Transactions

Register: Client Trust Liability:Lowry, Shaun Trust Funds

From 01/01/2009 through 11/07/2012

Sorted by: Date, Type, Number/Ref

Date	Number	Payee	Account	Memo	Increase	C	Decrease	Balance
01/14/2009		Lowry, Shaun D.:v O...	Northwest Bank - Trust...		990,000.00			990,000.00
01/14/2009	EFTS	Lowry, Shaun D.:v O...	Northwest Bank - Trust...	v omniture			7,691.21	982,308.79
01/14/2009	EFTS	Lowry, Shaun D.:v O...	Northwest Bank - Trust...	v omniture			5,300.00	977,008.79
01/14/2009	EFTS	Lowry, Shaun D.:v O...	Northwest Bank - Trust...				5,000.00	972,008.79
01/15/2009	EFTS	Lowry, Shaun D.:v O...	Northwest Bank - Trust...				90,000.00	882,008.79
02/19/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				1,000.00	881,008.79
02/19/2009	EFTS	Lowry, Shaun D.:Blu...	Northwest Bank - Trust...				1,000.00	880,008.79
02/26/2009	EFTS	Lowry, Shaun D.:Vis...	Northwest Bank - Trust...				3,432.50	876,576.29
03/04/2009	EFTS	Lowry, Shaun D.:v O...	Northwest Bank - Trust...				7,500.00	869,076.29
03/05/2009	EFTS	Lowry, Shaun D.:v O...	Northwest Bank - Trust...				13,350.00	855,726.29
03/06/2009	EFTS	Lowry, Shaun D.:Div...	Northwest Bank - Trust...				2,500.00	853,226.29
03/06/2009	EFTS	Lowry, Shaun D.:Ge...	Northwest Bank - Trust...				1,419.00	851,807.29
03/06/2009	EFTS	Lowry, Shaun D.:Por...	Northwest Bank - Trust...				2,585.00	849,222.29
03/09/2009	EFTS	Lowry, Shaun D.:v O...	Northwest Bank - Trust...				8,000.00	841,222.29
03/12/2009	EFTS	Lowry, Shaun D.:v O...	Northwest Bank - Trust...				8,940.54	832,281.75
03/12/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				859.46	831,422.29
03/13/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				8,250.00	823,172.29
03/16/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				11,530.00	811,642.29
03/17/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				3,235.00	808,407.29
03/18/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				5,415.00	802,992.29
03/20/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				3,800.00	799,192.29
03/23/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				9,520.00	789,672.29
03/24/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				2,750.00	786,922.29
03/26/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				6,480.00	780,442.29
03/30/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				8,600.00	771,842.29
03/31/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				2,150.00	769,692.29
04/02/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				7,463.00	762,229.29
04/03/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				15,020.00	747,209.29
04/06/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				14,080.00	733,129.29
04/07/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				847.54	732,281.75
04/07/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				2,372.46	729,909.29
04/08/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				6,500.00	723,409.29
04/09/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				2,170.00	721,239.29
04/10/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				13,570.00	707,669.29
04/13/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				10,700.00	696,969.29
04/14/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				7,550.00	689,419.29
04/15/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				5,100.00	684,319.29
04/16/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				2,221.00	682,098.29
04/17/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				5,650.00	676,448.29
04/20/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				11,105.00	665,343.29

Olglic Trust Transactions

Register: Client Trust Liability:Lowry, Shaun Trust Funds

From 01/01/2009 through 11/07/2012

Sorted by: Date, Type, Number/Ref

<u>Date</u>	<u>Number</u>	<u>Payee</u>	<u>Account</u>	<u>Memo</u>	<u>Increase</u>	<u>C</u>	<u>Decrease</u>	<u>Balance</u>
04/22/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				930.00	664,413.29
04/23/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				950.00	663,463.29
04/24/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				6,165.00	657,298.29
04/27/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				10,580.00	646,718.29
04/28/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				8,630.00	638,088.29
04/30/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				2,030.00	636,058.29
05/01/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				5,520.00	630,538.29
05/04/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				18,650.00	611,888.29
05/05/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				2,705.00	609,183.29
05/06/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				15,057.50	594,125.79
05/07/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				8,275.00	585,850.79
05/08/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				10,830.00	575,020.79
05/11/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				8,190.00	566,830.79
05/12/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				9,350.00	557,480.79
05/13/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				5,360.00	552,120.79
05/15/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				2,650.00	549,470.79
05/19/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				14,110.00	535,360.79
05/20/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				10,843.75	524,517.04
05/22/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				4,250.00	520,267.04
05/26/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				7,450.00	512,817.04
05/27/2009	1020	Snell & Wilmer, L.L.P.	Northwest Bank - Trust...				10,000.00	502,817.04
05/27/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				4,970.00	497,847.04
05/28/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				3,160.00	494,687.04
05/29/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				2,780.00	491,907.04
06/01/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				8,740.00	483,167.04
06/02/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				8,780.00	474,387.04
06/15/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				15,760.00	458,627.04
06/16/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				2,662.00	455,965.04
06/17/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				925.00	455,040.04
06/18/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				5,920.00	449,120.04
06/19/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				1,091.00	448,029.04
06/22/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				9,820.00	438,209.04
06/23/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				1,982.00	436,227.04
06/24/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				825.00	435,402.04
06/25/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				2,250.00	433,152.04
06/26/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				2,100.00	431,052.04
06/29/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				5,445.00	425,607.04
06/30/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				4,800.00	420,807.04
06/30/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				2,365.00	418,442.04
07/02/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				8,450.00	409,992.04

Oigllc Trust Transactions

Register: Client Trust Liability:Lowry, Shaun Trust Funds

From 01/01/2009 through 11/07/2012

Sorted by: Date, Type, Number/Ref

Date	Number	Payee	Account	Memo	Increase	C	Decrease	Balance
07/03/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				8,200.00	401,792.04
07/07/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				1,000.00	400,792.04
07/09/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				1,200.00	399,592.04
07/10/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				15,000.00	384,592.04
07/13/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				11,800.00	372,792.04
07/14/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				1,000.00	371,792.04
07/15/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				4,400.00	367,392.04
07/17/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				6,500.00	360,892.04
07/20/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				3,200.00	357,692.04
07/21/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				200.00	357,492.04
07/22/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				3,000.00	354,492.04
07/23/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				6,800.00	347,692.04
07/24/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				3,300.00	344,392.04
07/29/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				2,800.00	341,592.04
07/31/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				4,100.00	337,492.04
08/03/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				7,400.00	330,092.04
08/04/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				1,800.00	328,292.04
08/05/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				11,600.00	316,692.04
08/06/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				250.00	316,442.04
08/07/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				5,300.00	311,142.04
08/10/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				7,100.00	304,042.04
08/11/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				6,500.00	297,542.04
08/11/2009	1022	Snell & Wilmer, L.L.P.	Northwest Bank - Trust...				5,584.30	291,957.74
08/12/2009	EFTS		Northwest Bank - Trust...				4,300.00	287,657.74
08/14/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				12,100.00	275,557.74
08/17/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				8,900.00	266,657.74
08/18/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				200.00	266,457.74
08/19/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				3,643.81	262,813.93
08/21/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				300.00	262,513.93
08/24/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				22,100.00	240,413.93
08/25/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				5,900.00	234,513.93
08/26/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				1,300.00	233,213.93
08/27/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				1,000.00	232,213.93
08/28/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				4,550.00	227,663.93
08/31/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				10,100.00	217,563.93
09/01/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				3,800.00	213,763.93
09/02/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				8,500.00	205,263.93
09/03/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				428.10	204,835.83
09/04/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				5,600.00	199,235.83
09/08/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				9,200.00	190,035.83

Olglic Trust Transactions

Register: Client Trust Liability:Lowry, Shaun Trust Funds

From 01/01/2009 through 11/07/2012

Sorted by: Date, Type, Number/Ref

Date	Number	Payee	Account	Memo	Increase	C	Decrease	Balance
09/09/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				5,200.00	184,835.83
09/10/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				4,700.00	180,135.83
09/11/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				3,250.00	176,885.83
09/14/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				14,350.00	162,535.83
09/15/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				2,900.00	159,635.83
09/16/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				17,900.00	141,735.83
09/18/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				5,000.00	136,735.83
09/21/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				10,500.00	126,235.83
09/22/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				100.00	126,135.83
09/22/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				26,135.83	100,000.00
09/29/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				4,750.00	95,250.00
09/30/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				162.50	95,087.50
10/01/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				600.00	94,487.50
10/02/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				4,800.00	89,687.50
10/07/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				1,000.00	88,687.50
10/08/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				7,400.00	81,287.50
10/09/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				14,350.00	66,937.50
10/13/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				9,900.00	57,037.50
10/14/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				3,500.00	53,537.50
10/15/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				6,500.00	47,037.50
10/16/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				4,600.00	42,437.50
10/19/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				6,600.00	35,837.50
10/20/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				2,300.00	33,537.50
10/21/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				9,900.00	23,637.50
10/22/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				800.00	22,837.50
10/23/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				4,100.00	18,737.50
10/26/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				7,300.00	11,437.50
10/28/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				1,900.00	9,537.50
10/29/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				4,700.00	4,837.50
10/30/2009	EFTS	Lowry, Shaun D.	Northwest Bank - Trust...				600.00	4,237.50
11/09/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				2,610.00	1,627.50
11/10/2009	EFTS	Lowry, Shaun D.:We...	Northwest Bank - Trust...				1,627.50	0.00

Jacob Wieselmann

From: Jacob Wieselmann
Sent: Friday, June 25, 2010 9:53 AM
To: Matthew D. Samwick
Subject: status and need for change. Much more than you really wanted to know.....

Matt:

My inclination is not to write and send this but all in all, it seems like it is time to unburden. Sorry for the imposition I know this is. There is enough crap flying around without having to confront more but last night made me realize that it is time to deal with this.

I write this rather than simply speak about it as you and I are not good at sharing and deflect by getting into fooling around. Case in point, our prospective "organizational" retreat that has been in the works for over a year now. So, this is a way of bringing you up to speed. I expect it will sound a bit maudlin but it is important for many reasons that you understand where we are so we can plan or act accordingly and with understanding of how critical the situation is. I expect you have a parallel story.

As you noted yesterday, I don't look so good. Well things aren't so good and, as we are in this mess together, it is important to share some things with you so you understand. You and I are both of the type that keep on plodding either with optimistic outlooks that all will be well or, more often, with the fatalistic attitude that it is our job and lot to do so. Unfortunately, I do that to the degree that I discount those around me who are not so stoic and resilient. I can do that no longer.

I have dropped the ball and those around me are paying.

When I was "looking for a desk", my practice was growing but still small; getting to the point where I needed some support and tiring in that I wanted a broader base to assure that the phone kept ringing. Joining this firm was a great idea and still is. Where I dropped the ball was in neglecting the business end and by being willing to, even desirous of, not having to balance books every day, etc. However, I was irresponsible in not knowing what was truly going on and acting accordingly. It was a pleasure to not be so strapped, draws were consistent and money seemed to be coming in notwithstanding the incredible drain in time, money and resources resultant of Roger's work. Until his divorce and the representations that we had to make to the divorce court, I had no idea that we were living on Shaun's money and, frankly, still do not understand the arrangement or justification. If I had known that the prosperity was illusory, I would not have moved into a more expensive rent, would not have believed that we would be able to buy this year and would not have raised the family's expectations, would not have leased the cars, etc. all of which raised carrying costs. It was stupid and irresponsible to do things like that, things that I would not normally have done without truly assuring it made long term sense. Of course, Roger's stiffing us (which in hind sight was predictable) was the nail in the coffin. Since November, I have spent my last \$20,000 in savings paying debt and carrying costs and invested \$60,000 in the firm that is not mine and that I must now pay back. But the price I speak of is not primarily financial; it is the secondary cost that is impacting on my family. The pressure on everyone has become unbearable recently. I expect that is because the covers are off and mostly everyone around us can see the financial situation and it is tough to live with:

- Obviously, the housing situation is the principal emotional burden right now. It was hoped we would be able to pick up this house or do something reasonable to prevent having to move and unsettle the family and kids again. Too many upheavals in too short a time. The purchase hurdles you are aware of and realistically, are now probably insurmountable. The real problem is that we have burned bridges for renting, too. As you may be aware, the payable to Quinn Nieland that I committed to and shook hands on and promised, remains unpaid after almost a year. My rent to Noffz is late. Anywhere we try to rent in the next few months will check with prior landlords and hear from Quinn that I am a deadbeat.

- A very big emotional cost for everyone but principally Christina is that we have lost some good friends because we have not paid bills. We like to patronize our friends and often become friends with people we do business with. Lately, Christina has been asked not to “come back” to her doctors because the bill remained unpaid for so many months and parts of the medical bill (anesthesiologist) in the practice remains unpaid and is now in collection. As you can imagine, that was embarrassing and hurtful. The same is true of our orthodontist; where the kids go. No more credit or services without payment at the door and no more friendship.
- I cannot call on a paralegal that knows the Veys file intimately, Kiersten, (who was also a friend and riding buddy, and who has mutual friends with Christina), because I have owed her over two thousand dollars for about six months or more and keep promising to pay.... Without following through. She is very discreet and says nothing to mutual friends but I know they ask her and have asked Christina why Kiersten no longer works for me as she enjoyed it so much.
- Christina and the kids (and, frankly, me too) are embarrassed to go into many stores and places in town because of the chain of bounced checks and rejected debit cards. We still have watches and jewelry in two stores that we took in for repairs six months ago and cannot pick up, despite weekly calls from the store owners.
- The kids and Christina have been blocked from entry at the door to Club Sport three times now and no coffee shop charges are allowed;
- Our trash collection has been shut off;
- We can laugh off that we are Umpqua’s best customer but in truth, it is embarrassing to go in and have everyone there know our business as we pop up on the overdrawn list and get courtesy calls one to two times a week.
- I am tired of trying to explain to my mother in law why her \$5,000, “one week”, loan is now months and months and months late in repayment and not even on the payable list.
- Last week, seeing that the account in which she placed the money in New Jersey was down to zero, my aunt wrote for details and to see pictures of the house we were buying (with the loans she had extended for down payment). I have yet to explain to her that the loan is now in the firm and unlikely to be repaid. I have yet to speak to her because I don’t want to hear that that was not the purpose of her loan (that she made to Christina because they became so friendly on our trip to Spain) and that it should be repaid or used for a home soon. I guess I will tell her that if she wants to see the real estate that it went into she should look up Playa Cerritos on the web.

As for me, I am just tired and embarrassed of passing every aspect of my life by Leslie and essentially begging her for money every day. I am tired of begging for information and not getting it. I understand that you want to review everything and make sure it is right, but frankly I want to see what is wrong, not the polished version. I do not need a buffer from the financial picture. The biggest problem is that when Christina asks how things are and whether we can expect a draw this week, etc. I can’t tell her and look and feel like an idiot trying to explain why not and why I have no idea of what is happening with the financial side of the firm.

Things must change. With the little financial information that I can see from day to day operations, it is clear that the firm cannot sustain itself. I admire your ability to keep checks and payments and balls in the air but it must be exhausting for you, too. The carrying-cost assistance that the land deal was to provide has vaporized and I have absolutely no idea what is going on with the land company or its prospects or anything else about it. I am probably one of the few involved that has not even seen the projects being contemplated or any details of what is going on or planned so, still with all hope that something may come of the land deal, from my perspective, it is a bit ephemeral and ever-changing and too far off in the distance to rely on as a way to keep the firm afloat for the foreseeable future.

So what do we do. I am not sure. I have asked for meetings and information for some time... you know the result. We recognize the need to make changes but then we don't. I cannot plan without information. I am a bit frustrated at being an associate which is basically what I am here. Thought it would be a pleasant change. It is not. It still feels exclusively like your firm and I can understand why you and Bette like it that way...it is what you are used to. I also understand that you like and work best with control but my family and I are miserable being in the dark and going down without a fight. I also understand that Leslie knows your likes and dislikes and is used to working that way... that is part of why she and I have friction. I do not blame her for the problem, she is caught in the middle. [as an aside, I also understand that Leslie has become a bit of a lightning rod for me, for much of the emotion, frustration and feeling that I speak of in this note. It is true that she has become the symbol of the "old" Oswego Law Group for me. I understand the loyalty that you and her family feel for each other but on the other hand, I cannot sacrifice my home and my family for hers. I understand she must pay her mortgage, but I must pay my rent and my bills and that is the priority). Unfairly to her, she has become a metaphor for our current inclination to keep going down the same path without real analysis of the consequences. We cannot afford her and cannot afford her lack of value, yet we have carried the situation on and on for months as tasks went undone, tension built and Bette, you and I took cuts, etc. She is not the principal problem; she has just become a symbol of the dramatic adjustment that evidently need to be made for this place to stay afloat.

As if to emphasize the point and situation here, as I write this Christina just came in to borrow five dollars as Ally wanted to get coffee and talk with her mom..... not enough money in the account to cover two coffees.

Enough, I guess. Matt, I think it was fortuitous that our paths crossed and I am hopeful it yet proves to be a long and financially profitable association....regardless, it will remain a friendship, but my family has hit bottom and I am not willing to risk my marriage by sitting on my hands. Sorry to dump this on you but it is apparently too obvious from my face where I am so better out with it.

Let's try and talk a bit later in day or over weekend or sometime soon.

Jack

Jacob Wieselmann

ATTORNEY AT LAW

WIESELMAN GROUP

460 Fifth Street

Lake Oswego, OR 97034

Telephone 503.697.7277

Facsimile 503.697.9299

This message originates from the Wieselmann Group. The message and any file transmitted with it contain confidential information which may be subject to the attorney-client privilege, or otherwise protected against unauthorized use. The information contained in this message and any file transmitted with it is transmitted in this form based on a reasonable expectation of privacy. Any disclosure, distribution, copying or use of the information by anyone other than the intended recipient, regardless of address or routing, is strictly prohibited. If you have received this message in error, please advise the sender by immediate reply and delete the original message. Personal messages express views solely of the sender and are not attributable to the Wieselmann Group.

To ensure compliance with Treasury Department regulations, we advise you that, unless otherwise expressly indicated, any federal tax advice contained in this message was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or applicable state or local tax law provisions or (ii) promoting, marketing or recommending to another party any tax-related matters addressed herein.

Tracking:

Recipient

Matthew D. Samwick

Read

Read: 6/25/2010 9:53 AM

From: Shaun Lowry [<mailto:shaun@webforensics.com>]
Sent: Friday, October 19, 2012 10:22 AM
To: 'Jacob Wieselmann'
Subject: Lowry: Retainer/Trust Account Statement (Report)
Importance: High

Jack - good morning. Please let me know when you are able to gain access to the old financial system. I would like to have a full accounting report for all the money that I paid into, and was received by the firm for my retainer/trust account, from the beginning. I would also like to have a copy of all the documents that were used to transfer funds from my trust account into the operating account. I want to have a full understanding of what I was charged, where the money went, and how it was allocated or "accounted for" going in and out of my trust account.

Thank you Jack!

Shaun

Shaun Lowry | O: (503) 822-5280 | M: (503) 899-7900 | 23775 SW Stonehaven
Street | Sherwood, Oregon 97140

This message may be confidential and/or contain privileged information. If you received this message in error, please delete the message and do not open any attachments. Please also notify the sender by return email. Thank you.

On 2/20/13 8:31 AM, "Shaun Lowry" <shaun@webforensics.com> wrote:

Date: February 20, 2013

To: Jacob Wieselmann, WIESELMAN GROUP

From: Shaun Lowry

Re: Lowry: Client Trust Funds + Pre-paid Legal Fees

Jack, good morning. With the withdrawal and dismissal of the Omniture case against me and WebForensics, Inc. and with the assessment that I am not likely to be awarded much if any legal fees for pursuing increased legal costs against Omniture (as was considered and thought likely), certainly not enough for it to make sense for the time (and money) to do so, I am respectfully and formally requesting a full refund of all monies that are in my (Client) trust/escrow account and a refund of all monies that may have been considered/transferred for pre-paid legal fees, as that will no longer be necessary now that the case has been dismissed.

I do not know what the full balance of my account is, as I have never been provided an account summary, statement, or invoice from Oswego Law Group and/or Wieselmann Group. That is why I requested a full history report of my account a couple months ago. I paid in over \$300,000 for legal fees since 2004, plus the settlement award from my first Omniture case of \$990,000 which was placed in escrow with your firm.

During our meeting a couple months back at the coffee shop, you mentioned that you were having difficulties accessing the Client account information on your servers, and that was the reason that you were unable to provide me a full history of my client account. I trust this has been resolved by now and that you can run a full accounting history of my client trust/escrow account and provide me with a detailed statement. Please advise an ETA for this statement as I would like to review it in detail. Also, please provide a certified check for the balance of my client account and any/all pre-paid legal amounts that were not used for the Omniture case. As not much work was ever done on that case, I would expect that nearly all my funds will be returned. Once I have the statement, I will let you know if I have any questions or concerns regarding any of the amounts charged against my account.

Thank you Jack.

Best regards,

Shaun

Shaun Lowry | O: (503) 822-5280 | M: (503) 899-7900 | 23775 SW Stonehaven Street | Sherwood, Oregon 97140

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From: Shaun Lowry [mailto:shaun.lowry@gmail.com]
Sent: Thursday, February 21, 2013 12:55 PM
To: Jacob Wieselmann
Subject: Re: Lowry: Re Client Funds

Jack, why do we need to meet for you to process a refund of fees? Is there a problem? I think we should meet once you have reconciled any outstanding fees and have processed the refund of my fees, and after I have had a chance to review my client account statements. Please send those, the affidavit that you referenced, and any authorization forms or transfer notices that pertain to my client account.

Why would you ask when the last time I spoke to Matt Samwick? Why would that be relevant to this conversation? Matt is not my attorney, you are. Matt doesn't own, is not partner in, or work for your firm. Your firm has my money, !),5. Df(vbh.SAm If you want to see you Well today Arcella and he can possibly get her this weekend guesstimate coming Leviege and freezer. More details as the buyer n

Shaun Lowry
m: (503) 899-7900
e: shaun.lowry@gmail.com

On Feb 21, 2013, at 11:22 AM, Jacob Wieselmann <jackw@wgroup-law.com> wrote:

Shaun— what it said was. I will be pleased to meet with you at your earliest convenience. When was the last time that you spoke with Matt?

Sorry for the auto-correct. jack
Jacob Wieselmann
Attorney at Law

WIESELMAN LAW GROUP
1001 S.W. 5th Ave., Suite 1414
Portland, OR 97204
Telephone 503.697.7277
Facsimile 503.697.9299

On 2/21/13 7:33 AM, "Shaun Lowry" <shaun@webforensics.com> wrote:

??? I think your i-phone auto-corrected your intended message.

-Shaun

From: Jacob Wieselmann [mailto:jackw@wgroup-law.com]
Sent: Wednesday, February 20, 2013 10:12 PM
To: Shaun Lowry
Subject: Re: Lowry: Re Client Funds

I will be eased tower with you at your earliest convenience. When was the last time you spoke with Matt?

Sent from my iPhone

On Feb 20, 2013, at 8:04 PM, "Shaun Lowry" <shaun@webforensics.com> wrote:

Jack, I'M BECOMING VERY CONCERNED!! As you know, I was not privy to any of the discussions between you and Matt, and was/am not aware of any of the terms, agreements, or representations made to you prior to your acquisition of Oswego Law Group, or since. I assume those were all confidential conversations and agreements between you and Matt that were not, and have never been, discussed or shared with me.

I would think and expect that any law firm should be able to quickly and easily provide a client with their account history and a month-by-month billing statement. Please prepare that for me at your earliest convenience and kindly advise when you believe that will be available. Can you also, please, send me a copy of the affidavit that you referenced in your email below? Lastly, I would like a copy of any/all of the authorization forms used by anyone at Oswego Law Group/Wieselmann Group to transfer funds from my Client Account to the firm's account(s).

What exactly do you mean by "the application of the funds internally by my staff that I found confusing at best?" Please advise what your financials show for the amounts billed for the 2nd Omniture case filed against WebForensics, Inc. and me. The amount to be refunded back to me should be \$990,000 less that amount. Right? Please make arrangements to immediately return ALL of my unused funds!

Please let me know what is going on and how much of my \$990,000 funds are remaining, and when I can expect a check for the balance!

-Shaun

From: Jacob Wieselmann [<mailto:jackw@wgroup-law.com>]
Sent: Wednesday, February 20, 2013 10:03 AM
To: Shaun Lowry
Subject: Re: Lowry
Importance: High

Shaun, we discussed this.

I was advised and was asked to do an affidavit to the court in your divorce proceedings that you had no right and entitlement to any funds received by Oswego Law Group. Pursuant to the agreement worked out between you and Matt Samwick or my predecessor as owner of OLG, the funds were the companies when received. Those representations were made to me when I acquired the firm and I was made to understand that it was part and parcel of the relationship that you had had with Matt and the amount and quality of work that he had done for you. I relied on that in the decision to come on board the firm.

The accounting that I discussed with you was regarding the application of the funds internally by my staff that I found confusing at best.

Should you choose not to pursue a case, that is your choice. If you choose to do so, I will be happy to discuss it and thought we had.

I can't imagine that you are not telling me that the information provided to me for attesting in your divorce was not as you stated

I will be happy to discuss this further with you. Let's meet whenever you like.

Jack

Jacob Wieselmann

Attorney at Law

WIESELMAN LAW GROUP
1001 S.W. 5th Ave., Suite 1414
Portland, OR 97204
Telephone 503.697.7277
Facsimile 503.697.9299

On 2/20/13 8:31 AM, "Shaun Lowry" <shaun@webforensics.com> wrote:

Date: February 20, 2013
To: Jacob Wieselmann, WIESELMAN GROUP
From: Shaun Lowry
Re: Lowry: Client Trust Funds + Pre-paid Legal Fees

Jack, good morning. With the withdrawal and dismissal of the Omniture case against me and WebForensics, Inc. and with the assessment that I am not likely to be awarded much if any legal fees for pursuing increased legal costs against Omniture (as was considered and thought likely), certainly not enough for it to make sense for the time (and money) to do so, I am respectfully and formally requesting a full refund of all monies that are in my (Client) trust/escrow account and a refund of all monies that may have been considered/transferred for pre-paid legal fees, as that will no longer be necessary now that the case has been dismissed.

I do not know what the full balance of my account is, as I have never been provided an account summary, statement, or invoice from Oswego Law Group and/or Wieselmann Group. That is why I requested a full history report of my account a couple months ago. I paid in over \$300,000 for legal fees since 2004, plus the settlement award from my first Omniture case of \$990,000 which was placed in escrow with your firm.

During our meeting a couple months back at the coffee shop, you mentioned that you were having difficulties accessing the Client account information on your servers, and that was the reason that you were unable to provide me a full history of my client account. I trust this has been resolved by now and that you can run a full accounting history of my client trust/escrow account and provide me with a detailed statement. Please advise an ETA for this statement as I would like to review it in detail. Also, please provide a certified check for the balance of my client account and any/all pre-paid legal

amounts that were not used for the Omniture case. As not much work was ever done on that case, I would expect that nearly all my funds will be returned. Once I have the statement, I will let you know if I have any questions or concerns regarding any of the amounts charged against my account.

Thank you Jack.

Best regards,

Shaun

Shaun Lowry | O: (503) 822-5280 | M: (503) 899-7900 | 23775 SW Stonehaven Street | Sherwood, Oregon 97140

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From: Shaun Lowry (gmail.com) [mailto:shaun.lowry@gmail.com]

Sent: Tuesday, February 26, 2013 3:16 PM

To: 'Jacob Wieselmann'

Subject: RE: Lowry: Re Client Funds

Jack, thank you for giving up so much of your day to discuss this unbelievable situation with me. There are still, obviously, many questions that need answering, and things that need to be investigated and discussed as we work through a viable solution to the improper handling/taking of the funds in my client account. I do perceive your openness and transparency yesterday as being sincere and truthful. All of the information that I received yesterday, learning that the money that I had worked so hard to earn and then had to fight and spend nearly \$400K (all of my life savings) only to receive but a fraction of what I had earned, just to learn that it is gone is totally unbelievable. And seeing documented evidence of the theft of my client funds by someone I have cared deeply for, for over 8 years, is in a word, devastating. I appreciate your willingness to dig through and request/secure additional documents that will provide further answers and confirmation as to who transferred the funds out of my account, and where they went. From the information I saw yesterday, it certainly seems clear.

It is so unbelievable, stomach-wrenching and utterly overwhelming to believe my long-time and thought, very close friend, could allow, and worse, orchestrate such dishonesty against and about me, my history of payments to Oswego Law Group/Wieselmann Group, and to steal the very money he was paid SO MUCH throughout the 4 years to go fight for me and undo the incredible injustice to me (by Omniture).

I would like to meet with you again as discussed, and explore ways in which you believe we can effectively work through these issues, and discuss what steps need to be taken, and which steps should be taken first.

Thank you Jack - please confirm your availability to meet tomorrow as discussed.

Shaun

Shaun Lowry | O: (503) 822-5280 | M: (503) 899-7900 | 23775 SW Stonehaven Street | Sherwood, Oregon 97140

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From: Jacob Wieselmann [<mailto:jackw@wgroup-law.com>]

Sent: Tuesday, February 26, 2013 4:41 PM

To: Shaun Lowry ([gmail.com](mailto:))

Subject: Re: Lowry: Re Client Funds

Shaun--

I thank you as well for having the interest and the patience to share information and events as we did yesterday. Thank you for having the open mind to do so.

I, too, am stunned by what was discovered when we compared notes. I am in shock at having been duped, and disappointed at myself for putting your well-being and the well-being and future of my family in jeopardy. I abrogated my professional and personal responsibility. I will be apologizing to you and to Christina forever. Now, let's fix this.

I enclose a first draft of a letter to Matt. It is a working document in which I have pride of authorship. I simply put it out there as a catalyst for our discussion tomorrow. Take a look and let's work toward finalizing it and sending it out by the end of the day on Wednesday.

I have a lunch meeting at noon but am available to meet any time in the morning and again after approximately 2:00.... You pick

Attorney at Law

WIESELMAN LAW GROUP
1001 S.W. 5th Ave., Suite 1414
Portland, OR 97204
Telephone 503.697.7277
Facsimile 503.697.9299

Clackamas County
FILED / ENTERED
JUN - 4 2015
By: Trial Court Administrator

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

SHAUN DELYNN LOWRY,

Plaintiff,

v.

JACOB WIESELMAN, an individual,
OSWEGO LAW GROUP, a limited liability
company, WIESELMAN LAW GROUP, a
limited liability company, JOHN DOES 1-3
and JANE DOES 1-3, unknown individuals,

Defendants

Case No.: CV15020613

FIRST AMENDED COMPLAINT

(LEGAL MALPRACTICE, ACTION FOR
ACCOUNTING, BREACH OF CONTRACT)

Filing Fee: \$

(JURY TRIAL REQUESTED)

Plaintiff Pro Se, Shaun Lowry hereby alleges:

1.

At all times material, Plaintiff was and is a resident of Washington County, State of Oregon. All of the material transactions pled herein occurred in Clackamas County, State of Oregon, therefore jurisdiction in Clackamas County is proper.

2.

At all times material, Defendant Jacob Wieselman (aka "Jack Wieselman" hereafter referred to as Wieselman), an active member of the Oregon State Bar, was and is the owner of Defendants' Oswego Law Group LLC (hereafter OLG) and Wieselman Law Group LLC (hereafter WLG). Both entities were limited liability companies.

1 3.

2 Based on information and belief, OLG was sold to Wieselman in September 2008 and
3 OLG was administratively dissolved by the Oregon Secretary of State on June 8, 2012. WLG is
4 currently an active LLC doing business in the State of Oregon.

5 4.

6 At all times material Defendants John and Jane Does are unknown individuals that, based
7 on information and belief, were owners, shareholders, employees, relatives, or agents of
8 Defendants Wieselman, OLG and WLG.

9 5.

10 On or about September of 2004, Plaintiff engaged OLG to represent him in defending a
11 Motion for Declaratory Judgment and to pursue certain litigation against a Utah-based company
12 associated with a contract dispute to recover unpaid commission owed to Plaintiff. Plaintiff made
13 numerous large payments to OLG throughout the duration of the above case.

14 6.

15 Plaintiff settled the above dispute in December of 2008 with the Utah-based Company
16 entering into a confidential agreement in his favor. The funds from the settlement were
17 electronically transferred to the WLG IOLTA account. Pursuant to Plaintiff's fee agreements
18 with Defendants, said settlement was to be held in trust and an accounting was to be provided to
19 the Plaintiff upon any disbursement of the same or on request by Plaintiff. The settlement funds
20 deposited in the WLG IOLTA account were subject to the terms and conditions of the fee
21 agreement(s) and all applicable laws and rules pertaining thereto.

22 7.

23 Shortly after the above referenced settlement was reached, Plaintiff was sued a second
24 time by the Utah-based company in March 2009, compelling Plaintiff to again defend his
25 interests. Plaintiff remained a Client of, entered a Fee Agreement with, and paid Defendants for
26 a proper and diligent defense of the case as it significantly threatened Plaintiff's interests and
27 livelihood. The stated objectives and promised outcomes by Defendants for the defense were
28 twofold; have the case dismissed in Plaintiff's favor or prosecute the case to every extent

1 necessary to successfully defend the case on the merits and achieve an order favoring Plaintiff
2 through litigation and trial; and Secondly, seek and recover all related and reasonable attorney's
3 fees and costs paid by Defendant to defend his interests. Plaintiff agreed and contracted with
4 Defendants for the achievement of the two promised outcomes of the case.

5 8.

6 At or approximate to the conclusion of the above referenced case, Plaintiff learned that
7 Defendants had retained a law firm in Utah to assist with the administration of the second case in
8 Utah. Defendant was not involved with, or advised of, the retaining of this firm. Plaintiff only
9 learned in February 2013 that large sums of Plaintiff's money was paid to the Utah-based law
10 firm in connection with the defense of the second case brought against Plaintiff. Plaintiff had no
11 interaction or communications with the Utah firm prior to sending an email to the firm
12 requesting an accounting in 2013. Plaintiff never received the accounting related to his case.

13 9.

14 Based on information learned by Plaintiff at the conclusion of the second Utah case,
15 neither Defendants nor the Utah law firm made a proper appearance on behalf of Plaintiff in the
16 second case in Utah. Shortly after the conclusion of the second Utah case, Wieselmann admitted
17 to Plaintiff that a response was not filed by Defendants. Defendants did not appear or provide for
18 an appearance in the second Utah case.

19 10.

20 In December of 2012, the Utah-based company voluntarily withdrew their second lawsuit
21 against Plaintiff. Upon the withdrawal of the above referenced case in 2012, Plaintiff directed
22 Wieselmann to file the necessary motions to seek an order for Defendants attorney fees and costs
23 as had been the intent and strategy authored and employed by Defendants. Wieselmann admitted
24 to Plaintiff after the voluntary withdrawal by the Utah-based company that he never filed a
25 response or appeared for the above referenced case and as such, Plaintiff was barred from
26 seeking attorney fees as a matter of law. Wieselmann then advised Plaintiff that as a result of the
27 above, Plaintiff was limited to the filing for increased legal fees for an amount up to \$5,000 and
28 that the costs to do so would greatly exceed the \$5,000.00.

11.

1 On or about December, 2012, at or near the time of the conclusion of the second Utah
2 lawsuit and Pursuant to the terms and conditions of Plaintiff's agreement(s) with Defendants,
3 Plaintiff requested Wieselman provide an accounting of his settlement proceeds deposited in the
4 WLG IOLTA account, the amount deposited with Defendants for the legal work contemplated
5 for the defense of the second Utah lawsuit and the recovery of attorney fees and costs, and the
6 return of the unused and unearned balance. Plaintiff made multiple demands of Defendants for a
7 refund of all unearned and unused money that Plaintiff deposited in the WLG IOLTA account
8 and the money paid to Defendants for the legal work contemplated for the defense of the second
9 Utah lawsuit and the recovery of attorney fees and costs that became due and owing to Plaintiff
10 at the conclusion of the second lawsuit in Utah. Wieselman admitted to Plaintiff that all funds
11 had been spent by Defendants throughout 2009, and no funds remained.
12

12.

13
14 After the conclusion of the second lawsuit brought against Plaintiff by the Utah-based
15 company and Pursuant to the terms and conditions of Plaintiff's agreement(s) with Defendants,
16 Plaintiff requested that Defendants provide him with his original case files, documents,
17 materials, and a complete historical financial accounting of Petitioner's account(s) with OLG and
18 WLG. Wieselman was unresponsive to Plaintiff's multiple requests. Plaintiff learned that
19 Plaintiff's physical files and materials were destroyed due to Wieselman's failure to pay the
20 storage fees at the Lake Oswego Public Storage facility where the files were physically stored.
21 Defendant failed to provide the proper and adequate steps as required by the law and the OSB
22 necessary to protect and preserve Plaintiff's files and material. Further, Defendants failed to
23 provide prior notice to Plaintiff that his files and materials would be destroyed. Wieselman
24 additionally admitted to Plaintiff that he could not access his former financial or database
25 systems that contained Plaintiff's electronic records. In 2013, Wieselman delivered the items
26 remaining in Defendants office that pertained to Plaintiff, a single box containing a dvd disc and
27 two binders with a scant amount of copies of documents related to the Utah cases, to the law
28 office of Brett Hall, lpc. The dvd disc was not readable. No additional materials were returned.

13.

Beginning in February, 2013 and continuing, Wieselman admitted to Plaintiff that despite very little legal work conducted on the second Utah lawsuit brought against Plaintiff by the Utah-based company, the settlement proceeds that had been held in the WLG IOLTA account and all money paid to Defendants for the legal work contemplated for the defense of the second Utah lawsuit and the recovery of attorney fees and costs had been spent over the course of the year of 2009 by Defendants, and that there was no money left in trust or in Defendants accounts to refund to Plaintiff. In February of 2013, Wieselman provided Plaintiff with a copy of an alleged "Olg llc Trust Transaction" statement which allegedly shows the settlement proceeds which had been spent and the alleged allocation of the funds. Said statement failed to describe any legal work performed relating to amounts withdrawn from trust account as required in Section 2.3 and 3.2 of the Attorney Fee Agreement dated April 2, 2009.

14.

Additionally, Plaintiff learned that Wieselman had disclosed attorney/client privileged communications beginning in February, 2013 and continuing, with the specific and intended purpose to advance Defendants' interests, and then again with the malicious intent, to negatively affect Plaintiff's business and contractual opportunities and relationships.

FIRST CAUSE OF ACTION

(Legal Malpractice)

15.

Plaintiff realleges paragraphs 1 through 14 and hereby further alleges:

16.

At all times relevant, Plaintiff was engaged in an attorney/client relationship with all Defendants which included fee agreements for appropriate and professional legal services.

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17.

Plaintiff relied on the representations of all Defendants regarding course of conduct and legal advice. Defendants intentionally withheld critical and relevant information from Defendant regarding the financial indebtedness of Defendants or any investigations into or adversarial litigation involving Defendants that would have deterred Plaintiff from retaining Defendants.

18.

Defendants were negligent in their legal advice and actions including, but not limited to:

- a. Defendants intentionally withheld critical and relevant information from Defendant regarding the financial indebtedness of Defendants or any investigations into or adversarial litigation involving Defendants that would have deterred Plaintiff from retaining Defendants.
- b. WLG and Wieselman failed to file the necessary response to or appear in the 2nd complaint filed by the above referenced Utah-based company, file for a summary judgment dismissal, or conduct any discovery as would commonly be conducted and filed by other attorneys in the community.
- c. WLG and Wieselman failed to provide adequate legal counsel for an appropriate and reasonable defense of the 2nd case filed by the Utah-based company.
- d. Removed money from IOLTA account without providing an accounting or, in the alternative, allowing a third party to take money out of the IOLTA account allegedly for fees, costs, and expenses that were not approved by Plaintiff.
- e. Failure to refund Petitioner's money deposited in Defendant's IOLTA account that was not used or earned pursuant to the terms and conditions of the governing agreement(s).
- f. Wieselman unlawful disclosure of attorney/client privileged communications for the benefit of WLG and Wieselman, with the intent to cause loss of Plaintiff's business and contractual opportunities.

1 g. Failure to return Plaintiff's files and materials upon request by Plaintiff of
2 Defendants of the same. Files include but are not limited to Plaintiff's original
3 documents, executed contracts, and other critical materials and property.

4 19.

5 WLG and Wieselmann advised Plaintiff that a wait-and-see ("do nothing") strategy was in
6 his best interest as the Utah-based company was focused on merging with a large, California-
7 based company. WLG and Wieselmann assured Plaintiff that this strategy would result in the
8 successful recovery of his legal costs and attorney fees. No appropriate response, discovery, or
9 motions typical of a reasonably and properly defended case were filed by WLG or Wieselmann on
10 behalf of Plaintiff in the 2nd case brought by the Utah-based company. At no time did Defendants
11 advise Plaintiff that Defendants had not appeared or provided a response in the 2nd Utah case or
12 that the failure to appear or provide a response in the 2nd Utah case would threaten or jeopardize
13 the ability to successfully seek and receive an order for attorney fees and legal costs.

14 20.

15 Due to WLG and Wieselmann's failure to file a response, actively prosecute, or provide an
16 affirmative defense in the 2nd case brought by the Utah-based company, Plaintiff Lowry was not
17 entitled to the recovery of attorney fees and legal costs as was the guaranteed result consistently
18 communicated by Defendants under the underlying "do-nothing and wait" strategy. At no time
19 did Defendants advise Plaintiff that Defendants had not appeared or provided a response in the
20 2nd Utah case or that the failure to appear or provide a response in the 2nd Utah case would
21 threaten or jeopardize the ability to successfully seek and receive an order for attorney fees and
22 legal costs.

23 21.

24 Defendants failed to exercise the care, skill and diligence commonly exercised by other
25 attorneys in the community.

26 22.

27 Defendants' breach of duty to exercise the care, skill and diligence commonly exercised
28 by other attorneys in the community was the actual and proximate cause of Plaintiff's damages.

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23.

Based on the Defendants' negligence and malpractice, Plaintiff suffered damages in the amount of attorney fees paid to Defendants from 2004 to 2008 in the amount of \$400,000 or other amount to be proven at trial, or in the alternative, actual damages in the amount of \$990,000 plus statutory interest, or other amount to be proven at trial.

SECOND CAUSE OF ACTION

(Action for Accounting)

24.

Plaintiff realleges paragraphs 1 through 14 and further alleges:

25.

At all times material, Plaintiff and all Defendants were bound by the terms of attorney/client fee agreements.

26.

Section 2.3 and 3.2 of the Wieselman attorney fee agreement, dated April 2nd, 2009, included a clause requiring Defendants, who had a fiduciary duty to Plaintiff, to provide an accounting of all money held in trust anytime money was withdrawn by Defendants or upon request by Plaintiff. Defendants were also required to provide a monthly statement of fees, costs, and expenses including a summary of services rendered. No such statements were ever provided by Defendants.

27.

Said request has been made by Plaintiff and Defendants have refused to do so.

28.

At a meeting at Wieselman's office in February 2013, Wieselman provided Plaintiff with an alleged WLG IOLTA account statement. The statement was labeled, "Olg llc Trust Transaction." The statement failed to describe the legal services that were charged for. No accounting was provided prior to the meeting, or since.

1 **THIRD CAUSE OF ACTION**

2 **(Breach of Contract)**

3 28.

4 Plaintiff realleges paragraphs 1 through 14 and further alleges:

5 29.

6 At all times material, Plaintiff and Defendants had entered into a contractual agreement,
7 via the parties' attorney/client fee agreement(s).

8 30.

9 Plaintiff paid large sums of money to Defendants in return for the promise by Defendants
10 to provide professional and appropriate legal services.

11 31.

12 Defendants WLG and Wieselmann breached the parties' contract in the following manner:

- 13 a. Failure to provide conscientious, competent, and diligent legal services
- 14 b. Failure to file adequate and necessary responsive pleadings and/or motions;
- 15 c. Failure to pursue discovery;
- 16 d. Failure to inform Plaintiff of the progress of work done on his case;
- 17 h. Removed Plaintiff's money deposited in Defendant's IOLTA account without
- 18 fulfilling the conditions outlined in the governing fee agreement(s) or, in the
- 19 alternative, permitted a third party to take money out of the IOLTA account
- 20 without fulfilling the conditions outlined in the governing fee agreement(s);
- 21 i. Failure to refund Petitioner's money deposited in Defendant's IOLTA account
- 22 that was not used or earned pursuant to the terms and conditions of the governing
- 23 agreement(s) (as stated in paragraph 18(d) above);
- 24 j. Failure to refund Petitioner's money paid to Defendants not used or earned in the
- 25 2nd Utah case pursuant to the terms and conditions of the governing agreement(s)
- 26 (as stated in paragraph 18(e) above);
- 27
- 28

1 k. Unlawful disclosure of attorney/client privileged communications for the benefit
2 of Defendants (as stated in paragraph 18(f) above);

3 l. Failure to return Plaintiff's files and property upon request by Plaintiff of
4 Defendants of the same (as stated in paragraph 18(g) above);

5 32.

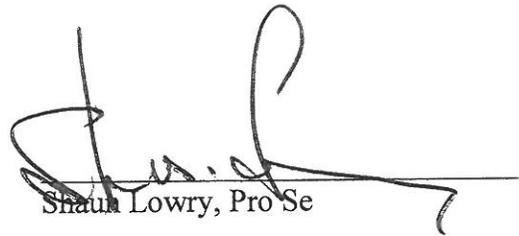
6 Said failures were material breaches of the parties' contractual agreement(s) and caused
7 Plaintiff actual damages in the amount of \$1,500,000 or other amount to be proven at trial.

8 33.

9 Plaintiff reserves the right to amend this Complaint to include, but not limited to, a claim
10 for Punitive Damages and Attorney Fees.

11 WHEREFORE, Plaintiff prays for relief as set forth in each claim for relief, for his
12 attorney fees, expert witness fees, costs and expenses of suit, and pre- and post-judgment interest
13 as applicable, and for such other additional relief in favor of Plaintiff as the court deems
14 appropriate.

15 Dated this 4th day of June, 2015.

16 
17 Shaun Lowry, Pro Se

AFFIDAVIT OF SERVICE

STATE OF OREGON
County of Clackamas

CIRCUIT COURT

Case Number: CV15020613

Plaintiff: **Shaun D. Lowry**

vs.

Defendant: **Jacob Wieselmann, et al.,**

First Amended Complaint filed on June 4th, 2015 in Clackamas County Court. First Amended Complaint to be served on Blunck & Walhood, LLC., attorneys for and on behalf of Jacob Wieselmann, and Wieselmann Law Group located at 2350 Willamette Falls Drive, West Linn, Oregon 97068.

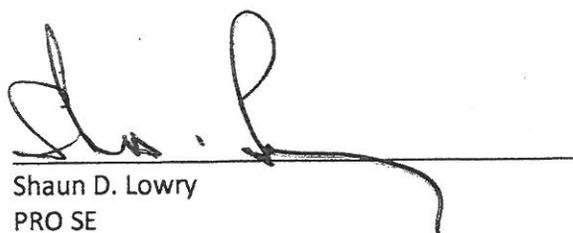
I, Shaun Lowry, being duly sworn, depose and say that on the 8th day of March, 2015 I:

Served the within named corporation by delivering a true and complete copy of the First Amended Complaint by First Class U.S. Mail. A true copy was also delivered to above corporation via email to attorney Matthew Mues at on June 4th, 2015.

Subscribed and Sworn to before me on the 8th day
of June, 2015.

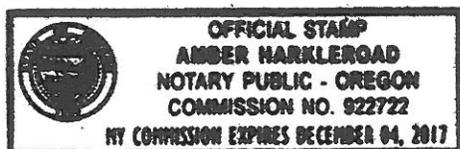


NOTARY PUBLIC



Shaun D. Lowry
PRO SE

Shaun D. Lowry
23775 SW Stonehaven St.
Sherwood, OR 97140



July 1, 2015

Jacob Wieselman
Wieselman Law Group
312 NW 10th Street, Suite 200
Portland, OR 97209

Re: Jacob Wieselman (Shaun D. Lowry)

Dear Mr. Wieselman:

The complaint filed against you by Shaun Lowry was recently reassigned to me.

Reviewing the file, I find that I have several questions to which I need you to respond. First, it was not clear to me whether you purchased Oswego Law Group from Mark Potter or from Matthew Samwick. Please provide me with a copy of the sale agreement and any documents signed in connection with that agreement.

I understand that Mr. Samwick worked with Oswego Law Group in some capacity between the time you acquired it in late-2008 and sometime in 2011. What functions did he perform?

You stated in one of your responses to Mr. Lowry (your email to him of February 21, 2013) that after you purchased Oswego Law Group, Mr. Samwick administered its trust account. Please explain why you would allow an individual who had, in May 2008, filed a Form B Resignation (in the face of allegations that he had converted client funds) manage your trust account? Please advise me whether Mr. Samwick or your secretary, Bette, ever had signing authority on your lawyer trust account and document your response with a copy of the bank signature card for the account. If either Mr. Samwick or Bette had signing authority, please explain the reasoning behind your permitting this. Please also describe the procedures you had in place for you to review Mr. Samwick's management of the account.

When you purchased Oswego Law Group, the *Omniture v. Lowry* case was still ongoing. That case settled in January 2009. Please describe the role you played in handling and/or settling that case. Who was the client contact – you or Mr. Samwick? If Mr. Samwick continued to be involved in Mr. Lowry's matter after Mr. Samwick resigned from the Bar, please describe what he did and whether it involved the unlawful practice of law by Mr. Samwick and assisting in the unlawful practice of law by yourself in violation of RPC 5.5(a).

Letter to Jacob Wieselmann

July 1, 2015

Page 2

You claim that when the *Omniture* case settled in January 2009, for \$990,000, Mr. Lowry owed Oswego Law Group approximately \$465,000 in attorneys fees. However, Mr. Lowry claims that he paid Oswego Law Group over \$300,000 in legal fees during the pendency of that matter. Please provide an accounting of all of the funds received by Oswego Law Group at any time from, or on behalf of, Mr. Lowry. Please also provide your time and billing records (including billings for time spent by Mr. Samwick or Bette) for the case, copies of all invoices you sent Mr. Lowry, and any other evidence that he owed you \$465,000 at the time of the *Omniture* I settlement.

You assert that Mr. Lowry agreed that the funds remaining from the *Omniture* settlement after disbursement to Oswego Law Group of \$465,000 would be a flat fee to handle the anticipated *Omniture* II lawsuit. You wrote to Mr. Lowry on February 21, 2013 that he and Mr. Samwick had worked out this financial arrangement between themselves, outside of your presence. Please explain why Mr. Samwick would have been negotiating a fee agreement with Mr. Lowry in January 2009 for legal services he could not perform. What did Mr. Samwick tell you about the financial arrangement? Please attach copies of any fee agreement entered by Mr. Lowry and the Oswego Law Group or the Wieselmann Law Group at any time. I would expect there to be at least two such fee agreements: the first in connection with the *Omniture* I case; the second in connection with the *Omniture* II case. If you did not have a written fee agreement for the flat fee in the *Omniture* II case, please explain why you did not.

You have stated Mr. Lowry corroborated your understanding that he had agreed to pay a flat fee for the *Omniture* II matter when he signed a declaration in his divorce case stating that he agreed, by March 2009, to a \$400,000 fee to defend against the *Omniture* II case. Who drafted this declaration for Mr. Lowry's signature and why? Who advised him to make the anticipatory fee agreement?

Assuming (although Mr. Lowry disputes this) that he owed Oswego Law Group \$465,000 in connection with the *Omniture* I case, and assuming (although Mr. Lowry disputes this also) that he agreed (consistent with his above-referenced declaration) to pay a \$400,000 flat fee in connection with the *Omniture* II case, your trust account should have had \$125,000 remaining in it (\$990,000 less \$865,000). Please explain what happened to the difference and document the transactions. The trust account ledger you produced shows that all monies from the *Omniture* I settlement were removed from trust by November 2009. Please explain.

Did you ever file an appearance on Mr. Samwick's behalf in the *Omniture* II case? My file materials suggest that the case was dismissed for lack of prosecution. Specifically, what services did you provide in that case? Please address whether charging \$400,000 (or more) in that case was justified under RPC 1.5(b) and why, if the case were dismissed for lack of prosecution, \$400,000 should not be considered a clearly excessive fee, in violation of RPC 1.5(a), for the work performed.

Letter to Jacob Wieselmann
July 1, 2015
Page 3

Again, the trust account ledger you provided shows that all of the monies from the *Omniture I* settlement were removed from trust by November 2009. Who withdrew them? Where did they go? Did you receive any of this money? My investigator tells me that between 2005 and 2012, several tax liens were placed on your properties. Please explain what liens were pending and in what amounts in 2008 and 2009. Please describe your financial circumstances during those years and what you have done to satisfy the tax liens.

You claim that \$465,000 was due to the firm for fees in the *Omniture I* settlement funds matter; however, that amount was not immediately withdrawn upon receipt of those funds. Rather, sums of anywhere from several hundred dollars to several thousand dollars were withdrawn almost daily between January 14, 2009 through November 10, 2009. Please explain the multiple withdrawals. Also, if – as you contend – Oswego Law Group and Mr. Lowry entered a flat fee agreement in or about March 2009, why were those funds (\$400,000? \$525,000?) not withdrawn all at once?

Please provide copies of any and all written communications between you and Mr. Lowry – and between you and Mr. Samwick – concerning the *Omniture I* matter, the *Omniture I* settlement, a possible complaint against Mr. Samwick, and the *Omniture II* case. This request includes any and all email correspondence.

You and Mr. Lowry discussed entering into an agreement (and entered negotiations concerning said agreement) whereby you and your wife would sue Mr. Samwick on grounds ostensibly unrelated to Mr. Lowry's matters. In consideration of Mr. Lowry's agreement not to sue you, you agreed (or contemplated agreeing) that you would share with Mr. Lowry any funds you were able to recover from Mr. Samwick. The proposed agreement you drafted stated that your offer was in exchange for "Lowry's agreement not to pursue litigation against Wieselmann and to release him from all claims as allowed by law and the ORPC." At the time you were negotiating this agreement, Mr. Lowry was your former client. Please address whether these negotiations were conducted consistent with the requirements of RPC 1.8(h) [prohibiting lawyers from settling a claim or potential claim for a lawyer's liability with an unrepresented client or former client]. See RPC 1.8(h)(2).

I understand that there is currently litigation ongoing between you and Mr. Lowry concerning your handling of the *Omniture I* settlement funds. Please describe and attach any pleadings in that/those matters.

Letter to Jacob Wieselmann
July 1, 2015
Page 4

Please provide the requested responses and materials no later than July 22, 2015.

Very truly yours,



Mary Cooper
Assistant Disciplinary Counsel
Extension 321

MAC:kld

cc: Shaun D. Lowry

September 5, 2013

Oregon State Bar
Helen Hirschbiel, CEO/ Executive Director
P.O. Box 231935
Tigard, Oregon 97281-1935

RECEIVED

MAY 24 2016

Oregon State Bar
Executive Director

Re: Denial of Client Security Fund Application/Claim #2015-19
Lawyer: Jacob Wieselman
Applicant: Shaun D. Lowry
Claim Amount: \$50,000.00

Dear Ms. Hirschbiel,

I received your letter dated May 10th, 2016 regarding the denial of my CSF application and claim for benefit of \$50,000.00. Please accept this letter as my formal request for board review by the Oregon State Bar Board of Governors.

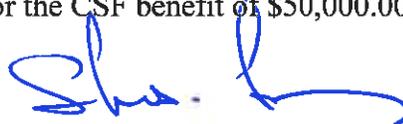
Please reconsider the following facts and arguments for acceptance of this claim:

1. Purpose and Mission of the Client Security Fund:
 - a. The Oregon State Bar Client Security Fund was created in 1967 to help reimburse clients who lose money or property as a result of dishonest conduct by their lawyer.
 - b. The Fund is one way the Bar and its members compensate for the misdeeds of a few lawyers.
2. Eligibility of Lowry's Claim – each of the elements of an “eligible claim,” have been met
 - a. at the time of the loss, the lawyer was providing legal services to the client
 - b. the lawyer engaged in dishonest contact with regard to the client's funds
 - c. as a result of the dishonest conduct, a civil judgment was obtained against the lawyer; disciplinary actions were taken by the OSB, and the lawyer resigned from the bar
 - d. the claimant [Lowry] has made a reasonable attempt to recover the amount claimed without success. Lowry has only received \$25,000 from a contribution payment by Samwick. Wieselman claims to be financially involvement. It is not likely that Lowry will receive any additional recovery.
 - e. the claim is filed with the bar within two years after the latest of: the lawyer's conviction, judgment date, or date of disbarment, suspension, reprimand or resignation; or the date the claimant knew or should have known of the loss.
3. Jacob Wieselman placed the \$990,000.00 in the Oswego Law Group lawyer trust account instead of his Wieselman Law Group lawyer trust account as was required by the settlement agreement between Lowry and Omniture (“Omniture I.”
 - a. Wieselman did the above action without notifying client.
 - b. Wieselman did the above action without receiving written approval by both parties to the settlement agreement as the agreement required.
 - c. Wieselman allowed client's \$990,000.00 settlement funds to be placed into a trust account in which he did not have access.
 - d. Wieselman allowed client's \$990,000.00 settlement funds to be placed into a trust account in which Matthew Samwick, who had previously submitted his Form B resignation while under disciplinary actions by the OSB for the conversion of his Client's funds, had direct access and control of.

4. Wieselman failed to implement reasonable IOLTA safeguards that would have reasonably protected clients' funds held in the firm's lawyer trust account.
 - a. Wieselman retained the employment of Matthew Samwick as the office manager and paralegal of Wieselman's law firm after he had previously Form B resigned while under investigation by the OSB for converting Client funds.
 - b. Wieselman did not remove Samwick's access to, or ability to direct withdrawal and usage of client's funds held in the firms OLG IOLTA.
 - c. Wieselman implemented no other reasonable procedures to safeguard clients' funds
5. Wieselman intentionally failed to provide proper disclosure to Clients re: Samwick
 - a. Wieselman intentionally withheld notice to clients as to the nature of Matthew Samwick's Form B resignation. As a result, Wieselman's clients were unable to make an informed decision regarding the maintaining of their funds in Wieselman's IOLTA.
 - b. It is reasonable to conclude, that Wieselman intentionally withheld the nature of Samwick's Form B resignation in an effort to thwart clients fleeing from the firm, which would greatly impact the financial viability of the firm.
6. Wieselman intentionally failed to review financials of his law firm
 - a. Emails prove Wieselman did not receive or review financial reports from the office staff, that were effectually managed by Samwick. Wieselman uses this explanation as to his lack of knowledge of the conversion of Lowry's funds held in the OLG IOLTA by his staff.
 - b. Wieselman knew, or reasonably should have known that the substantial draws he received, combined with the payroll for the office staff, and payables of the office could not reasonably be met with the limited client work and account receivables of the firm.
7. OSB Directed Disciplinary Actions against Wieselman
 - a. On October 6th, 2015, Mary Cooper of the OSB, advised Wieselman that formal disciplinary proceedings were being instituted against Wieselman.
 - b. The OSB alleged violations of:
 - i. Charging clearly excessive fees
 - ii. Failure to maintain financial records
 - iii. Failure to safeguard and maintain records of client property
 - iv. Failure to deposit and maintain client funds in trust**
 - v. Failure of duty to account and return client property**
 - vi. Failure to supervise non-lawyer personnel**
 - vii. Conduct involving dishonesty, fraud, deceit, or misrepresentation**
8. Wieselman Form B Resignation
 - a. During disciplinary actions by the OSB, Wieselman submitted his Form B Resignation.

The OSB Disciplinary Counsel believed and concluded there was beyond sufficient evidence of dishonest conduct by Jacob Wieselman, and sought such serious disciplinary actions against Wieselman and seeking his disbarment. The Order accepting Wieselman's resignation of his license was signed by Chief Justice of the Oregon Supreme Court, Hon. Thomas A. Baumer, on March 24th, 2016.

I respectfully request the Oregon State Board of Governors reconsider my application, review all available information, and grant my application for the CSF benefit of \$50,000.00. Thank you.



Shaun D. Lowry
23775 SW Stonehaven St.
Sherwood, OR 97140

Client Security Fund
First Supplemental Investigative Report

FROM: Stephen Raher, investigator
DATE: CSF Meeting May 7, 2016
RE: Claim No. 2015-19
Claimant: Shaun Lowry
Lawyer: Jacob Wieselman

Claimant has filed a claim against attorney Jacob Wieselman for \$990,000. Investigator presented a report (**Exhibit 1**) at the November 14, 2015, meeting of the Committee. The report noted that Claimant had filed a pro se civil suit against Mr. Wieselman and his law firm. The Committee voted to postpone action on the claim pending resolution of the civil matter.

Intervening Events

On January 22, 2016, Claimant, Wieselman Law Group, LLC/Oswego Law Group (collectively the “Firm”), and Mr. Wieselman entered into an Agreement for Stipulation to Judgment (the “Settlement Agreement”) that includes a stipulated judgment against Wieselman and the Firm (the “Judgment,” a copy of which is attached as **Exhibit 2**).

According to Claimant, the operative complaint in the civil case is the Second Amended Complaint, dated August 5, 2015. This complaint asserts three causes of action: legal malpractice, fraud, and negligence. The Judgment, which was entered on March 3, provides for judgment in favor of Claimant on his malpractice and negligence actions; the fraud claim is dismissed with prejudice.

In addition to the Settlement Agreement and the Judgment, the parties executed an Assignment of Claims and Covenant Not to Execute (the “Assignment,” a copy of which is attached as **Exhibit 3**). There are two provisions in the Assignment that are relevant to this investigation. First, to the extent that Wieselman or the Firm have any claims against the PLF, such claims are assigned to Claimant. Second, Claimant agrees not to execute on or otherwise enforce the Judgment against Wieselman or the Firm. The covenant not to execute is not limited in duration.

The Settlement Agreement includes a declaration by Mr. Wieselman (**Exhibit 4**) stating that he never knowingly converted or directed others to convert Claimant’s funds. Although the declaration does not provide a definitive explanation of what happened, the clear implication is that the misappropriation of Claimant’s funds was the work of Matthew Samwick and legal assistant Bette Douglas. Claimant has recently alleged that Mr. Samwick “has . . . consistently maintained that Wieselman controlled the IOLTA account and directed his office staff on all withdrawals from the IOLTA and operating accounts.”¹ Claimant further explains that he had intended to investigate these conflicting accounts during the discovery phase of his litigation.

¹ Email from Claimant to Investigator (Apr. 27, 2016).

Mr. Wieselmann had filed a third-party claim (for contribution and indemnity) against Mr. Samwick. This claim was *not* assigned to Claimant under the Settlement Agreement. Instead, Mr. Wieselmann, the Firm, and Mr. Samwick stipulated to dismissal of the third-party claim, with prejudice, and an order of dismissal was entered on February 8, 2016.

Claimant never formally asserted a claim against Samwick in connection with this loss, but did inform Investigator that he would substitute Samwick for one of the “Doe defendants” if he discovered evidence implicating Samwick. On the same day that the Settlement Agreement was executed, Claimant and Samwick entered into a Settlement Agreement, Mutual Release, and Covenant Not to Sue (the “Samwick Agreement,” a copy of which is attached as **Exhibit 5**). The Samwick Agreement contains the following releases: (1) both parties mutually release any and all claims arising from or related to the *Lowry v. Wieselmann* litigation, and (2) Claimant covenants not to sue Samwick for “any act, omission, or claim whatsoever, known or unknown, that exists as of the date of this Agreement.” The agreement further calls for Samwick to pay Claimant \$25,000. Claimant informs Investigator that this amount has been paid.

At approximately the same time that Samwick and Claimant entered into the Samwick Agreement, they executed a separate document (the “Bonus Agreement”) containing a mutual release of claims and an agreement that Samwick would pay Claimant \$175,000 in compensation related to real estate work that Claimant had previously performed for Samwick.

Discussion

As noted in the prior report, there were some concerns about the timeliness of this claim. Those concerns have been resolved, now that Claimant has obtained a money judgment. Because the CSF claim was filed prior to the Judgment, the claim is now timely under Rule 2.8(c).

Perhaps the more salient issue is the settlement of Lowry’s claim against Samwick. Unsurprisingly, PLF counsel informed Investigator that the PLF disclaims any liability for Samwick’s acts, since he was not a member of the bar (and thus not insured) at the time of the misconduct. It is the Investigator’s opinion that Samwick is the party most likely responsible for the misappropriation of Claimant’s funds. However, Wieselmann has dismissed his claim against Samwick with prejudice and Claimant has released all claims against Samwick. Accordingly, Samwick is relatively free from potential liability. Wieselmann also bears responsibility for the misappropriation, but he is similarly insulated from liability—Claimant has secured a judgment but simultaneously relinquished the ability to enforce the judgment against Wieselmann.²

CSF Rule 5.1.1 states that in exchange for receiving an award, a claimant must assign to the OSB any rights he holds against the lawyer *and* “the person or entity who may be liable for the claimant’s loss.” For the reasons discussed above, Claimant has effectively extinguished all of the rights that he could have assigned to the OSB. Although Rule 5.1.1 does not require claimant to give any value in exchange for an award, it is notable that Claimant is seeking compensation from CSF and PLF after having helped to insulate the two most likely wrongdoers from liability.

² According to the Assignment, Claimant’s covenant not to execute the Judgment is binding on any assignees, and Investigator is not aware of any reason why this provision would not be valid.

As to the PLF claims, Mr. Wieselmann unsurprisingly does not warrant the validity of the assigned claims. Indeed, there is reason to doubt the collectability of any claim that Claimant intends to pursue against the PLF. The Settlement Agreement, the terms of the Judgment, and the content of the Wieselmann declaration all seem designed to defeat the PLF coverage exclusion for intentional wrongful conduct by emphasizing a lack of intent on Mr. Wieselmann's part. Nonetheless, at least two other PLF policy provisions would probably bar any claim by Claimant (as Wieselmann's assignee). First, the PLF's grant of coverage specifies that a covered act or omission must be "committed . . . in rendering professional services in your capacity as an attorney in private practice, or in failing to render professional services that should have been rendered in your capacity as an attorney in private practice." PLF Claims Made Policy § III(1)(a). The PLF's interpretive comment concerning this provision states that its intent is to exclude a lawyer's "conduct in carrying out the commercial or administrative aspects of law practice." *Id.*, cmt. Examples of commercial or administrative activities include "depositing or withdrawing monies or instruments into or from trust accounts." *Id.*

Second, the general tortious conduct exclusion also may be a bar to recovery. This exclusion applies to, among other things, "[i]njury to, loss of, loss of use of, or destruction of any real, personal, or intangible property." *Id.* § V(16)(b). The PLF's interpretive comments note that this provision applies to money, including money held in a lawyer trust account.

Concluding Summary

For the reasons discussed below, Investigator submits this supplemental report to the Committee without a recommendation.

The Committee previously postponed action on this claim. The motivating factor for the postponement was a desire to see what transpired in the civil suit. Because the case settled without any evidentiary hearings or dispositive motions, it is unlikely that the facts of the case will ever be established with certainty. The ultimate result of the litigation is that Claimant obtained \$25,000 from Samwick, an uncollectible judgment against Wieselmann, and a claim of dubious validity against the PLF.

The Claim likely meets the criteria for approval,³ and thus the Committee may want to approve payment. Nonetheless, taking a broader view, it is difficult to deny that the claim does not fit easily with the CSF eligibility guidelines for several reasons. First, the Judgment is for malpractice and negligence, not for dishonest conduct. Second, Claimant has obtained a judgment against Wieselmann but the CSF would be unable to pursue collection, thus impairing

³ The only reason that Investigator cannot say that the claim is eligible without qualification lies in the wording of ORS 9.655(1). For a claim over \$5,000, this statute requires either that the responsible attorney be convicted of a crime or the claimant has obtained a judgment against the attorney. To Investigator's knowledge, Mr. Wieselmann has not been charged with (let alone convicted of) any crime. Although Claimant has obtained a judgment, the statute also requires that "execution issued on the judgment has been returned uncollected or issuance of execution would be a useless act." ORS 9.655(1)(c). Here, the Judgment does not at present meet this requirement (because Claimant has contractually agreed not to execute on the judgment), although collection on a PLF claim could potentially constitute a partial execution on the Judgment.

the CSF's subrogation rights. Third, the party most likely to have committed dishonest conduct is Mr. Samwick, who was not a member of the bar at the time of the loss. Finally, Claimant's settlement with Mr. Samwick seems somewhat collusive. In exchange for \$25,000, Samwick is insulated from liability while Claimant seeks to collect from third parties such as PLF and the CSF. This scenario leaves Investigator with the feeling that the most guilty party is emerging relatively unscathed.

The content of the Lowry/Samwick settlement agreements are difficult to account for in making a recommendation to the Committee. Claimant arguably bargained away his claim against Samwick for pennies on the dollar; on the other hand, this may have been the best realistic result available to a pro se litigant. Meanwhile, Claimant maintains that the Bonus Agreement (and the associated \$175,000 payment) is unrelated to the Wieselmann matter. Investigator finds this representation plausible, but notes that the very existence of the two separate Samwick settlements illustrates the complexity of the Lowry/Samwick relationship.

Claimant was under no obligation to clear his settlement agreements with the CSF, but it is appropriate for the Committee to examine the agreements and draw reasonable inferences therefrom. Investigator encourages each member of the Committee to review the record and make a decision based on his or her own weighting of the applicable factors.

Amended Findings and Conclusions

1. Claimant was a client of Mr. Wieselmann.
2. Mr. Wieselmann was an active member of the Oregon State Bar when Claimant retained him and at the time of the loss. He tendered a Form B resignation on March 25, 2016.
3. At all times relevant to the claim, Mr. Wieselmann maintained an office in Lake Oswego, Oregon.
4. Claimant suffered a loss due to Mr. Wieselmann's failure to account for settlement proceeds that he held in trust for his client. Accordingly, the loss arose from an established attorney-client relationship.
5. Investigator has not discovered any bond, surety agreement, or insurance that would cover Claimant's loss.
6. Claimant obtained a stipulated civil judgment of \$982,856 against Mr. Wieselmann on March 3, 2016.
7. Concurrent with execution of the stipulated judgment, Claimant agreed to forbear collection on the judgment, in exchange for assignment of any claims Mr. Wieselmann may have against the PLF.
8. Claimant released any claims against Mr. Samwick in exchange for \$25,000.
9. Claimant filed his CSF claim prior to obtaining a judgment against Mr. Wieselmann; accordingly, the claim is timely under CSF Rule 2.8(c). In addition, evidence indicates that the loss occurred in November 2009 (when the settlement funds were completely dissipated), meaning that Claimant's CSF claim was filed within the six-year period of ultimate repose contained in Rule 2.8.
10. Claimant's claim is exclusive off interest, attorney fees, and court costs.
11. Claimant is not represented by an attorney.

Client Security Fund
Investigative Report

FROM: Stephen Raher, investigator
DATE: CSF Meeting November 14, 2015
RE: Claim No. 2015-19
Claimant: Shaun Lowry
Lawyer: Jacob Wieselman

Investigator's Recommendation

Claimant has filed a claim in the amount of \$990,000. Attorney Jacob Wieselman has various defenses, which (as discussed below) are not terribly persuasive. Notably, even assuming every one of Mr. Wieselman's defenses were valid, there would still be more than \$50,000 in missing funds. Given the CSF's limit on reimbursements, Investigator recommends payment of \$50,000, the maximum amount allowable under CSF Rule 6.2.

Overview of Claim

Claimant has an extensive work history as a software salesman. He spent some time working for a Utah-based company called Omniture. As part of his work for Omniture, Claimant negotiated a large deal, for which he felt Omniture owed him a commission of \$4.5 million. Omniture disagreed about the amount of the commission. Sometime in 2004, Claimant hired Lake Oswego-based attorney Matthew Samwick¹ to represent him in litigation with Omniture ("Omniture I").

The OSB investigated Mr. Samwick for mishandling of client funds. In May 2008, Samwick tendered a Form B resignation and sold the Firm to attorney Mark Potter. Mr. Wieselman had moved to Oregon in 2003 from the east coast where he had practiced law for many years. By 2008, Mr. Wieselman was looking for a small law practice to join. He was introduced to Mr. Samwick around the same time that Mr. Potter allegedly expressed a desire to rescind his purchase of the Firm.

According to Mr. Wieselman, Samwick released Mr. Potter from his liability under the purchase and sale agreement and Wieselman assumed the contract as buyer of the Firm sometime in late 2008. Mr. Samwick continued to be employed by the Firm as a paralegal, and in this capacity he exercised control over the Firm's client trust account.

The Omniture I case was one of the Firm's largest matters at the time that Mr. Wieselman purchased the Firm. On December 31, 2008, Claimant and Omniture settled the Omniture I case (Mr. Wieselman claims responsibility for finalizing the settlement). Under the terms of the settlement, Omniture was to pay Claimant \$990,000 within ten days. Bank records show that

¹ Claimant actually retained Mr. Samwick's law firm, Oswego Law Group. After Mr. Wieselman purchased the firm, he referred to it varyingly as Oswego Law Group, Wieselman Group, and Oregon Law Group. For simplicity's sake, I will refer to it simply as the "Firm."

this amount was wired to the Firm's IOLTA account at Northwest Bank on January 14, 2009. All parties agree that none of the \$990,000 was disbursed to Claimant. The precise details of what happened are hotly contested.

Claimant's Version of Events

Claimant states (and documentary evidence corroborates) that he had made numerous payments to the Firm during the course of Omniture I. These payments were usually in the range of \$2,000 to \$5,000, but include one payment of \$20,000. When the matter settled, Claimant assumed that the Firm would present a final accounting and refund the settlement payment, less any fees still owing. This never happened, and sometime in March 2009 Omniture filed a new declaratory judgment action against Claimant ("Omniture II").

On April 2, 2009, Claimant signed a new engagement letter with Mr. Wieselman, wherein the Firm agreed to represent Claimant in the Omniture II case on an hourly basis. According to Claimant, Omniture was a litigious opponent, and he anticipated that the second suit could be costly. Thus, Claimant was fine with leaving his settlement funds in the Firm's IOLTA account as a war chest. In addition, Claimant divorced his wife in 2010 and the divorce led to a custody dispute in 2011, all of which occupied his attention. Not much happened in the Omniture II case during this time. Claimant believes that the second suit was motivated by personal animus on the part of Omniture's CEO, and that when Omniture was acquired by Adobe Systems, Inc. in October 2009, Adobe was not invested in pursuing this grudge. In any event, in 2012, Claimant started asking Wieselman about the status of the Omniture II litigation and the possibility of recovering attorney fees from Omniture. Wieselman concluded that Claimant could not recover attorney fees. Omniture dismissed its complaint in December 2012.

In early 2013, Claimant started asking Wieselman for an accounting and a refund of his retainer. Wieselman responded with a series of excuses before eventually admitting that the money was no longer in the Firm's trust account.

Wieselman's Version of Events

Mr. Wieselman alleges that at the time Omniture I settled, Claimant owed the Firm \$444,841.62, which was properly paid from the settlement proceeds. Claimant vigorously disputes this, saying he had paid all or nearly all of his fees on an ongoing basis and that he never received invoices or an accounting from the Firm. The only evidence that corroborates Mr. Wieselman's narrative is the Lowry Declaration (discussed below). Wieselman's narrative is contradicted by the lack of any supporting billing records and the pattern of activity in the Firm's IOLTA account—if upwards of \$400,000 were actually due and owing, then one would expect to see one or two large withdrawals from the IOLTA account, representing payment of fees and expenses due at the time of settlement. Instead, there are nearly one hundred fifty small withdrawals (several per week) from January to November 2009. Most of these transfers are for less than ten thousand dollars, and other than one \$90,000 transfer (in January 2009), the largest such transaction was \$26,135.83 (in September 2009).

As for Omniture II, Wieselman alleges that Claimant agreed to retain the firm for a \$400,000 flat fee. Claimant flatly denies this, and the only written contract is clearly an hourly fee agreement. Once again, the only written evidence that somewhat supports Wieselman's narrative is the Lowry

Declaration, which does state that Lowry agreed to a \$400,000 flat fee. Once again, there is no \$400,000 withdrawal from the Firm's IOLTA account, as one would expect.

As discussed below, there are reasons to discount the reliability of Mr. Wieselmann's narrative. Nonetheless, one of the driving facts behind Investigator's recommendation is that even if one were to give Mr. Wieselmann the benefit of the doubt on all disputed facts, significantly more than \$50,000 (i.e., the maximum CSF payout) is still unaccounted for:

Settlement received by Firm	990,000.00
Fees & costs allegedly owed for Omniture I	(465,635.87)
Alleged flat-fee for Omniture II	(400,000.00)
Minimum amount due to Claimant	<u>\$ 124,364.13</u>

Lowry Declaration

The major inconsistency in Claimant's narrative is an unsworn declaration he executed on January 26, 2010, in connection with his divorce proceedings. The four-paragraph declaration includes three paragraphs relevant to this claim, which are reproduced below in full (bracketed comments by Investigator):

1. At the time of the Omniture settlement, there was \$444,841.62, plus \$20,794.25 in miscellaneous time for me due and owing to the Wieselmann Group. I assigned all settlement proceeds to WebForensics. [*n.b.: not clear what "WebForensics" is or what the significance of the alleged assignment is*]
2. At the time of the settlement, I approved advances against legal fees as requested from the Wieselmann Group against the funds held in trust. I approved all future advances. [*n.b.: not clear what the "future advances" are*]
3. By March, 2009, it became clear to be that my livelihood was at stake and that Omniture was going to file a retaliatory lawsuit to end my career in web analytics. That case is still pending and my livelihood remains at stake. I agreed, given the cost and tactics of Omniture in the prior lawsuit, to a \$400,000 fee to defend that case.

Wieselmann has argued that this declaration was a strategy for Claimant to hide money from his wife during the divorce, although at the same time Wieselmann relies heavily on the validity of the Declaration (in fact, he admits that the Declaration is the only written memorialization of the alleged flat-fee agreement for Omniture II). Claimant insists that he fully disclosed the settlement funds to his ex-wife, and that the Declaration was not an attempt to hide assets. Claimant's explanation of the declaration is essentially that he signed it based on the trust he placed in his counsel.

Wieselmann's Credibility

During his interview with Disciplinary Counsel and Investigator, Mr. Wieselmann repeatedly stated that he was negligent in managing his IOLTA account, but that all affirmative misconduct was attributable to his staff. This is consistent with a February 26, 2013, email to Claimant, in

which Mr. Wieselmann apologized for the misappropriated funds, claimed to have “been duped,” and stated “I abrogated my professional and personal responsibility.”

For purposes of a CSF claim, negligence is not a defense to misappropriation of funds. In addition, there are several reasons to doubt Mr. Wieselmann’s credibility.

For example, according to Disciplinary Counsel, the Firm’s official IOLTA account (as reported to the OSB) is with Chase Bank. The Omniture settlement funds were deposited into a different IOLTA account, with Northwest Bank. During the interview, Mr. Wieselmann stated that he did not know of the Northwest Bank IOLTA account until after the funds had been misappropriated. However, during the same interview, Wieselmann stated that he drafted the Omniture settlement agreement, which directed Omniture to wire the funds to the Northwest Bank account.

In addition, Mr. Wieselmann’s explanations concerning his knowledge of the misappropriation are inconsistent. The Firm’s trust account ledger for the Omniture settlement funds shows that the funds were received on January 14, 2009, and were completely depleted (through a series of small withdrawals) by November 10, 2009.² Claimant has produced two emails showing that Mr. Wieselmann knew of the misappropriation as early as 2010. First is a lengthy email Wieselmann sent to Samwick on June 25, 2010. In the email Wieselmann laments the financial performance of the Firm and states that “Until his divorce and the representations that we had to make to the divorce court, I had no idea that we were living on Shaun’s money and, frankly, still do not understand the arrangement or justification.” Then, on January 1, 2011, Wieselmann sent another long email to Samwick regarding his personal financial situation, wherein he explains a sizeable unpaid tax debt that he “would have [paid] with the Lowry money had I known we had it.”

The two emails discussed above indicate that Wieselmann became aware of the existence and use of the settlement money approximately around the time of the Lowry Declaration. Despite this knowledge, Wieselmann did not take any steps to address the Firm’s inability to refund the money that was due to Claimant (which, as discussed above, would have been a *minimum* of \$124,364.13. Moreover, when Claimant initially asked for an accounting and refund in February 2013, Wieselmann’s first response was to say:

Pursuant to the agreement worked out between you and Matt Samwick or my predecessor as owner of OLG [i.e., the Firm], the funds were the companies [sic] when received. Those representations were made to me when I acquired the firm.... I relied on that in the decision to come on board the firm.

Because the Omniture I settlement was not finalized until *after* Mr. Wieselmann purchased the Firm, his initial explanation is implausible. In addition, available evidence indicates that Mr.

² The transfers listed on the Firm’s trust ledger are *largely* consistent with the bank statements produced by Northwest Bank, but do not correspond completely. In any event, the Northwest Bank account balance as of November 30, 2009 was \$32.55. On the same date, the Firm’s Chase IOLTA account had a \$27 balance. Therefore, all available evidence indicates that no material portion of the settlement funds was still held in trust as of November 2009.

Wieselman first learned of the treatment of the settlement fund in 2010 (well after he acquired the Firm), at which time he expressed surprise.

Finally, when asked why he did not discover the misappropriation earlier, Mr. Wieselman cites an overwhelming workload, comprised largely of criminal defense engagements under the Criminal Justice Act. A review of U.S. District Court dockets for the relevant time period reveals that Mr. Wieselman had only a moderate federal criminal defense workload at the time.

Mr. Wieselman's response to the aforementioned emails is to point out that Claimant obtained the email from Mr. Samwick. Despite the fact that Samwick seems to have coordinated (or, at the very least, suffered) the misappropriation of the settlement funds, Claimant is currently employed by Mr. Samwick. Mr. Wieselman argues that this impairs Claimant's credibility. Claimant admits to a continuing employment relationship with Samwick (although he says that their social relationship has cooled), but says that if he can uncover actual evidence of Samwick's involvement in the misappropriation, he will amend his state-court complaint to name Samwick as a defendant.

Summary of Recommendation

This claim involves voluminous documents and numerous disputed facts. To the extent that the CSF Board determines that any of the unresolved factual issues demand further investigation, Investigator is more than willing to defer action on the claim and continue his investigation. Nonetheless, Investigator recommends payment of \$50,000 at this time, as discussed below.

No one disputes that Claimant did not receive any of the settlement proceeds from Omniture I. Mr. Wiselman argues that the Firm was entitled to the majority of the proceeds, but even if one were to conclude that his allegations are truthful, Claimant was still entitled to a refund of approximately \$124,000, which he did not receive.

Mr. Wiselman's response to Claimant's allegation is unpersuasive: he claims ignorance of the actual misappropriation, attacks Claimant's character, and ultimately blames his staff and Mr. Samwick for the misconduct (admitting his own negligence in the process). None of these are viable defenses.

There are two hurdles to approval of the claim at this point. First, Claimant's civil suit against Mr. Wiselman is still pending. In other cases, the CSF Board has opted to let civil litigation reach its conclusion before reaching final judgment on a claim. While this approach is often warranted, Investigator believes that waiving the provisions of Rule 2.6.2 are justified here, because it is unlikely that any judgment would be fully collectible. Second, the claim is arguably untimely under Rule 2.8. Investigator recommends waiver of this requirement because Claimant has been diligent in pursuing his loss, and could potentially cure any timeliness issue by renewing his claim after entry of a judgment in his civil suit (assuming, of course, that Claimant is the prevailing party). In addition, the claim was made within Rule 2.8's six-year period of ultimate repose.

Findings and Conclusions

1. Claimant was a client of Mr. Wieselman.
2. Mr. Wieselman was an active member of the Oregon State Bar at all times relevant to this claim, and remains so at this time.
3. At all times relevant to the claim, Mr. Wieselman maintained an office in Lake Oswego, Oregon.
4. Claimant suffered a loss due to Mr. Wieselman's failure to account for settlement proceeds that he held in trust for his client. Accordingly, the loss arose from an established attorney-client relationship.
5. Investigator has not discovered any bond, surety agreement, or insurance that would cover Claimant's loss.
6. Claimant filed a civil suit against Mr. Wieselman and the Firm on June 4, 2015. That suit is still pending and thus no judgment has been entered. Investigator is not aware of any active³ criminal investigation or proceeding related to the loss.
7. Claimant has engaged in extensive discussions with Mr. Wieselman regarding recovery of the misappropriated funds, which included discussion of a legal action against Mr. Samwick. Ultimately, these discussions were unfruitful.
8. Claimant first became aware of the loss on or about February 25, 2013, when he met with Mr. Wieselman and learned that the settlement funds were no longer in his trust account. Claimant and Wieselman then discussed strategies to recover the funds for several months. Claimant filed his CSF claim on July 10, 2015. Arguably, this is past the two-year limitations period of CSF Rule 2.8. Investigator recommends waiver of the limitations period because the delay can be attributed to Claimant's efforts to negotiate a resolution with Mr. Wieselman. In addition, evidence indicates that the loss occurred in November 2009 (when the settlement funds were completely dissipated), meaning that Claimant's CSF claim was filed within the six-year period of ultimate repose contained in Rule 2.8.
9. Claimant's claim is exclusive off interest, attorney fees, and court costs.
10. Claimant is not represented by an attorney.

³ During his interview, Mr. Wieselman did say he received a call from the IRS Criminal Investigation Division last year. He claims that the CID investigated for several months and ultimately declined to prosecute. It is not clear to Investigator whether the CID investigation was related to this matter.

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

SHAUN DELYNN LOWRY,

Plaintiff,

v.

JACOB WIESELMAN, an individual; OSWEGO
LAW GROUP, a limited liability company,
WIESELMAN LAW GROUP, a limited liability
company, JOHN DOES 1-3 and JANES DOES
1-3, unknown individuals,

Defendants.

JACOB WIESELMAN, an individual; and
WIESELMAN LAW GROUP, LLC, an Oregon
limited liability company,

Third-Party Plaintiffs,

v.

MATTHEW D. SAMWICK, an individual,

Third-Party Defendant.

) Case No. CV15020613
)
) **STIPULATED GENERAL**
) **JUDGMENT AND MONEY**
) **AWARD**

Based on the stipulation of the parties, it is hereby ORDERED AND ADJUDGED that:

1. Plaintiff shall have judgment against defendants Jacob Wieselman, Wieselman Law Group, and Oswego Law Group on the FIRST CAUSE OF ACTION (Legal Malpractice) and the THIRD CAUSE OF ACTION (Negligence) of the SECOND AMENDED

1 COMPLAINT, jointly and severally, for the principal amount of \$982,856.00 plus post-
2 judgment interest on the principal amount at nine percent (9%) per annum from the date of
3 entry of this judgment until paid;

4 2. Plaintiff's remaining causes of action are hereby DISMISSED with
5 PREJUDICE and without costs and attorney fees as to all defendants.

6 **MONEY AWARD**

- 7 1. Judgment Creditor: Shaun DeLynn Lowry
8 Address: 23775 SW Stonehaven Street
9 Sherwood, Oregon 97140
(503) 899-7900
- 10 2. Judgment Creditor's Attorney: Bonnie Richardson
11 Address: Folawn Alterman & Richardson LLP
12 805 SW Broadway, Suite 470
Portland, OR 97205
(503) 517-8200
- 13 3. Judgment Debtors: Oswego Law Group, LLC
14 Addresses: Oswego Law Group, LLC
15 312 NW 10th St. Ste. 200
Portland, OR 97209
- 16 Wieselman Law Group, LLC
17 Wieselman Law Group, LLC
312 NW 10th St. Ste. 200
Portland, OR 97209
- 18 Jacob Wieselman
19 312 NW 10th St. Ste. 200
Portland, OR 97209
- 20
- 21 4. Judgment Debtor's Attorney: _____
22 Address:
- 23 5. Any person or public body, other than
24 Judgment Creditor's attorney, known
25 to be entitled to any portion of the
26 money award: None.
6. Principal amount of Money Award: \$ 982,856.00

- 1 7. Pre-judgment interest: None.
2 8. Post-judgment interest: 9% per annum simple interest on any
3 unpaid portion from date of entry until
4 9. Costs and disbursements: None.
5 10. Attorney fees: None.

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7
8
9 DATED: _____

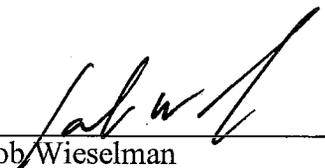
Clackamas County Circuit Court Judge

10
11 STIPULATED TO AND SUBMITTED BY
12 this 22 day of January 2015:

13 FOLAWN ALTERMAN
& RICHARDSON, LLP

OSWEGO LAW GROUP, LLC

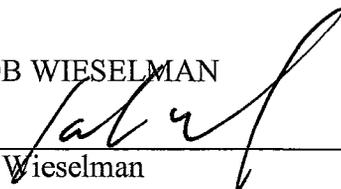
14
15 By: _____
16 Bonnie Richardson, OSB #983331
17 bonnie@farlawfirm.com
Attorney for Plaintiff



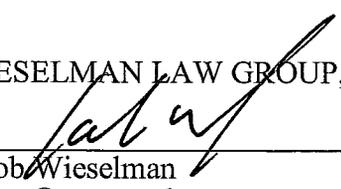
18 Jacob Wieselmann
19 jackw@wgroup-law.com
20 Defendant Oswego Law Group, LLC

21 JACOB WIESELMAN

WIESELMAN LAW GROUP, LLC



22 Jacob Wieselmann



23 Jacob Wieselmann
24 jackw@wgroup-law.com
25 Defendant Wieselmann Law Group, LLC
26

**ASSIGNMENT OF CLAIMS AND
COVENANT NOT TO EXECUTE**

Parties

This Assignment of Claims and Covenant Not to Execute (“Assignment/Covenant”) is entered into by and among Shaun Lowry (“Plaintiff”), Oswego Law Group (“OLG”), Jacob Wieselman (“Wieselman”), and Wieselman Law Group, LLC (“WLG”). There are no parties to this Assignment/Covenant other than those listed above. This Assignment/Covenant becomes effective three days after entry of the general judgment in the Lawsuit, as defined herein.

Recitals

A. Plaintiff brought suit in a case entitled Shaun DeLynn Lowry v. Jacob Wieselman, Oswego Law Group, Wieselman Law Group, John Does 1-3, and Jane Does 1-3, Clackamas County Circuit Court Case No. CV15020613 (the “Lawsuit”), claiming legal malpractice, fraud, negligence, breach of contract, and a demand for accounting. Wieselman and WLG filed third-party claims against Matthew D. Samwick (“Samwick”) for common law indemnity and contribution/negligence.

B. Plaintiff has alleged \$1,990,000 in total damages resulting from the alleged actions or inactions of Wieselman, WLG, and/or OLG.

C. Plaintiff, Wieselman, WLG, and OLG have entered into an Agreement for Stipulation to Judgment effective January 22, 2016 (the “Settlement Agreement”), in which, among other things, (1) Wieselman, WLG, and OLG agreed to stipulate to judgment against them, jointly and severally, in the amount of \$982,856.00 (the “Stipulated Judgment”), (2) Plaintiff agreed to execute a covenant limiting his enforcement, execution, or collection on the Stipulated Judgment to Wieselman’s, WLG’s, and/or OLG’s assets consisting of claims against, and any insurance or plan proceeds due from, the Professional Liability Fund (“PLF”) arising out of the Lawsuit.

Agreement

In consideration of the foregoing recitals and the promises contained herein, the parties agree as follows:

1. Assignment.

In exchange for Plaintiff’s covenant not to execute, Wieselman, WLG, and OLG hereby assign to Plaintiff, to the fullest extent permitted by law, all claims, rights, and defenses available to Wieselman, WLG, and/or OLG against the PLF in, or arising from, the Lawsuit or the Stipulated Judgment (“Assigned Claims”). The parties intend this assignment to be broadly construed, and to include claims of any kind or nature that may be pursued under any theory of law or in equity, including those for indemnity, contribution, breach of contract, tort, or statutory violations. By this assignment, as owner of the claims, Plaintiff is entitled to pursue, litigate, and

collect on the Assigned Claims in his own name. If necessary, however, Plaintiff is permitted to litigate or otherwise pursue any of the Assigned Claims in Wieselman's, WLG's, or OLG's name (or some combination thereof). This assignment shall be binding upon Wieselman, WLG, OLG, and each of their successors, legal representatives, and assigns, and shall inure to the benefit of Plaintiff, his successors, legal representatives, and assigns.

2. Limited Covenant Not to Execute on Judgment.

As part of the exchange of consideration pursuant to the Settlement Agreement, Plaintiff covenants to limit his enforcement on or execution of the Stipulated Judgment to the Assigned Claims. Plaintiff covenants to not take any steps to enforce, execute, or collect the Stipulated Judgment against any other assets of Wieselman or his family members, agents, or heirs, or against any other assets of WLG, or OLG, or their respective members, shareholders, employees or agents; provided, however, that nothing in this Assignment/Covenant is intended to impede, interfere, or compromise Plaintiff's ability or right to pursue, or to collect upon, any claims against Samwick or to enforce any agreements made with Samwick.

3. Cooperation.

a. Upon written request by Plaintiff, Wieselman shall reasonably cooperate with Plaintiff in Plaintiff's prosecution or pursuit of the Assigned Claims;

b. Wieselman shall provide Plaintiff with documents in Wieselman's possession reasonably necessary to enable prosecution or investigation of the Assigned Claims, which documents shall not include privileged/confidential attorney-client communications and/or work product (excepting those communications or work product for which Lowry holds the privilege), provided that Plaintiff shall pay any necessary and reasonable vendor copying or production costs associated with such production. Wieselman does not have access to servers used by OLG. To the extent that Plaintiff requests Wieselman's assistance in securing access to the servers and/or any other documents from any other party, including Samwick, any reasonable fees or costs that Wieselman incurs after the date of this agreement related to obtaining access to the servers and/or other documents shall be paid by Plaintiff promptly upon submission of a statement therefor;

c. If Wieselman, WLG, or OLG receives any proceeds from the Assigned Claims, Wieselman, WLG, and OLG, agree to promptly provide Plaintiff notice of that receipt and to promptly pay over such proceeds to Plaintiff.

4. Intent. It is the intent of the parties to this Assignment/Covenant that the Assigned Claims shall survive unaffected by this Assignment/Covenant. Accordingly, this Assignment/Covenant is made in reliance upon, and should be given effect to the fullest extent permitted by, ORS 31.825, *Brownstone Homes Condo. Ass'n v. Brownstone Forest Heights, LLC*, No. CA A145740, 2015 WL 7299027 (Or. Nov. 19, 2015), *Portland Sch. Dist. No. 1J v. Great Am. Ins. Co.*, 241 Or. App. 161, 249 P.3d 148 (2011), and *Terrain Tamers Chip Hauling, Inc. v. Ins. Mktg. Corp. of Oregon*, 210 Or. App. 534, 152 P.3d 915 (2007). This

Assignment/Covenant is not intended to release or otherwise compromise or affect any Assigned Claims against the PLF or any other insurer.

5. Binding Assignment. The terms of this Assignment/Covenant inure to the benefit of, and bind, the parties' members, managers, heirs, beneficiaries, affiliated entities, successors, predecessors, and assigns. Each party executing this Assignment/Covenant represents and warrants that (a) it has obtained all necessary consents and approvals to the extent applicable, and (b) except as provided herein, it has not assigned or transferred, or purported to assign or transfer, to any other person or entity any of the claims that are the subject matter of this Assignment/Covenant.

6. Survival. This Assignment/Covenant, and obligations contained herein, survive even if the amount of the Stipulated Judgment is found to be unreasonable.

7. Counterparts. This Assignment/Covenant may be executed in counterparts, each of which shall be deemed an original but which, taken together, shall constitute one and the same instrument. The parties agree to accept delivery of counterpart signature pages by facsimile, PDF, or email. Signature pages received by facsimile and email are as effective as original signatures.

8. Governing Law. This Assignment/Covenant is entered into under the laws of the State of Oregon. If it becomes necessary to interpret or enforce any part of this Assignment/Covenant's terms, it is the intent of all parties that the laws of the State of Oregon shall apply.

9. Full Understanding; Independent Legal Counsel. The parties each acknowledge, represent, and agree (a) that they have read this Assignment/Covenant, (b) that they fully understand the terms of this Assignment/Covenant, and (c) that they have had the opportunity to be fully advised by their legal counsel, accountants, and other advisors with respect to this Assignment/Covenant. Neither Wieselmann, WLG, or OLG, nor their counsel represent or warrant that Plaintiff will recover against any third party, including but not limited to the PLF.

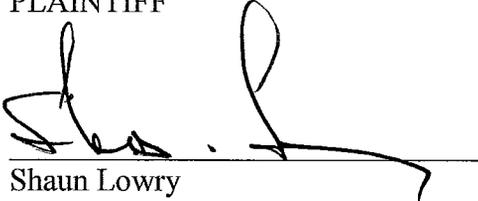
10. Dispute Resolution/Attorney Fees. In the event a dispute arises regarding this Assignment/Covenant, the dispute shall be submitted to Judge Karsten H. Rasmussen who shall act as sole arbitrator. Any decision rendered by Judge Rasmussen shall be final and binding. Should it be necessary for any party to or beneficiary of this Assignment/Covenant to initiate arbitration, the prevailing party(ies)/beneficiary(ies) to such arbitration shall be entitled to reimbursement of their reasonable attorney fees, and other costs, expenses, and disbursements (including the fees and expenses of the arbitrator and experts).

The EFFECTIVE DATE of this Assignment/Covenant is three (3) days after entry of the Stipulated General Judgment in the Lawsuit.

IN WITNESS WHEREOF, the Parties have caused this Assignment/Covenant to be executed at Portland, Oregon.

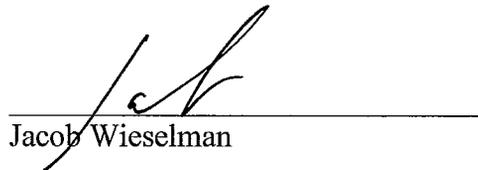
PLAINTIFF

DATED: 1/22/2016


Shaun Lowry

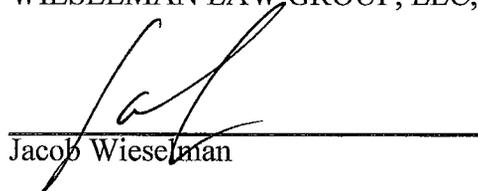
JACOB WIESELMAN

DATED: 1/22/2016


Jacob Wieselman

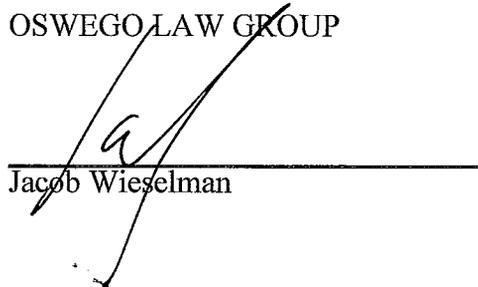
WIESELMAN LAW GROUP, LLC,

DATED: 1/22/2016


Jacob Wieselman

OSWEGO LAW GROUP

DATED: 1/22/2016


Jacob Wieselman

DECLARATION OF JACOB WIESELMAN

I, Jacob Wieselman, state and declare as follows:

1. I am one of the defendants in the matter of *Shaun Lowry v. Jacob Wieselman, et al.*, Clackamas County Circuit Court Case No. CV15020613. I make this declaration based upon my own personal knowledge and am competent to testify to the matters stated herein.

2. In 2008, I acquired the Oswego Law Group from Attorney Mark Potter who had acquired the firm some six months earlier from Matthew Samwick. From the time of that acquisition, I was the sole practicing attorney in that firm and was responsible for overseeing and managing its employees. Later, I began operating that firm under the name of the Wieselman Law Group.

3. At the time that I acquired the firm from Attorney Potter, Mr. Samwick still worked for Attorney Potter as a paralegal and office administrator. Because he had previously owned the firm, Mr. Samwick had vastly more knowledge of the firm's files, computer systems, servers, as well as its clients and their accounts. This, together with the fact that the firm's cases had been largely neglected for at least six months put me into emergency mode, attempting to cure defaults, avoid entry of orders of default and otherwise assuring that the interests of the clients were protected. Beyond that, I brought my own book of active litigation clients into Oswego Law Group. Consequently, I was swamped from the outset and worked feverishly "putting out fires" and getting client matters back on track. Consequently, I relied and trusted Mr. Samwick and Bette Douglas to operate the day-to-day administrative business of the firm.

4. Bette Douglas and Mr. Samwick had access to the firm's accounts and the ability to control cash flow into and out of the accounts, at least through the online banking, internet access. I relied on Mr. Samwick and Ms. Douglas to properly manage the firm's accounts.

5. At the time that I decided to retain Mr. Samwick, I knew that Mr. Samwick had issued his Form B resignation to the Oregon State Bar several months earlier. It was my understanding that, at the time he tendered that resignation, Mr. Samwick was in the midst of disciplinary proceedings by the Oregon State Bar charging Mr. Samwick for inappropriate dealings with clients that violated professional rules of conflict and improper business dealings with then-existing clients.

6. Shaun Lowry was a client of Oswego Law Group and Mr. Samwick's before I acquired the firm. At the time of that acquisition, Mr. Lowry was engaged in litigation with a Utah-based corporation named Omniture, Inc. In December 2008, I settled the Omniture litigation ("Omniture I") on behalf of Mr. Lowry for \$990,000,

7. At the time that I acquired the firm, my knowledge about both Mr. Lowry's fee arrangements with the firm (or with Mr. Samwick) and the amounts that were owed to Mr. Lowry was largely based upon Mr. Samwick's oral representations to me.

8. It was not until February 20, 2013, that Mr. Lowry asked for payment of the funds obtained in the settlement of the Omniture I litigation. In a February 2013 meeting with Mr. Lowry, I explained to him that there was no money being held on his behalf.

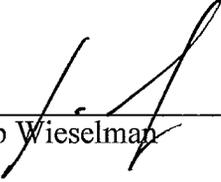
9. I never knowingly converted Mr. Lowry's funds. I never knowingly directed the conversion of Mr. Lowry's funds.

10. I never directed or authorized the withdrawal or use of Mr. Lowry's Omniture I settlement funds for any purpose other than for the payment of what I believed to be validly performed and contracted-for legal services.

11. With the exception of the amounts for which I authorized withdrawals, described above in paragraph 11, it is my belief that Mr. Samwick made or directed or authorized all of the withdrawals of Mr. Lowry's settlement funds.

I HEREBY DECLARE THAT THE ABOVE STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND THEY ARE MADE FOR USE AS EVIDENCE IN COURT AND ARE SUBJECT TO PENALTY FOR PERJURY.

DATED this 22 day of January 2016.



Jacob Wieselmann

SETTLEMENT AGREEMENT, MUTUAL RELEASE, and COVENANT NOT TO SUE

This Settlement Agreement, Mutual Release and Covenant Not to Sue (the "Agreement") is entered into between Matthew Samwick ("Samwick") and Shaun Lowry "Lowry"), effective this 22 day of ~~December, 2015~~ *January, 2016*

RECITALS:

1.1 Lowry is the plaintiff in a lawsuit ("the lawsuit") currently pending against Jack Wieselman and others as described as follows:

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

SHAUN DELYNN LOWRY,

Plaintiff,

vs.

JACOB WIESELMAN, an individual;
OSWEGO LAW GROUP, a limited liability
company; WIESELMAN LAW GROUP, a
limited liability company, JOHN DOES 1-3
and JANE DOES 1-3, unknown individuals,

Defendants.

vs.

MATHEW SAMWICK,

Third-Party Defendant

No. CV15020613

SECOND AMENDED COMPLAINT

1.2 WHEREAS, certain defendants have sued Samwick for indemnity and contribution;

1.3 WHEREAS, Samwick and Lowry wish to enter into this Agreement to fully, finally, and completely resolve any and all claims that they may have against each other, including, but not limited to, any claims, matters, or allegations relating to or arising from the lawsuit;

1.4 WHEREAS, contemporaneous with the execution of this Agreement, Samwick and the Wieselman defendants will enter into a complete and full mutual release;

IN CONSIDERATION FOR THE MUTUAL PROMISES AND COVENANTS HEREIN, IT IS HEREBY AGREED AS FOLLOWS:

2.0 Samwick and Lowry Mutual Releases and Lowry's Covenant Not to Sue.

Samwick and Lowry hereby mutually release each other from: any and all liabilities, demands, claims, suits, actions, causes of action, charges, damages, judgments, levies or executions, debts, liens, defaults, contract obligations, torts, violations of any existing laws, claims for indemnity or contribution, and any other claim or matter, known or unknown, liquidated, fixed, contingent, direct or indirect, against each other, including, but not limited to, any claim, matter, or allegation arising from or related to the lawsuit. Provided, however, that the releases herein are not intended to limit, impair, or otherwise affect either the effectiveness or enforcement of the personal guaranties that Samwick has provided Lowry in respect of the separate bonus agreements entered into contemporaneous with this agreement.

These mutual releases are intended to be full, complete and final and shall be interpreted in the broadest possible sense. These mutual releases are effective even if additional or different facts are discovered later.

Lowry further covenants and promises not to sue Samwick for any act, omission, or claim whatsoever, known or unknown, that exists as of the date of this Agreement. Lowry will not attempt to set aside this covenant on any grounds whatsoever, even if additional or different facts are discovered later; and Lowry specifically promises not to ever claim that any misrepresentations or omissions were made in connection with the execution of this Agreement.

3.0 Payment

Upon execution of this Agreement, Samwick hereby agrees to pay Lowry the sum of \$25,000.

4.0 GENERAL PROVISIONS

4.1 No Admission. This Agreement is made and entered into for the purpose of providing each of the parties peace from existing and threatened litigation and is not, and shall not be construed as an admission of any sort by either of the parties.

4.2 Acknowledgment of Right to Seek Independent Counsel. Each of the parties to this Agreement has read the Agreement and understands its contents. If any party has not had legal counsel, that party acknowledges that they have the right to seek independent legal counsel before execution of this Agreement.

4.3 Recitals and Amendments. The recitals above are part of this Agreement. No amendments, modifications, or supplements to this Agreement may be made other than pursuant to a writing signed by all parties.

4.4 Binding Arbitration. All disputes related to this Agreement shall be determined exclusively by binding arbitration pursuant to the rules of the Arbitration Service of Portland with a sole arbitrator. This Agreement shall be construed in accordance with and governed exclusively by the laws of the State of Oregon.

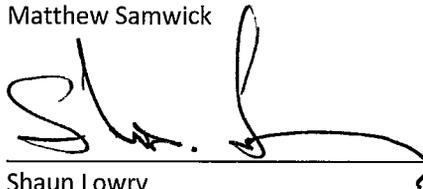
4.5 Integration. There have been numerous discussions leading up to this Agreement. This Agreement contains the entire agreement and understanding among the parties and supersedes and replaces all prior negotiations and proposed agreements, written or oral. The parties agree that they are not relying on any representation made by anyone in agreeing to the terms of this Agreement.

**THE TERMS OF THIS AGREEMENT ARE CONTRACTUAL
AND NOT A MERE RECITAL**

CAUTION! THIS IS A RELEASE. READ IT CAREFULLY BEFORE SIGNING!



Matthew Samwick



Shaun Lowry

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2016
From: Helen Hirschbiel, Executive Director
Re: CSF Claims Approved for Payment or Denied

The CSF Committee approved the following claims for payment at their May 7, 2016 meeting:

WOOD (Pettingill)	\$4,000
GERBER (Ovendale)	\$4,000
ECKREM (Saunders)	\$1,989
ECKREM (Lee)	\$1,073
ECKREM (Icenhower)	\$3,000
ECKREM (Doron)	\$1,250
ECKREM (Everett)	\$2,000
MERRILL (Freeman)	\$1,080

The CSF Committee denied the following claims for the reasons cited:

ECKREM (Smith); No evidence of dishonest conduct. Fee dispute.
ECKREM (Moore); No evidence of dishonest conduct. Fee dispute.
ECKREM (Burkus); No evidence of dishonest conduct. Fee dispute.
ECKREM (Cliff); No evidence of dishonest conduct. Fee dispute.
ECKREM (Maloney); No evidence of dishonest conduct. Fee dispute.
WIESELMAN (Lowry); Insufficient evidence of dishonest conduct.
BOCCI (Tait); No evidence of dishonest conduct. Fee dispute.

OREGON STATE BAR
Client Security - 113
For the Four Months Ending April 30, 2016

Description	April 2016	YTD 2016	Budget 2016	% of Budget	April Prior Year	YTD Prior Year	Change v Pr Yr
REVENUE							
Interest	\$659	\$2,572	\$6,900	37.3%	\$489	\$1,508	70.6%
Judgments		240	1,000	24.0%	100	300	-20.1%
Membership Fees	1,620	219,240	230,000	95.3%	945	650,861	-66.3%
TOTAL REVENUE	2,279	222,052	237,900	93.3%	1,534	652,669	-66.0%
EXPENSES							
SALARIES & BENEFITS							
Employee Salaries - Regular	1,036	4,185	32,000	13.1%	2,506	11,106	-62.3%
Employee Taxes & Benefits - Reg	408	1,645	11,500	14.3%	907	3,624	-54.6%
TOTAL SALARIES & BENEFITS	1,445	5,830	43,500	13.4%	3,413	14,730	-60.4%
DIRECT PROGRAM							
Claims		57,189	200,000	28.6%	2,600	18,067	216.5%
Collection Fees			1,000			93	-100.0%
Committees			150				
Travel & Expense		470	1,800	26.1%		225	109.0%
TOTAL DIRECT PROGRAM EXPENSE		57,659	202,950	28.4%	2,600	18,385	213.6%
GENERAL & ADMINISTRATIVE							
Office Supplies			150				
Photocopying			50		5	5	-100.0%
Postage	5	51	150	33.8%	21	60	-16.0%
Professional Dues			200		200	200	-100.0%
Telephone		23	200	11.4%	37	52	-56.6%
Training & Education		545	600	90.8%			
Staff Travel & Expense			1,094			221	-100.0%
TOTAL G & A	5	618	2,444	25.3%	264	538	14.9%
TOTAL EXPENSE	1,449	64,108	248,894	25.8%	6,276	33,654	90.5%
NET REVENUE (EXPENSE)	830	157,945	(10,994)		(4,743)	619,015	-74.5%
Indirect Cost Allocation	2,655	10,620	31,861		2,527	10,108	5.1%
NET REV (EXP) AFTER ICA	(1,825)	147,324	(42,855)		(7,270)	608,907	-75.8%
Fund Balance beginning of year		1,098,116					
Ending Fund Balance		1,245,440					

OREGON STATE BAR
Client Security - 113
For the Five Months Ending May 31, 2016

Description	May 2016	YTD 2016	Budget 2016	% of Budget	May Prior Year	YTD Prior Year	Change v Pr Yr
REVENUE							
Interest	\$740	\$3,312	\$6,900	48.0%	\$490	\$1,998	65.7%
Judgments	50	290	1,000	29.0%	100	400	-27.6%
Membership Fees	960	220,200	230,000	95.7%	5,400	656,261	-66.4%
TOTAL REVENUE	1,750	223,802	237,900	94.1%	5,990	658,659	-66.0%
EXPENSES							
SALARIES & BENEFITS							
Employee Salaries - Regular	1,098	5,283	32,000	16.5%	2,620	13,726	-61.5%
Employee Taxes & Benefits - Reg	413	2,057	11,500	17.9%	891	4,514	-54.4%
TOTAL SALARIES & BENEFITS	1,510	7,340	43,500	16.9%	3,511	18,241	-59.8%
DIRECT PROGRAM							
Claims	16,392	73,581	200,000	36.8%	1,465	19,532	276.7%
Collection Fees			1,000			93	-100.0%
Committees			150				
Travel & Expense	65	535	1,800	29.7%	365	590	-9.3%
TOTAL DIRECT PROGRAM EXPENSE	16,457	74,116	202,950	36.5%	1,830	20,215	266.6%
GENERAL & ADMINISTRATIVE							
Office Supplies			150				
Photocopying			50			5	-100.0%
Postage	15	65	150	43.6%	20	81	-19.1%
Professional Dues			200			200	-100.0%
Telephone	11	34	200	17.1%	29	81	-57.8%
Training & Education		545	600	90.8%			
Staff Travel & Expense	65	65	1,094	5.9%	65	286	-77.2%
TOTAL G & A	91	710	2,444	29.0%	114	652	8.8%
TOTAL EXPENSE	18,058	82,166	248,894	33.0%	5,455	39,109	110.1%
NET REVENUE (EXPENSE)	(16,309)	141,636	(10,994)		535	619,551	-77.1%
Indirect Cost Allocation	2,655	13,275	31,861		2,527	12,635	5.1%
NET REV (EXP) AFTER ICA	(18,964)	128,361	(42,855)		(1,992)	606,916	-78.9%
Fund Balance beginning of year		1,098,116					
Ending Fund Balance		1,226,476					

Account Number	Account Description	Date	Vendor	Reference	Debit Amount	Credit Amount
113-4310-000	Interest - Fund Balance	5/31/2016		May 2016 Alloc Mthly Sav. Int.	\$0.00	\$739.61
113-4340-000	Judgments Collected	5/9/2016	Thomas LaFollett	MO 5927549420	\$0.00	\$50.00
113-4405-000	Membership Fees - CSF Assessment	5/2/2016		DUES	\$15.00	\$0.00
113-4405-000	Membership Fees - CSF Assessment	5/4/2016		DUES	\$0.00	\$165.00
113-4405-000	Membership Fees - CSF Assessment	5/4/2016		DUES	\$0.00	\$60.00
113-4405-000	Membership Fees - CSF Assessment	5/10/2016		DUES	\$0.00	\$225.00
113-4405-000	Membership Fees - CSF Assessment	5/10/2016		DUES	\$0.00	\$90.00
113-4405-000	Membership Fees - CSF Assessment	5/13/2016		DUES	\$0.00	\$105.00
113-4405-000	Membership Fees - CSF Assessment	5/13/2016		DUES	\$0.00	\$45.00
113-4405-000	Membership Fees - CSF Assessment	5/18/2016		DUES	\$0.00	\$150.00
113-4405-000	Membership Fees - CSF Assessment	5/20/2016		DUES	\$15.00	\$0.00
113-4405-000	Membership Fees - CSF Assessment	5/24/2016		DUES	\$45.00	\$0.00
113-4405-000	Membership Fees - CSF Assessment	5/23/2016		DUES	\$0.00	\$75.00
113-4405-000	Membership Fees - CSF Assessment	5/23/2016		DUES	\$0.00	\$105.00
113-4405-000	Membership Fees - CSF Assessment	5/31/2016		DUES	\$0.00	\$45.00
113-4405-000	Membership Fees - CSF Assessment	5/31/2016		DUES	\$30.00	\$0.00
113-6100-000	Employee Salaries - Regular	5/5/2016	ADP Payroll Services	Payroll EFT's & Checks	\$77.66	\$0.00
113-6100-000	Employee Salaries - Regular	5/5/2016	ADP Payroll Services	Payroll EFT's & Checks	\$475.98	\$0.00
113-6100-000	Employee Salaries - Regular	5/19/2016	ADP Payroll Services	Payroll EFT's & Checks	\$25.89	\$0.00
113-6100-000	Employee Salaries - Regular	5/19/2016	ADP Payroll Services	Payroll EFT's & Checks	\$12.94	\$0.00
113-6100-000	Employee Salaries - Regular	5/19/2016	ADP Payroll Services	Payroll EFT's & Checks	\$505.10	\$0.00
113-6105-000	Employee Taxes & Benefits - Regular	5/5/2016	ADP Payroll Services	Payroll EFT's & Checks	\$0.24	\$0.00
113-6105-000	Employee Taxes & Benefits - Regular	5/5/2016	ADP Payroll Services	Payroll EFT's & Checks	\$42.35	\$0.00
113-6105-000	Employee Taxes & Benefits - Regular	5/5/2016	Cascade Centers, Inc.	Monthly Services April 2016	\$0.49	\$0.00
113-6105-000	Employee Taxes & Benefits - Regular	5/5/2016	Northwest Employee Benefits	Health Insurance May 2016	\$166.32	\$0.00
113-6105-000	Employee Taxes & Benefits - Regular	5/12/2016	PERS	5/5/16 PR Employee Contr	\$47.13	\$0.00
113-6105-000	Employee Taxes & Benefits - Regular	5/19/2016	ADP Payroll Services	Payroll EFT's & Checks	\$0.26	\$0.00
113-6105-000	Employee Taxes & Benefits - Regular	5/19/2016	ADP Payroll Services	Payroll EFT's & Checks	\$41.61	\$0.00
113-6105-000	Employee Taxes & Benefits - Regular	5/17/2016	Oregon Dept of Administrative Services	Pension Bond Assessment	\$28.31	\$0.00
113-6105-000	Employee Taxes & Benefits - Regular	5/17/2016	PacificSource Administrators	May 19 Payroll Benefits	\$0.32	\$0.00
113-6105-000	Employee Taxes & Benefits - Regular	5/27/2016	PERS	5/19/16 PR Contributions	\$47.41	\$0.00
113-6105-000	Employee Taxes & Benefits - Regular	5/31/2016		April/May SAIF W/C Alloc	\$3.19	\$0.00
113-6105-000	Employee Taxes & Benefits - Regular	5/31/2016	Oregon Dept of Administrative Services	Pension Bond 5/19/16	\$28.36	\$0.00
113-6105-000	Employee Taxes & Benefits - Regular	5/31/2016	Cigna Life Insurance Company of North America	May 2016 Life Insurance	\$6.61	\$0.00
113-6105-000	Employee Taxes & Benefits - Regular	5/31/2016	Cigna Life Insurance Company of North America	May 2016 Life Insurance	\$0.00	\$0.07
113-7185-000	Claims	5/17/2016	Riser-Doron, Dorit	CSF Claim ECKREM (Doron)	\$1,250.00	\$0.00
113-7185-000	Claims	5/17/2016	Freeman, Richard	CSF Claim MERRILL (Freeman)	\$1,080.00	\$0.00
113-7185-000	Claims	5/26/2016	Kirkendall, Lori Lynn	CSF Claim WOOD 2014-20	\$4,000.00	\$0.00
113-7185-000	Claims	5/26/2016	Hollis, John	CSF Claim GERBER 2016-22	\$4,000.00	\$0.00
113-7185-000	Claims	5/26/2016	Lee, Katrina	CSF Claim ECKREM 2016-03	\$1,073.00	\$0.00
113-7185-000	Claims	5/26/2016	Icenhower, Chardey	CSF Claim ECKREM 2016-04	\$3,000.00	\$0.00
113-7185-000	Claims	5/31/2016	Saunders, Kristin R.	CSF Claim ECKREM 2015-40	\$1,989.00	\$0.00
113-7930-000	Travel & Expense - Others	5/26/2016	National Client Protection Organization	NCPO Conference Dinner	\$65.00	\$0.00
113-9000-000	Indirect Cost Allocation	5/29/2016		Monthly ICA Allocation	\$2,655.08	\$0.00
113-9620-000	Postage	5/31/2016		Postage - USPS/UPS/NEXT DAY	\$14.61	\$0.00
113-9800-000	Telephone	5/31/2016	Premiere Global Services	Conference Calls 4/13-5/12/16	\$11.49	\$0.00
113-9850-000	Travel & Expense - Staff	5/26/2016	National Client Protection Organization	NCPO Conference Dinner	\$65.00	\$0.00

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2016
From: Legal Ethics Committee
Re: Updating OSB Formal Ethics Opinions 2005-73

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 OSB Formal Ethics Op No 2005-73.
2. Decline to adopt the revisions to OSB Formal Ethics Op No 2005-73.

Discussion

The Oregon Supreme Court adopted numerous amendments to the Oregon Rules of Professional Conduct over the last couple of years. OSB Formal Op No 2005-73 is one of the last opinions to be amended to bring it into conformance with the new rules.

In addition to swapping out the old Oregon RPC 7.2 with the new RPC 7.2, the Legal Ethics Committee has included a second question for analysis that relates to lawyers giving gifts as a token of appreciation for a referral. The Committee felt guidance on the question was needed after a bar counsel column from December 2011 reminded lawyers that under RPC 7.2(a) lawyers may not “compensate or give anything of value to 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.” The article noted that while some jurisdictions have concluded that *de minimis* thank you gifts are allowed, Oregon has no such exception. Consequently, lawyers expressed concern that giving any gift at all, even as an expression of gratitude after a referral is made (which is common practice), was inappropriate.

The proposed opinion does not establish a *de minimis* exception for gift-giving in exchange for referrals. Instead, the opinion notes that the key question is whether the gifts are *payments in exchange for the referral*. Where the gift is a token of appreciation after the referral is made, it would not violate Oregon RPC 7.2. The size of the gift and when it is given will likely be indicators of whether it is payment in exchange for a referral or whether it is merely an expression of thanks, given in the ordinary course of social or business hospitality.

Staff recommends adopting the proposed amended opinion.

Attachments: Redline version of OSB Formal Ethics Op No. 2005-73.

FORMAL OPINION NO. 2005-73

Information aAbout Legal Services: Acceptance of Referrals

Facts:

Lawyer is social friends with *X*, is known to *Y* as a competent professional, and has a lawyer-client relationship with *Z*. Lawyer is aware that, from time to time, *X*, *Y*, and *Z* may refer potential clients to Lawyer. Although Lawyer has thanked *X*, *Y*, and *Z* for doing so, Lawyer has not compensated *X*, *Y*, or *Z* for their referrals and has not affirmatively requested that future referrals be made. Lawyer would like to send a small gift to *X*, *Y*, and *Z* after learning about the referrals as a token of appreciation.

Question:

1. May Lawyer accept future referrals from *X*, *Y*, and *Z*?
- 1.2. May Lawyer send a small gift to *X*, *Y*, and *Z* as a token of appreciation?

Conclusion:

1. Yes.
- 1.2. Yes, qualified.

Discussion:

Oregon RPC 7.2 provides, in pertinent part:

(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 (c) or Rule 1.17. Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.~~

Formal Opinion No 2005-73

(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 communication about the lawyer or the lawyer's firm, the lawyer shall so inform the client. 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.~~

On the facts as presented, there does not appear to be a violation of any Oregon RPC by accepting referrals, so-~~There is no reason~~ Lawyer may ~~not~~ continue to accept the referrals. *See also* OSB Formal Ethics Op No 2005-35 (rev 2015).

Lawyer also may provide de minimis gifts in the ordinary course of social or business hospitality as long as the proposed gifts are not payments in exchange for X, Y, or Z recommending the Lawyer's services.¹ Lawyer should therefore be careful to not run afoul of the rule by providing something of value *in exchange for* the referral. Where the intent is not compensation for the referral, it does not violate the rule.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 2.6-4 (limitations on obtaining employment

¹ See, e.g., Arizona Ethics Op 02-01; Phil. Ethics Op. 93-26. Lawyer should be advised that many other states prohibit an attorney from giving any gift to a person in exchange for a client referral, no matter how de minimis. See, e.g., Conn. Informal Op. 92-24 (noting lawyer could not discount services as compensation for clients for referring another client); Rhode Island Op. 89-05 (5/29/89) (noting gift of less than \$100 ran afoul of the rule against giving anything of value for recommending a lawyer's services); Alabama Formal Op. 1999-01 (prohibiting attorney from paying another attorney's advertising expenses in exchange for receiving referrals).

through the recommendation of a third party), § 2.6-5 (lawyer-referral services, prepaid legal-services plans, and legal-services organizations)§ 2.27-2.28, § 13.2-1(d) (group legal plans)12.8 (Oregon CLE 2003OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 47 (2003) (supplemented periodically); and ABA Model RPCRule 7.2.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2016
From: MCLE Committee
Re: CLE Credit for Service - Executive Branch Statewide Elective Office

Action Recommended

Review and approve proposed amendments to rules and regulations exempting Executive Branch statewide elected officials from the general CLE credit requirement during term of office.

Background

The MCLE Committee recommends amending Rule 5.2 and Regulation 5.100 to exempt members who serve in certain statewide public offices in the Executive Branch from MCLE credit requirements other than those credits required in Rules 3.2(b) and (c) -- ethics, access to justice, child abuse and elder abuse reporting. This exemption would apply to the following offices in Oregon: Governor, Secretary of State, Commissioner of the Bureau of Labor and Industries, Attorney General and Treasurer.

Applying the exemption to those whose term in office includes all or part of a reporting period will prevent an unintended consequence of leaving an official with an abbreviated amount of time to complete a three-year credit requirement after a term in office.

MCLE Committee members recognize that statewide elected officials in the Executive Branch provide a tremendous service to our state, and are closely engaged in the legislative process and administration of law. Therefore, the Committee recommends amending Rule 5.2 and Regulation 5.100 as follows:

MCLE Rule 5.2 Other CLE Activities

(e) Legislative Service. General credit hours may be earned for service as a member of the Oregon Legislative Assembly while it is in session.

(f) Service in Executive Branch Statewide Elected Office. Members serving as statewide elected officials in Oregon's Executive Branch, whose term in office includes all or part of a reporting period, are exempt from all MCLE requirements except those credits required in Rules 3.2(b) and (c).

~~(f)~~ (g) New Lawyer Mentoring Program (NLMP)

(1) Mentors may earn CLE credit for serving as a mentor in the Oregon State Bar's New Lawyer Mentoring Program.

(2) New lawyers who have completed the NLMP may be awarded CLE credits to be used in their first three-year reporting period.

~~(g)~~ (h) Jury instructions Committee Service. A member serving on the Oregon State Bar Uniform Civil Jury Instructions Committee or Uniform Criminal Jury Instructions Committee may earn two general credits for each 12 months of service.

~~(h)~~ (i) A member seeking credit for any of the activities described in Rule 5.2 must submit a written application on the form designated by the MCLE Administrator for Other CLE Activities.

Regulation 5.100 Other CLE Activities. The application procedure for accreditation of Other CLE Activities shall be in accordance with MCLE Rule 5.2 and Regulation 4.300.

(a) With the exception of panel presentations, when calculating credit for teaching activities pursuant to MCLE Rule 5.2, for presentations where there are multiple presenters for one session, the number of minutes of actual instruction will be divided by the number of presenters unless notified otherwise by the presenter. Members who participate in panel presentations may receive credit for the total number of minutes of actual instruction. Attendance credit may be claimed for any portion of an attended session not receiving teaching credit.

(b) Credit for legislative service may be earned at a rate of 1.0 general credit for each week or part thereof while the legislature is in session.

(c) Members serving as Governor, Secretary of State, Commissioner of the Bureau of Labor and Industries, Attorney General and Treasurer during all or part of a reporting period are required to complete the minimum credit requirements in the following categories – ethics, access to justice, child abuse and elder abuse reporting -- during the reporting periods set forth in MCLE Regulation 3.300(d). These members are exempt from any other credit requirements during the reporting period in which they serve.

~~(e)~~ (d) Members who serve as mentors in the Oregon State Bar's New Lawyer Mentoring Program (NLMP) may earn eight credits, including two ethics credits, upon completion of the plan year. If another lawyer assists with the mentoring, the credits must be apportioned between them.

~~(d)~~ (e) Upon successful completion of the NLMP, new lawyers may earn six general/practical skills credits to be used in their first three-year reporting period.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2016
From: Helen Hirschbiel, CEO/Executive Director
Re: Sponsorship of Access to Justice Conference

Action Requested

Approve sponsorship of the Access to Justice Conference up to \$5,000.

Discussion

The Oregon Supreme Court Chief Justice Balmer has recommended that Oregon hold an Access to Justice Conference in the fall of 2016 as a means for the courts, the bar, legal aid providers, and others working on access to justice issues, to share information, evaluate efforts, and generate new ideas. A small group of representatives from the Court, the Campaign for Equal Justice, Legal Aid, and the OSB have met several times this year to discuss the details and planning of such a conference. Mercy Corps has offered to donate its space in downtown Portland for a conference on Thursday, September 8. We anticipate that other expenses (food, bringing in national speakers, etc.) could be as much as \$10,000. The Oregon Law Foundation has committed to providing \$2,500 toward those costs, and we anticipate the Court will contribute funds as well. The CEJ will provide staff support for planning the logistics of the conference. The group is now turning to the bar for additional financial support.

At its April 22, 2016 meeting, the Board of Governors approved amendments to OSB Bylaw 7.203 as follows:

The bar does not generally accept proposals for grants, contributions or sponsorships to non-profit or charitable organizations, including law-related organizations. The bar may provide financial support to the Classroom Law Project (CLP) and the Campaign for Equal Justice (CEJ) or any other organization that is germane to the Bar's purposes as set forth in Section 12.1 of these Bylaws. The bar's annual budget shall include an amount dedicated to providing such financial support, although that amount may change from year to year based upon the overall financial needs of the bar. This budgeted amount shall be in addition to any amounts budgeted to allow bar leadership and staff attendance at local bar and community dinners and similar events.

The Board has not yet established a budget or a policy for implementation of this bylaw. Therefore, I am bringing this request for sponsorship to the Board, rather than making the decision on my own. Sponsoring an Access to Justice Conference is clearly germane to the purposes for which the bar exists. OSB Bylaw 12.1 provides that bar activities be focused on, among other things, "improving the functioning of the courts... [and] making legal services available to society..." Therefore, I recommend that the Board approve sponsorship of the conference up to \$5,000.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2016
From: Helen M. Hirschbiel, Executive Director
Re: Operations and Activities Report

OSB Programs and Operations

Department	
Accounting & Finance/ Facilities/IT (Rod Wegener)	<p><i>Accounting</i></p> <ul style="list-style-type: none"> ▪ The Bar is still waiting for the State of Oregon PERS report. Once this information is received, the 2014 -2015 Statements will be complete and Moss Adams will be able to complete their audit for the bar. ▪ Accounting is in the process of upgrading Great Plains from version 10 to version 2015 in anticipation of Aptify. <p><i>Information Technology</i></p> <ul style="list-style-type: none"> ▪ The IT Manager is leading the bar through the build phase of the Aptify AMS. User Acceptance Testing for all groups should be underway in mid-May. As groups test configurations, IT will be focusing on data conversion and integrations with 3rd party systems. Go-live has been delayed to mid- to late October. <p><i>Facilities</i></p> <ul style="list-style-type: none"> ▪ The Joffe Medi-Center lease expires September 30. Joffe has indicated that they do not intend to renew their lease.
Communications & Public Services (includes RIS and Creative Services) (Kay Pulju)	<p><i>Communications</i></p> <ul style="list-style-type: none"> ▪ The Public Service Advisory Committee and staff are developing a “legal Q&A” series of short videos for the bar’s website. This is a public education project that will help people understand legal issues and their options for getting legal help. Staff also produced a public member recruitment video featuring board members Vanessa Nordyke and Charles Wilhoite. ▪ An update of the bar’s Senior Law Handbook, called Legal Issues for Older Adults, is in process. The new version will be designed for distribution primarily as an online publication, with options for print versions. ▪ The June edition of the Bulletin includes a cover story on the 50th anniversary of Miranda v. Arizona and a feature on retirement planning. The July issue will include another article in our series on rural practice and a feature on legal metaphors.

	<p><i>Creative Services</i></p> <ul style="list-style-type: none"> ▪ Staff are developing a new web interface to work with the bar’s new association management software. Section website migration continues - to date 17 new section sites are complete and 7 more have been developed and are now being reviewed by the appropriate section leaders. Five sections have no website presence (other than an identity page on the bar’s website), which leaves 13 sites still to be transitioned. ▪ A new electronic version of the Bulletin was launched in June. The new format closely adheres to the print format, offers new navigation and accessibility options, and is takes significantly less time to produce than the prior method. ▪ Marketing efforts have continued to focus on CLE Seminars along with other bar programs and services. <p><i>Referral & Information Services</i></p> <ul style="list-style-type: none"> ▪ Staff are preparing for the annual Lawyer Referral Service (LRS) renewal campaign. Approximately 550 attorneys will receive registration materials through the mail in early July with a return deadline in mid-August. The new program year begins on September 1st, and will be the fourth full year under the new percentage fee model. Registration fees typically result in \$115,000 in revenue for the bar. ▪ LRS revenue is on track to meet or exceed budget projections for 2016. Current revenue for 2016 is at \$310,855 as of May 31st. Total revenue generated since percentage-fee inception in 2012 is \$2,346,396. This revenue represents over \$16,300,000 in legal fees LRS attorneys have billed and collected from LRS-referred cases over the past four years. ▪ RIS continues to monitor a pilot program for several new Modest Means Program panels. At the end of the program year RIS will report results to the Public Service Advisory Committee. ▪ RIS is continuing its marketing campaign, focusing on Google Ads and Craigslist. The department is also designing a new edition of “Legal Issues for Older Adults” as part of our grassroots marketing strategy.
<p>CLE Seminars (Karen Lee)</p>	<ul style="list-style-type: none"> ▪ CLE staff are participating in Aptify training and learning how to use INXPO, the new online seminars content delivery system. We tested the webcasting feature at the June 8 Section Summit; it worked well. ▪ CLE Seminars staff developed a new menu of CLE services for sections, which were presented at the June 8 Section Summit. These changes were met with mixed results. ▪ The department is currently recruiting for two positions: (1) CLE Seminars Assistant; (2) CLE Seminars Customer Service Specialist ▪ We continue working with the Executive Director to plan a futures conference for this summer, as suggested by bar President Ray Heysell.

<p>General Counsel (includes CAO and MCLE) (Amber Hollister)</p>	<ul style="list-style-type: none"> ▪ CAO is on pace to receive over 2000 bar complaint inquiries (which is the most CAO has received in over three years). ▪ Stacy Owen has accepted a position in Disciplinary Counsel’s Office, leaving an opening for a CAO Attorney. ▪ General Counsel and Deputy General Counsel attended the annual ABA National Conference on Professional Responsibility, which offers some of the most advanced ethics CLE programming in the nation. ▪ Thirteen members were suspended effective June 2, 2016 for failure to comply with the MCLE Rules for the reporting period ending 12/31/2015. ▪ The MCLE Department is working with Communications to publicize recent MCLE Rule changes to members well in advance of the next reporting season.
<p>Human Resources (Christine Kennedy)</p>	<p><i>Recruitment Activities</i></p> <ul style="list-style-type: none"> ▪ Replacements Hired <ul style="list-style-type: none"> ○ Stacy Owen promoted from CAO Attorney to Assistant Disciplinary Counsel replacing Martha Hicks. ○ Gabriela van Gemeren promoted from CLE Seminars Assistant to CLE Seminars Event Coordinator replacing Kelly Dilbeck. ▪ Active Searches <ul style="list-style-type: none"> ○ Accounting Specialist – A/P ○ Assistant General Counsel and Client Assistance Office Attorney ○ CLE Customer Service Specialist ○ CLE Seminars Assistant <p><i>Additional activities</i></p> <ul style="list-style-type: none"> ▪ Provided implicit bias training mandatory for all employees. ▪ Renewed the workers’ compensation insurance policy at a 9.43% decrease. ▪ Renewed the employment practices liability and director’s and officer’s insurance policy for a 3.63% increase. ▪ Invited Judge Angel Lopez to speak to staff on Law Day about “Miranda: More than Words” following the ABA’s theme for the day.
<p>Legal Publications (Linda Kruschke)</p>	<ul style="list-style-type: none"> ▪ The following have been posted to BarBooks™ since April 18, 2016: <ul style="list-style-type: none"> ○ Three supplement chapters of <i>Oregon Administrative Law</i>. ○ Three chapters and the final PDF of <i>Creditors’ Rights and Remedies</i>. ○ Five chapters of <i>Damages</i>. ○ Two revised <i>Uniform Criminal Jury Instructions</i>. ▪ By the end of June we will be launching the new version of BarBooks™ that will work on any device because it has a responsive interface. It will also include over 100 CLE Seminar handbooks. ▪ We printed and shipped the preorders for <i>Creditors’ Rights and Remedies</i> in early June.

	<ul style="list-style-type: none"> ○ Preorders and Standing orders to date = \$14,551 ○ Budget = \$31,800 ▪ We started taking preorders for the <i>Oregon RPCs Annotated</i> and <i>Oregon Formal Ethics Opinions</i>. <ul style="list-style-type: none"> ○ ORPCs Annotated: Budget = \$0; Revenue to date = \$6,036 ○ Or. Formal Ethics Ops: Budget = \$22,500; Revenue to date = \$6,744 ▪ Other books that will be completed in 2016, barring any unforeseen delays, include <i>Oregon Administrative Law</i> supplement, <i>Damages</i> revision, and <i>Elder Law</i> revision. ▪ The <i>Oregon Real Estate Deskbook</i> was selected for the ACLEA Award of <i>Outstanding Achievement</i> in the small organization category.
<p>Legal Services (Judith Baker) (includes LRAP, Pro Bono and an OLF report)</p>	<p><i>Legal Services Program</i></p> <ul style="list-style-type: none"> ▪ The BOG approved the LSP Committee met to disburse the \$200,000 general fund money that was awarded to the Legal Services Program to fund legal aid. Lane County Legal Aid and Advocacy Center will have a recommendation to the LSP Director on June 27 regarding whether it will merge with the Oregon Law Center or stay an independent organization taking steps to be in compliance with the LSP Standards and Guidelines. ▪ The LRAP Advisory Committee met on 5/21 and reviewed 39 applicants, the second-most to ever apply. The Advisory Committee selected 23 participants. Seven of the participants work for civil legal services organizations, three for other non-profits, six are Deputy DAs, and seven are public defenders. The yearly forgivable loans range in size from \$2,000 to \$7,500. All but two of the loans are for under \$4,000. ▪ The second Certified Pro Bono Roundtable was held in April, with about 15 attendees. These meetings seems to be popular and productive for the Programs. The third meeting is scheduled for July. Work moves forward on the Pro Bono Celebration. It is planned to have CLEs simulcast in two to four cities outside of Portland. The Pro Bono Committee is working on plans to publicize both the changes to the MCLE rules allowing for credit for pro bono work and fairly recent changes to the Judicial Canons specifically allowing for support of pro bono by judges. <p><i>Oregon Law Foundation</i></p> <ul style="list-style-type: none"> ▪ The OLF board approved a Request for Application (RFA) to announce the availability of the Bank of America Settlement funds. Due to a staff departure the OLF is considering delaying the RFA announcement at this time. The OLF held an Access to Justice CLE and reception for lawyers and bankers at the Oregon Historical Society. Leadership Banks were sent letters evidencing the Community Reinvestment Credits received from paying a supportive interest rate.

<p>Media Relations (Kateri Walsh)</p>	<ul style="list-style-type: none"> ▪ Leading the effort to produce a video “town-hall” format of the annual “Building a Culture of Dialogue” program hosted by the Bar Press Broadcasters Council. The program has resisted cameras in the past, fearing it would chill the very robust discussion. There is energy around trying it this year, in partnership with KGW TV. ▪ Providing media relations strategy and support to the MBF Public Outreach Committee, which will launch a new judicial outreach and civic education effort beginning this year. This will revitalize the work that used to be done through the Multnomah County Judicial Outreach group. ▪ Presenting at the New Judge Seminar in June by OJD regarding managing media interest in cases in their courtrooms. ▪ Staffing and advising a committee of the Bar Press Broadcasters Council that is drafting proposed amendments to UTCR 3.180, to address newer technologies such as cell phone cameras, notebooks and other potential recording instruments. ▪ Managing approximately 10-12 CAO and/or DCO cases being actively tracked by media. Staff also responds on a daily basis to calls from journalists seeking guidance or expert sources on all variety of law-related stories. ▪ Providing media outreach planning and management to the UPL committee on the topic of Notario Fraud, and the passage of HB 4128. Staff will be supporting a multi-faceted effort through remainder of year to reach out in various mediums to educate the public on the issue.
<p>Member Services (Dani Edwards)</p>	<ul style="list-style-type: none"> ▪ Summer marks recruitment season for the Member Services Department. Staff continue to work with the Board Development Committee on the recruitment of lawyer and non-member volunteers interested in serving on bar boards, committees, and councils. The deadline for non-lawyers to apply is July 8 while lawyer volunteers have until August 19. A new non-lawyer recruitment video was produced in-house and is available at http://www.osbar.org/volunteer/publicmember.html. ▪ Committee and Section Annual Reports for 2015 are now available on the bar’s website at http://www.osbar.org/docs/leadership/committees/CommitteeAnnualReport.pdf and http://www.osbar.org/docs/sections/SectionAnnualReport.pdf. ▪ The deadline for BOG election candidates passed. Regions 1, 3, 4, and 5 each have one seat open this year. The full candidate list is available online at http://www.osbar.org/leadership/bog. ▪ Rich Spier and Helen lead a summit for section leaders on June 8. More than 40 members participated either in-person or by webcast. The summit focused on clarifying the policy requirements for section websites and CLE programing taking effect on January 1, 2017.

<p>New Lawyer Mentoring (Kateri Walsh)</p>	<ul style="list-style-type: none"> ▪ Processing NLMP completion packets that continue to come in from the program’s 5/31/16 completion deadline. Certifying completions and working with non-compliant new lawyers on repairing their status. ▪ Working to enroll and educate new members sworn in since the April ceremony about the NLMP. Working to find mentors as new members continue to enroll. We currently have roughly 900 bar members working through the program (453 matched pairs), and 74 new lawyers awaiting a mentor match. ▪ Working with the NLMP Committee to craft a plan for a thorough evaluation of the NLMP, which has not been done since the conclusion of its first year of operation in 2012. We are now in our 5th year and are interested in aggregating program data to seek opportunities for program or process improvements. ▪ Instituting new mentor recruitment efforts based on the needs we see from our newest class of participants. We are particularly in need of mentors in the areas of family law, immigration, business law and in-house counsel. ▪ Finalizing a new Law Firm Certification policy which will allow firms with well-established in-house mentoring programs to streamline the administrative requirements for new associates’ participation in NLMP. ▪ Continuing to establish partnership strategies with several specialty and local bars interested in mentoring support services. ▪ Actively seeking several pro bono cases to be shopped out to participants as a model for a new <i>Mentoring Through Pro Bono</i> initiative we expect to get off the ground in 2016.
<p>Public Affairs (Susan Grabe)</p>	<ul style="list-style-type: none"> ▪ <u>2016 Oregon Legislation Highlights Publication</u>: The 2016 Session edition of the Legislation Highlights Notebook is complete and is posted to BarBooks. ▪ <u>2017 Law Improvement Package</u>: The Law Improvement proposals approved by the BOG have been forwarded to Legislative Counsel’s Office for pre-session drafting for the 2017 Legislative Session. Outreach to both internal and external interest groups will continue over the next few months. ▪ <u>ABA Lobby Day</u>: OSB President Ray Heysell and Susan Grabe traveled to Washington, D.C., to meet with our congressional delegation in support of federal funding for legal services as well as to voice opposition to legislation that would require businesses providing professional services to switch to an accrual instead of a cash method of accounting. ▪ <u>Oregon eCourt</u>: Public Affairs has worked with the OSB/OJD eCourt Implementation Task Force to assist the court with the Oregon eCourt rollout and to develop new Uniform Trial Court Rules regarding Oregon eCourt. Mandatory eFiling for active members of the Oregon State Bar

	<p>will be in place in all Oregon circuit courts by the fall of 2016. Public Affairs has also worked to ensure outreach to and training opportunities for OSB members regarding the move to mandatory eFiling.</p> <ul style="list-style-type: none"> ▪ <u>Oregon eCourt Survey</u>: Public Affairs assisted the judicial department’s Quality Assurance vendor with an eCourt survey of bar members. Initial feedback was positive. We are currently drilling down into the data to determine what some of the comments mean in terms of recommendations for the future. ▪ <u>Interim legislative workgroups</u>: Public Affairs will be engaging in a number of interim work group projects. At this point, we have identified the following issues: <ul style="list-style-type: none"> ○ Advance Directive ○ Definition for elder abuse reporting ○ Uniform Collateral Consequences of Conviction Act ○ Uniform Collaborative Law Act ○ Guardianship, Due Process and cost shifting in contested case hearings ○ Probate Modernization ○ Power of Attorney
<p>Regulatory Services (Dawn Evans)</p>	<p><i>Admissions Office</i></p> <ul style="list-style-type: none"> ▪ The Admissions Ceremony for successful applicants took place on April 28, 2016 at Willamette University. ▪ The Board of Bar Examiners (BBX) continues to focus on plans for implementation of the Uniform Bar Examination (UBE) in Oregon, scheduled tentatively to begin with the July 2017 bar exam. Understanding the importance of an Oregon law component, the BBX is reviewing both exam and legal education components that are being utilized in other UBE states. ▪ The number of applications for reciprocal admission in 2016 is down 20% from the previous year, a development that likely relates to the increase from three to five years’ practice time as of January 1 for applicants from Washington, Alaska, Idaho, and Utah. The number of applicants for the July 2016 exam has rebounded from last year’s 445 to an applicant pool of 494, which is consistent with years prior to 2015 <p><i>Disciplinary Counsel’s Office</i></p> <ul style="list-style-type: none"> ▪ Preparations for the upcoming Ethics School on Friday, May 6, 2016, are ongoing. Staff attorneys from DCO and the Client Assistance Office are joined by Doug Querin from OAAP, offering a full day of useful information about ethics, practice management, and self-care for the busy, practicing lawyer. ▪ Assistant Disciplinary Counsel and former Board of Governors member

	<p>Kellie Johnson represented the Bar in oral argument before the Oregon Supreme Court on Wednesday, June 15. The case being argue, <i>In re Sanai</i>, is a reciprocal discipline case arising out of Mr. Sanai’s disbarment by the Washington State Bar. In doing so, Ms. Johnson was following in the footsteps of Mercedes Deiz and Jana Toran, the only black women who preceded her in arguing before the Court.</p> <ul style="list-style-type: none"> ▪ Assistant Disciplinary Counsel Martha Hicks retired at the end of May, after more than twenty-five years’ service to the Bar in attorney discipline. On June 13, the department welcomed Stacy Owen, employed in the Client Assistance Office for more than two years, who has joined the staff as a lawyer who will review, investigate, and make recommendations regarding attorney complaints.
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Executive Director’s Activities April 23 to June 23, 2016

Date	Event
4/23	Attended Minoru Yasui Symposium
4/26	Brown Bag lunch at Stoll Berne
4/27	Classroom Law Project Legal Citizen Dinner
4/28	Attended OSB Admission Ceremony
5/2-5/3	Attended Center for Legal Inclusiveness Diversity Summit in Denver
5/4	Attended MB Tillicum Gathering
5/5	Meeting with Oregon Paralegal Association representatives regarding the possibility of OSB establishing voluntary certification program for paralegals
5/7	Client Security Fund Meeting
5/10	Meeting with Court representatives re Professional Adjudicator
5/13	BOG Committee Meetings
5/13	BOG Alumni Dinner
5/14	Legal Ethics Committee Meeting
5/17	Oregon Law Foundation Annual Reception
5/19	Meeting Chief Justice
5/19	MBA Annual Award Dinner
5/20	Meeting with Chair of ONBA to discuss D&I Strategic Planning
5/20	Judge Youlee You’s Investiture
5/24	Meeting with Chair of Civil Rights Section to discuss D&I Strategic Planning
5/25	Meeting with Chair of OAPABA to discuss D&I Strategic Planning
5/25	Brown Bag lunch at Sussman Shank
5/26	Meeting with Chair of OMLA to discuss D&I Strategic Planning
5/26	Retirement of Julie McFarland of Youth Rights Justice
6/2-6/3	Attended ABA CPR Annual Conference

6/3-6/4	Attended NCPO Annual Conference
6/4	Participant on NCPO Panel Presentation regarding Client Protection Funds and new legal services delivery models
6/6	Meeting with Simon Whang, former Board member and president of OAPABA to discuss D&I Strategic Planning
6/7	Brown Bag lunch at Perkins Coie
6/7	Meeting with Dave Bartz, managing partner at Schwabe Williamson & Wyatt, to discuss D&I Strategic Planning
6/8	Presented at Section Summit
6/9	Meeting with Diversity Section chair to discuss D&I Strategic Planning
6/10	Meeting with Dean Jennifer Johnson (Lewis & Clark Law School)
6/13	Meeting with Brendan McDonnell, managing partner at K&L Gates
6/14	In-house Implicit Bias Training with Fig8Consulting
6/15	Meeting with OGALLA president to discuss D&I Strategic Planning
6/15	Attend OWLS Board Meeting to discuss D&I Strategic Planning
6/16	Meeting with Julia Markley to discuss D&I Strategic Planning
6/16	Brown Bag lunch with Miller Nash
6/21—6/23	Local Bar tour of Eastern Oregon
6/24	BOG Meeting

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2016
Memo Date: June 10, 2016
From: Dawn M. Evans, Disciplinary Counsel
Re: Disciplinary/Regulatory Counsel's Status Report

1. Decisions Received.

a. Supreme Court

Since the Board of Governors met in April 2016, the Supreme Court took the following action in disciplinary matters:

- Issued an order in *In re Gerald Noble*, accepting this Portland lawyer's stipulation to a 4-year suspension, 2 years stayed, pending successful completion of a 2-year probation; and
- Accepted the Form B resignation from Medford lawyer *John P. Eckrem*; and
- Accepted the Form B resignation from Seattle lawyer *Charles P. Mortimer*; and
- Issued an order in *In re Christian V. Day*, accepting this Portland lawyer's stipulation to a 36-month suspension; and
- Issued an order in *In re Richard P. Schulze, III*, suspending this Reno, Nevada lawyer for 1 year in a reciprocal discipline proceeding following a 1-year suspension in Nevada for discipline arising from his appointment as trustee of a special needs trust and representation of the guardian of the ward of that trust; and
- Accepted the Form B resignation from St. Helens lawyer *David Brian Williamson*.

b. Disciplinary Board

No appeal was filed in the following cases and the trial panel opinions are now final:

- *In re Franco Dorian Ferrua* of Brazil (181-day suspension plus restitution); and
- *In re Mariel Marjorie Ettinger* of LaGrande (disbarment).

One Disciplinary Board trial panel opinion has been issued since April 2016:

- A trial panel recently issued an opinion in *In re Eric M. Bosse* of Newberg (24-month suspension) for engaging in an ongoing pattern of behavior including failure to account for or return client funds, false statements to the bar during its investigation, neglect of legal matters, failure to communicate, misrepresentation, and conduct prejudicial to the administration of justice.

In addition to these trial panel opinions, the Disciplinary Board approved stipulations for discipline in: *In re Lynn Earl Smith* of Lake Oswego (reprimand), *In re C. Fredrick Burt* of Salem (reprimand), *In re Gregory P. Oliveros* of Clackamas (60-day suspension, all stayed, 3-year probation), *In re Scott P. Bowman* of Gladstone (reprimand), *In re James R. Dowell* of Portland (reprimand), and *In re Sydney E. Brewster* of Salem (reprimand).

The Disciplinary Board Chairperson approved BR 7.1 suspensions in *In re Rick Inokuchi* of Coos Bay and *In re Dirk D. Sharp* of Bend.

2. Decisions Pending.

The following matters are pending before the Supreme Court:

In re Rick Sanai – reciprocal discipline matter referred to Disciplinary Board for hearing on defensive issues; trial panel opinion issued (disbarment); accused appealed; oral argument June 15, 2016

In re G. Jefferson Campbell – disbarment; accused appealed; awaiting briefing schedule

In re Scott W. McGraw – 18-month suspension; accused appealed; awaiting briefing schedule

In re G. Jefferson Campbell – Form B resignation pending

In re Eric M. Bosse – 24-month suspension; accused appealed; awaiting briefing schedule

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

In re G. James R. Kirchoff – February 18-19, 2016

In re Robert S. Simon – April 19-22, 2016

In re Dale Maximiliano Roller – May 9-11, 2016

3. Trials.

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

In re Lisa D. T. Klemp – June 20-21, 2016 (continuation from previous trial date)

In re Kevin Carolan – Septemeber 19-21, 2016

In re Gary B. Bertoni – September 28-30, 2016

In re Lane D. Lyons – September 30 – October 1, 2016

In re Samuel A. Ramirez – October 3-5, 2016

In re Shannon M. Kmetic – October 26-27, 2016

4. Diversions.

The SPRB approved the following diversion agreements since April 2016:

- In re Thomas O. Carter* – June 1, 2016
- In re Thomas C. Patton* – June 1, 2016
- In re Demetri Tsohantaridis* – July 1, 2016

5. Admonitions.

The SPRB issued 7 letters of admonition in April and May 2016. The outcome in these matters is as follows:

- 3 lawyers have accepted their admonitions;
- 0 lawyers have rejected their admonitions;
- 0 lawyers have asked for reconsiderations;
- 4 lawyers have time in which to accept or reject their admonition.

6. New Matters.

Below is a table of complaint numbers in 2016, compared to prior years, showing both complaints (first #) and the number of lawyers named in those complaints (second #):

MONTH	2012	2013	2014	2015	2016
January	46/49	21/21	29/31	18/19	30/30
February	27/27	23/23	24/25	28/28	38/38
March	38/39	30/30	41/45	22/22	28/30
April	35/38	42/43	45/47	17/17	26/26
May	19/20	37/37	23/24	24/24	27/30
June	39/40	31/31	23/24	31/31	
July	22/22	28/30	43/44	27/27	
August	35/35	33/36	19/21	28/29	
September	22/22	26/27	24/24	21/21	
October	23/23	26/26	25/25	38/39	
November	18/18	25/26	19/19	24/25	
December	26/26	19/19	21/23	20/20	
TOTALS	350/359	341/349	336/352	298/302	149/154

As of June 1, 2016, there were 170 new matters awaiting disposition by Disciplinary Counsel staff or the SPRB. Of these matters, 41% are less than three months old, 27% are three

to six months old, and 32% are more than six months old. Seventeen of these matters were on the SPRB agenda in May.

7. Reinstatements.

The reinstatement application of Tami Beach will be considered at this meeting.

8. Staff Outreach.

On June 2, Assistant Disciplinary Counsel Ted Reuter spoke at the Bar’s Oregon Tax Institute on the legal ethics pitfalls of a tax practice.

DME/rh

Oregon State Bar
Meeting of the Board of Governors
April 22, 2016
Open Session Minutes

President Ray Heysell called the meeting to order at 12:20 p.m. on April 22, 2016. The meeting adjourned at 3:20 p.m. Members present from the Board of Governors were John Bachofner, Jim Chaney, Chris Costantino, Rob Gratchner, Guy Greco, Michael Levelle, John Mansfield, Vanessa Nordyke, Ramón A. Pagán, Per Ramfjord, Julia Rice, Josh Ross, Rich Spier, Kate von Ter Stegge, Tim Williams, and Elisabeth Zinser. Not present were Kathleen Rastetter, Kerry Sharp, and Charles Wilhoite. Staff present were Helen Hirschbiel, Amber Hollister, Rod Wegener, Susan Grabe, Dani Edwards, Judith Baker, Charles Schulz, David Johnson, and Camille Greene. Present from the PLF were Bob Newell, Teresa Statler, Rob Raschio, Molly Jo Mullen, Carol Bernick, Betty Lou Morrow and John Berge. Also present was Colin Andries, ONLD Chair, and Jay Hull, Davis Wright Tremaine.

1. Call to Order/Finalization of Agenda

The board accepted the agenda, as presented, by consensus.

2. Joint Meeting with Professional Liability Fund Board of Directors

A. Western States Bar Conference Highlights

Ms. Bernick reported on her trip to the Western States Bar Conference. Ms. Hirschbiel presented findings from the 2015 Altman Weil Flash Survey on Law Firms in Transition. .

B. Innovations in Law Practice Models

Ms. Bernick introduced Jay Hull, Chief Innovation Partner at Davis Wright Tremaine. Mr. Hull presented the work DWT has been doing in response to economic pressures to provide more value to clients. They use design thinking concepts to evaluate client needs and to identify the people, processes and technology that will best serve those needs. For example, they are working with Microsoft in-house counsel to determine the most cost-effective way to handle their volumes of procurement contracts. In the future, DWT will provide each client with a secure dashboard to access their fees, case status, calendars, etc.

Mr. Hull stressed that market forces will continue to make inroads on the legal profession, and lawyers need to be prepared to respond. For example, other legal services that are continuing to evolve are IBM's Watson, Legal Zoom, Legal Design Lab, Ross, medium BIG DATA, the Big Four accounting firms have their own lawyers in house, and Amazon Echo.

C. PLF Financial Statements

Ms. Bernick introduced the PLF's CFO, Betty Lou Morrow, who updated the board on the current financial status and presented a brief review of the investment portfolio comparing Q1 2016 with Q4 2015.

D. Future of the Legal Profession Task Force

Mr. Heysell recommended the board appoint a Futures Task Force as described in his memo to the board.

Motion: Ms. Zinser moved the board approve Mr. Heysell's recommendation to appoint a Futures Task Force. Mr. Ross seconded. Several governors recommended that the task force include non-members, as well as individuals with expertise in technology. Mr. Heysell welcomed nominations from BOG members. The board voted unanimously in favor of the motion. The motion passed.

3. BOG Committees, Special Committees, Task Forces and Study Groups

A. Public Affairs Committee

Mr. Ross asked the board to accept the committee's Legislative Package Recommendations for the 2017 Session, as outlined in the exhibit. **[Exhibit A]**

Motion: The board unanimously approved the committee motion.

B. Policy and Governance Committee

Mr. Levelle presented the committee's memo regarding proposed revisions to the bar's strategic functions and goals for the purposes of continued strategic planning around those goals.

Motion: The board voted unanimously in favor of the committee motion to approve the five strategic functions. The motion passed.

Ms. Hirschbiel outlined the planning process suggested by Mark Engle. The next step is for the Board to identify a function or functions that the Board would like to have more in-depth discussions around. Such discussion would include review and evaluation of the current strategies and programs that support the function.

Motion: Mr. Levelle moved the board to direct the P&G committee to focus first on Function 5, which is, the bar's role as an advocate for diversity, equity and inclusion. Ms. Nordyke seconded. The board voted unanimously in favor of the motion. The motion passed.

C. Board Development Committee

Ms. Nordyke encouraged the board to submit names of non-members to consider for the BOG's public member position in 2017.

Ms. Nordyke presented the Board Development Committee's recommendation to appoint Sarah Dandurand to the Pro Bono Committee, and Barry Goehler to the Disciplinary Board.

Motion: The board voted unanimously in favor to accept the committee motion. The motion passed.

Ms. Nordyke presented the Board Development Committee's recommendation to appoint three new members to the OSB Judicial Administration Committee: Patty Rissberger, Nathan Orf, and James Miner.

Motion: Mr. Greco moved to table the committee motion to approve the appointments to the Judicial Administration Committee (JAC). Mr. Mansfield seconded. The P&G Committee will be reviewing the JAC charge and survey request at its next meeting, and may be recommending changes to the JAC structure or charge. Mr. Greco noted that it may be better to wait until after any changes are made

before appointing new members. The board voted unanimously in favor of tabling the committee motion. The committee motion was tabled.

D. Budget and Finance Committee

Mr. Mansfield presented a general financial update. The committee will present amendments to the bylaws at the June 24, 2016 BOG meeting. The review of the reserve and contingency funds revealed that uses of the funds are appropriate and prudent. Mr. Levelle suggested the committee develop standards for the use of these funds.

E. Oregon eCourt Implementation Task Force

Ms. Grabe asked the board to approve the eCourt task force charge. **[Exhibit B]**

Motion: Mr. Williams moved, Mr. Greco seconded, and the board voted unanimously in favor the motion to accept the changes to the task force charge. The motion passed.

Ms. Grabe asked the board to take action on the eCourt survey. **[No Exhibit]**

Motion: Mr. Ross moved, Mr. Bachofner seconded, and the board voted unanimously in favor to accept the motion for the bar to work with the court to develop the eCourt survey. The motion passed.

F. Awards Special Committee

Ms. Hierschbiel presented the nomination form for the 2016 Oregon State Bar Awards. She encouraged board members to submit nominations to Ms. Pulju by the June 30 deadline. At the June 24 board meeting the board will form an awards committee including the president and interested board members. This committee will meet on July 22 to prepare recommendations for the board to select at its September 9 board meeting. **[Exhibit C]**

4. OSB Committees, Sections, Councils and Divisions

A. Oregon New Lawyers Division Report

In addition to the written report, Mr. Andries highlighted the October CLE on documentation and immigration issues for undocumented alien juveniles to educate new lawyers how to obtain the necessary court orders. The ONLD is working on a summit with the WA NLD re: recruitment, retaining, and retirement of attorneys in remote areas.

B. Legal Services Program Committee

Ms. Baker presented the proposed recommendations for disbursing unclaimed client funds from the Legal Services Program:

1. Disburse \$117,500 from the annual unclaimed client funds for 2016 and hold the remainder in reserve.

Motion: Mr. Greco moved, Mr. Bachofner seconded, and the board voted unanimously in favor to accept the proposed recommendation to disburse the funds. The motion passed.

2. Do not disburse any of the unclaimed client funds from the Strawn v Farmers class action and hold the remainder of such funds in reserve.

Motion: Mr. Bachofner moved, Mr. Greco seconded, and the board voted unanimously in favor to accept the recommendation to not disburse the funds. The motion passed.

Ms. Baker asked the board to accept the 2014 Legal Services Program Accountability Report.
[Exhibit D]

Motion: Ms. Zinser moved, Mr. Bachofner seconded, and the board voted unanimously in favor to accept the report. The motion passed.

C. Board of Bar Examiners

Mr. Schulz asked the board to approve the proposed changes to RFA 16.05 re: Limited Admission of House Counsel.

Motion: Mr. Bachofner moved, Mr. Mansfield seconded, and the board voted unanimously in favor to accept the changes. The motion passed.

D. Client Security Fund Committee

Claim 2015-38 CAIN (Mitchell)

Ms. Hirschbiel asked the board to consider the request of the Claimant that the BOG reverse the CSF Committee's denial of the claim, as presented in her memo. **[Exhibit E]**

Motion: Mr. Greco moved, Mr. Ramfjord seconded, and the board voted unanimously to uphold the committee's denial of the claim.

Claim 2016-08 ALLEN (Reitz)

Ms. Hirschbiel asked the board to consider the request of the Claimant that the BOG reverse the CSF Committee's denial of the claim, as presented in her memo. **[Exhibit F]**

Motion: Mr. Greco moved, Mr. Bachofner seconded, and the board voted unanimously to uphold the committee's denial of the claim.

Claim 2015-32 LANDERS (Koepke)

Ms. Hirschbiel asked the board to consider the request of the Claimant that the BOG reverse the CSF Committee's denial of the claim, as presented in her memo. **[Exhibit G]**

Motion: Mr. Greco moved, Mr. Ramfjord seconded, and the board voted unanimously to uphold the committee's denial of the claim.

Ms. Hirschbiel presented the committee's financials for information purposes.

E. Legal Ethics Committee

Ms. Hirschbiel presented the committee's request for board approval of proposed updates to formal ethics opinions 2005-106 and 2005-169. **[Exhibit H]**

Motion: Mr. Ramfjord moved, Ms. Nordyke seconded, and the board voted unanimously to approve the amendments as recommended by the committee.

5. Consent Agenda

A. Report of Officers & Executive Staff

Report of the President

As written.

Report of the President-elect

Mr. Levelle reported on the County Bar Presidents' conference call on April 7, 2016 and the effort to keep the momentum going in the effort to engage county bars.

Report of the Executive Director

Ms. Hirschbiel reported on the status of the new AMS system. On June 8, 2016 there will be a Section Summit to present the new section CLE procedures. Mr. Spier will facilitate. The new MCLE rules will take effect on September 1, 2016. On April 12, 2016 the changes to the disciplinary rules, approved by the BOG at its March 11, 2016 meeting, were presented to the Supreme Court. Discussion regarding the funding of the court's adjudicator position was discussed.

Director of Regulatory Services

In addition to her written report, Ms. Hirschbiel reported that Ms. Evans is working on drafting proposed rule changes, incorporating the board's approval of 18 out of the 31 DSRC recommendations and some "housekeeping" changes that will be helpful. Ms. Evans anticipates presenting the full set of rule changes to the BOG at its June 24, 2016 board meeting.

Diversity Action Plan

Ms. Hirschbiel presented the 2015 implementation report and encouraged the board to look at both the 2014 and 2015 implementation reports in advance of its June 2016 meeting.

MBA Liaison Report

Mr. Ramfjord reported on the monthly MBA meetings he recently attended and updated the MBA on the DSRC rule changes.

OSB ADA Self-Evaluation 2016

Ms. Hollister presented the evaluation and noted that the report is a requirement of Title 2.

B. Other

Motion: Mr. Greco moved, Ms. Zinser seconded, and the board voted unanimously to approve the consent agenda of past meeting minutes, Fee Arbitration Rule change, and proposed Sponsorship Policy.

6. Closed Sessions – see CLOSED Minutes

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

7. 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 22, 2016
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 BOG received status reports on the non-action items.

B. Pending or Threatened Non-Disciplinary Litigation

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

C. Other

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

DRAFT

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 22, 2016
Memo Date: April 18, 2016
From: Josh Ross, Public Affairs Committee Chair
Re: 2017 OSB Law Improvement Program

Action Recommended

- 1) Accept the Public Affairs Committee (PAC) recommendation to include eight proposals submitted as part of the 2017 Oregon State Bar (OSB) Law Improvement Program package for submission to Legislative Counsel's office for bill drafting.
- 2) Modify the PAC recommendation regarding what is included in the OSB Law Improvement package.
- 3) Decline to submit a package of Law Improvement proposals for 2017.

Background

Every long session, the OSB submits proposed legislation as part of the Law Improvement Program to the Oregon State Legislature for passage. On April 15, 2016, the PAC hosted the OSB Legislative Forum. This year nine OSB sections, workgroups, and committees submitted fifteen proposals for consideration by the Board of Governors (BOG) to be included as part of the 2017 Law Improvement program package.¹

The OSB's Law Improvement package is intended to include proposed legislation from sections, workgroups, and committees 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 section executive committee, and 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 PAC to ensure that they meet the criteria established by both the OSB policies and bylaws, and the U.S. Supreme Court case, *Keller v. State of California*, 499 US 1, 111 S.Ct 2228 (1990).²

¹ In addition, a representative of the Sustainable Futures Section appeared at the Law Improvement Forum to submit a last minute proposal. The concept was an amendment to the Estate Planning and Administration Section's proposal. The amendment would modify the Uniform Prudent Investor Act and allow trustees to consider environmental, social and governance factors when investing and managing trust assets under ORS 130.755(3). This concept was proposed after the deadline.

² For more information on the Oregon State Bar bylaws and the *Keller* case, please visit http://www.osbar.org/leadership/bog/bog_resources.html.

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.

What are the OSB's Legislative Guidelines?

The OSB's policies and Bylaws limit legislative or policy activities to those reasonably related to any of the following subjects:

1. The regulation and discipline of lawyers;
2. The improvement of the functioning of the courts including issues of judicial independence, fairness, efficacy and efficiency;
3. The availability of legal services to society;
4. The regulation of lawyer trust accounts;
5. The education, ethics, competence, integrity and regulation of the legal profession;
6. The provision of law improvement assistance to elected and appointed government officials;
7. Issues involving the structure and organization of federal, state and local courts in or affecting Oregon;
8. Issues involving the rules of practice, procedure and evidence in federal, state or local courts in or affecting Oregon; and
9. Issues involving the duties and functions of judges and lawyers in federal, state, and local courts in or affecting Oregon.

If the BOG approves a particular proposal for drafting, 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 2016. 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.

Below is the list of legislative proposals from the nine bar groups reviewed by the PAC. Legislative concepts that receive approval for drafting will be submitted to Legislative Counsel's office to be drafted. Those bills that receive final BOG approval will be introduced through the Judiciary Committee, and pre-session filed for the 2017 legislative session.

Direct link to proposals: <http://osbpublicaffairs.homestead.com/2017LIP.html>.

Legislative Proposals

The PAC recommends that the BOG approve eight of the fifteen proposals.

1. The PAC recommends approval for the eight proposals listed below:
 - a. OSB Board of Governors
 - i. Discipline System Review Committee
 - ii. Chapter 9 Administrative Changes
 - b. Business Law Section - Incorporation of Electronic Technology*
 - c. Estate Planning and Administration Section - Amendment to ORS Chapter 130
 - d. Family Law Section
 - i. Spousal Support
 - ii. PERS Survivor Beneficiary Change*
 - e. Nonprofit Organizations Law Section - Update to ORS Chapter 65
 - f. Securities Regulation Section - Eliminating Requirement to Register Employee Equity Plans*

For each of the proposals listed above, the PAC recommends that the section or committee move forward with its proposal(s) with the expectation that each group will implement the suggestions of the PAC and report back on its progress. Those sections with an asterisk after the proposal will be expected to address any concerns raised and report back to the Public Affairs Committee.

2. The PAC has identified the following proposals that need additional work and further vetting, specifically:
 - a. Business Law Section
 - i. Ratification of Defective Corporate Action
 - ii. Holding Companies and Back-End Mergers
 - b. Debtor Creditor Section - Garnishment Statutes
 - c. Family Law Section - Life Insurance
 - d. Real Estate and Land Use - Mortgage Loan Originator

For each of these proposals, the PAC recommends that the Public Affairs Department staff engage with the sponsoring sections in order to manage emerging issues. Sections and committees are expected to continue to work and fine-tune these concepts.

3. The PAC has identified the following proposals as inappropriate for inclusion in the law improvement program at this time, specifically:
 - a. Business Law Section
 - i. Architect Shareholder Liability
 - b. Sustainable Futures Section - Modify Oregon's Uniform Prudent Investor Act
 - c. Workers' Compensation Section - Workers' Compensation Board-Bar Membership

For each of these proposals, the PAC recommends that the proposal not be included in the 2017 Law Improvement Program package nor submitted to Legislative Counsel for drafting.

DRAFT

OSB / OJD Task Force on Oregon eCourt Implementation**Charge**

To work cooperatively with the Oregon Judicial Department and OSB members to ~~assist in the implementation~~ monitor the ongoing operation of the Oregon eCourt initiative over the next five years; ~~provide input and feedback from bar members on the implementation of Oregon eCourt~~ to gather input and feedback from OSB members on how well Oregon eCourt is working for them and their staff; to propose solutions for problems identified by OSB members and court staff, develop a strategy to maintain communication ~~communicate with OJD~~ and continue to educate bar members about Oregon eCourt programs; and to provide periodic updates to the Board of Governors.

2016 Oregon State Bar Awards

The Oregon State Bar is seeking nominations for its annual awards. The Oregon State Bar presents the Award of Merit, President's Awards, and the Wallace P. Carson, Jr. Award for Judicial Excellence. The Oregon Bench and Bar Commission on Professionalism presents the Edwin J. Peterson Award. Please help us honor our most outstanding lawyers, judges and citizens by nominating your deserving colleagues for these awards.

Award of Merit

The Award of Merit is the highest honor that the bar can bestow. The recipient may be: 1) an Oregon lawyer who has made outstanding contributions to the bench, the bar and the community-at-large, and who exhibits the highest standards of professionalism; or 2) a non-lawyer who has made outstanding contributions to the bar and/or bench, and who exhibits the highest standards of service to the community-at-large. The award does not have to be granted every year, and only one award may be bestowed in any year.

Wallace P. Carson, Jr. Award for Judicial Excellence

The Wallace P. Carson, Jr. Award for Judicial Excellence honors a member of the state's judiciary. The criteria for the award are as follows: 1) a current or retired state court judge or federal judge; 2) who has made significant contributions to the judicial system; and 3) who is a model of professionalism, integrity and judicial independence.

President's Awards

President's Awards are presented in five categories: Diversity & Inclusion Membership Service, Public Service, Public Leadership and Sustainability. The Board of Governors wants to honor innovative, hard-working individuals who stand out because of their special contributions to the legal profession.

Diversity & Inclusion Award Criteria: The nominee must be an active or emeritus member of the Oregon State Bar, or an Oregon law firm; the nominee must have made recent significant contributions to the goal of increasing minority representation in the legal profession in Oregon through creative employment efforts, innovative recruitment and retention programs, advocacy or other significant efforts.

Membership Service Award Criteria: The nominee must have volunteered for the activity involved; must be an active or emeritus member of the Oregon State Bar; and must have made significant contributions to other lawyers through recent efforts in one or more of the following areas: OSB CLE programs or publications; OSB committees, sections, task forces, boards and other bar groups; the OSB legislative/public affairs process; or similar activities through local bar associations or other law-related groups.

Public Service Award Criteria: The nominee must have volunteered for the activity involved; must be an active or emeritus member of the Oregon State Bar; and must have made significant contributions to the public through recent efforts in one or more of the following areas: pro bono legal service to individuals or groups, law-related public education, coordination of public service law-related events (such as those associated with Law Day), service with community boards or organizations, or similar activities which benefit the public.

Public Leadership Award Criteria: The President's Public Leadership Award is given to someone who is not a member of the Oregon State Bar. The nominee must have made significant contributions in any of the areas covered by the president's awards to bar members.

Sustainability Award Criteria: The nominee must be an active or inactive member of the bar or be an Oregon law firm; the nominee must have made a significant contribution to the goal of sustainability in the legal profession in Oregon through education, advocacy, leadership in adopting sustainable business practices or other significant efforts.

Nomination Guidelines

To ensure full consideration of the nominee's contributions, your nomination packet should include:

1. Award Nomination Form: Fill in all requested information and specify the desired award category. A letter can be substituted if it includes the same information.
2. Supporting Detail: The thoroughness of this information can make the difference in the selection process. Supporting detail may include resume information, narratives describing significant contributions and special qualifications, a list of references with phone numbers, letters of recommendation, articles, etc.
3. Submitting Nominations: Nominations must be received by Thursday, June 30, 2016. Electronic submissions are preferred and should be sent to kpulju@osbar.org. Printed nominations should be mailed to: Oregon State Bar, Attn: Awards, P.O. Box 231935, Tigard, OR 97281-1935. For further assistance contact Kay via email or at (503) 431-6402 or 800-452-8260, ext. 402.

Selection Process

Nominations for the OSB awards will be reviewed by the Board of Governors Member Services Committee. The committee will recommend recipients to the Board of Governors. The Oregon Bench and Bar Commission on Professionalism will select the Edwin J. Peterson Award recipient.

Annual Awards Event

Award recipients will be honored at a luncheon on December 8, 2016 at The Sentinel Hotel (formerly The Governor Hotel) in Portland.

2016 Oregon State Bar Awards

Nominee Information Sheet

Nominee Name _____ Bar No. _____

Office Address _____

Office Telephone _____ E-mail Address _____

Award Category: Please indicate the award category for which this nomination is submitted (*select one*)

Award of Merit

Diversity & Inclusion Award

Public Leadership Award

Carson Award

Membership Service Award

Sustainability Award

Public Service Award

Based on the criteria for the award indicated above, explain why you believe the nominee is deserving of this honor.

You are encouraged to attach additional information as outlined in the nomination guidelines to completely describe the nominee's unique qualifications for this award.

Nominating Group/Person _____

Contact Person _____

Office Telephone _____ E-mail Address _____

Please return this form by 5 p.m., Thursday, June 30, 2016

Electronic submission (preferred): kpulju@osbar.org or mail to:
Oregon State Bar, Attn: Awards, P.O. Box 231935, Tigard, OR 97281-1935

OREGON STATE BAR
Board of Governors

Meeting Date: April 22, 2016
Memo Date: April 8, 2016
From: Legal Services Program Committee
Re: 2014 Legal Services Program Accountability Report

Action Recommended

The Legal Services Program Committee is recommending that the BOG accept the 2014 Legal Services Program Accountability Report.

Background

The OSB Legal Services Program (LSP) began in 1998, following the Oregon Legislature's appropriation of a portion of court filing fees to support civil legal aid services to the poor. Pursuant to ORS 9.572 the OSB is required to manage the funds, develop Standards and Guidelines for providers, appoint a Director of the LSP and create a LSP Committee to provide ongoing oversight, evaluation and support to legal aid providers, to ensure compliance with the Standards and Guidelines, and to further the program's goals.

As part of the oversight and evaluation functions, the Director of the LSP conducts an accountability process that focuses on the effectiveness of the providers in meeting the needs of the individual clients and the larger client community, and the development and use of resources. The LSP Committee is the governing body responsible for making recommendations to the BOG on the assessment of provider programs. The LSP Committee has reviewed the 2014 Legal Services Program Accountability Report and is forwarding to the BOG.

**Oregon State Bar
Legal Services Program
Accountability Analysis**

Overview

The accountability process is designed to provide the OSB LSP with information about the work of legal services providers. With this information the OSB LSP can carry out its duties to the OSB Board of Governors as outlined in the *Oregon Legal Services Program Standards and Guidelines*.

The process focuses on the effectiveness of the providers in meeting the needs of individual clients and the larger client community, and in developing and using resources. The goals of the review are to ensure compliance with OSB LSP *Standards and Guidelines*; to ensure accountability to clients, the public and funders; and to assist with each provider's self-assessment and improvement.

The process has four components:

1. **An annual Self Assessment Report (SAR)** submitted by providers, including a narrative portion and a statistical/financial portion;
2. **Ongoing Evaluation Activities by the OSB LSP**, including peer reviews, desk reviews, ongoing contacts and other evaluation activities consistent with the OSB LSP *Standards and Guidelines*;
3. **A periodic Peer Survey** conducted of attorney partners, clients, judges, opposing counsel and community partners, all of whom are identified by the providers; and
4. **A periodic Accountability Report** to the OSB Board of Governors and other stakeholders, summarizing the information from the providers' Self Assessment Reports and other information, including ongoing contacts with providers by OSB LSP staff, annual program financial audits and the Annual Peer Survey.

The accountability review is an analysis of the information supplied by the programs in the Self Assessment Report covering the 12 month period ending December 31, 2014.

The Providers

There are four providers that receive funding from the OSB LSP:

Legal Aid Services of Oregon (LASO) – statewide provider with regional offices and the only entity that receives federal funds;

Oregon Law Center (OLC) – statewide provider with regional offices;

Lane County Legal Aid and Advocacy Center (LCLAC) – provides service in Lane County; and

Center for Nonprofit Legal Services (CNPLS) – provides service in Jackson County

The Performance Areas

This accountability analysis is divided into "Performance Areas" that track the broad themes expressed in the mission statement and statement of goal in the OSB Legal Services Program Standards and Guidelines. Each section outlines and discusses the level of alignment found and makes recommendations. The performance areas are as follows:

- *“An integrated, statewide system of legal services... [that eliminates] barriers...caused by maintaining legal and physical separation between providers...”*
- *“Centered on the needs of the client community.”*
- *“Efficient and effective...by deploying limited resources in a manner that maximizes the system’s ability to provide representation*
- *Full spectrum of legal services... The broadest range of legal services required to serve the needs of clients.”*
- *“High quality legal services.”*

1) Performance Area One: Achieving an Integrated Statewide System of Legal Aid Services

It is the goal of the OSB LSP that all providers are part of an integrated statewide delivery system designed to provide relatively equal levels of high quality client representation throughout the state of Oregon. This means that the providers need to work together strategically to target limited resources to ensure equality of access statewide. It also means that the providers need to minimize geographic and institutional parochialism. They should also be integrated in the Campaign for Equal Justice’s statewide efforts to increase resources for legal aid.

a) Strategic Planning

One of the structures that the four legal aid providers use to cooperate and provide relatively equal access for clients statewide is the strategic planning process. The last strategic planning process was in 2012/13 in response to the falling revenues for statewide legal aid funding in general and LASO in particular because of federal funding cuts including federal sequestration. The final result was the closing of the Lane County LASO Office with LCLAC remaining as the sole legal services provider in Lane County while keeping the statewide service delivery system stable. The strategic planning committee also created a long term strategic plan for providing efficient and effective service in future years without necessarily increasing revenue. The final report was December, 2013. Because the recommendations from the December, 2013 strategic planning report have been implemented, the providers are engaged in another strategic planning process which started in September, 2015.

Recommendation: Oregon’s strategic planning efforts have been recognized as a national best practice. That said those efforts need to be more integrated to meet this performance area. The last strategic planning report dated December 7, 2013 made recommendations on how OLC and LASO can enhance efficient and effective legal services to clients statewide. Although CNPLS and LCLAC information was included when looking at revenue, staffing and poverty population statistics, those organizations were not included in the main part of the plan that spoke to implementing recommendations on how to be effective and efficient. These are the recommendations having to do with advocacy, coordination, service delivery models, staffing patterns and technology.

LASO and OLC are the two statewide organizations with regional offices. They share a responsibility to provide services statewide while focusing on the needs of the local community. They work closely together to provide a full range of legal services to low-income clients. They maintain separate organizations only because of the restrictions on the federal funds and strive to integrate services as much as possible. They accomplish this by

sharing a board; they both use Legal Server as their case management system; they use the same policies for intake, priority setting, regional office management and regional manager evaluation. They also have joint quarterly managers meetings. Jackson and Lane County programs focus on providing services to clients in their community, except for the LCLAC lawyers who are experts in and focus on state policy. Because the county programs are stand alone nonprofits with different boards and different administrative and service delivery systems it makes it difficult for CNPLS and LCLAC to integrate with LASO and OLC in a way that promotes the efficiencies and effectiveness contemplated by this performance standard. The providers need to strive in this strategic planning process to look at ways to include all the providers in the recommendations that flow from the final strategic planning report.

b) Increasing Resources for Legal Aid

The Campaign for Equal Justice is legal aid's primary resource development arm. CEJ coordinates the annual fund drive, educates lawyers and the community about the importance of access to justice, works to increase state and federal funding for legal aid and builds an endowment. CEJ reports that the providers are integrated from a resource development and fund raising perspective. The providers engage in numerous activities to support CEJ's annual campaign and work closely with CEJ and the OSB to protect and expand funding for legal aid.

c) Integrated Training and Legislative Advocacy Network

Training: It is important that providers encourage lawyers to stay abreast of changes among the issues that affect low income clients in Oregon by participating in various forums in which such issues and strategies are discussed.

OLC houses the State Support Unit (SSU). The goal of the SSU is to provide support to all Oregon's legal aid lawyers. They do this by sponsoring trainings designed to provide professional development for legal aid lawyers statewide. These trainings include areas such as new lawyer training, motion practice training, discovery training, complex litigation training and trial advocacy training. The SSU also maintains listservs to keep all staff up to date on changes in legislative, administrative and case law. In addition, the SSU attorneys sponsor quarterly task force meetings organized by family, employment, housing and administrative law to keep staff up to date on substantive law developments and provide opportunities to network, discuss cases and understand statewide developments. It is important that legal aid attorneys participate in various forums in which areas of law and strategies are discussed. This allows attorneys to stay aware of changes among the issues that affect the low-income communities it serves.

The SSU reports that all provider attorneys are members of most of the statewide task force listservs. LCLAC attorneys routinely attend most state task force meetings but CNPLS only occasionally attends and has been absent from the family law task force. LCLAC and CNPLS are both absent from the employment law listserv and task force. LCLAC and CNPLS case closing statistics show that attorneys from those offices do not focus on employment law cases.

Recommendation: All provider practitioners should strive as much as practical to participate in the trainings and task force meetings facilitated by the SSU. Attorneys can currently attend task force by phone and providers should work on ways to allow lawyers located outside of Portland to attend trainings and task force meetings remotely to defray the cost of traveling to Portland. This may allow Medford attorneys to attend task force meetings more frequently although they should make it a priority to be more connected to the other lawyers who practice poverty law in Oregon.

Legislative Advocacy: LCLAC and CNPLS work closely with OLC in legislative advocacy in a variety of areas of law and the providers report that it is very effective.

2). Performance Area Two: Centered on the Needs of the Client Community

Performance Area Two gauges the success of providers at targeting their services on the most compelling needs of the client community and the ability to implement response to the changing circumstances. They do this by understanding their community through participation on boards and advisory committees as well as working with social service agencies and community based organizations that serve low income persons. In other words providers need to be integrated into the community to be able to understand current need and see emerging trends. Ongoing assessment should be coupled with periodically conducting a more formal needs assessments and setting program priorities to address the needs identified. To fully understand the needs of a community, providers should strive to reach those populations that have not traditionally sought the services of the legal aid office.

- a) **OLC and LASO:** OLC and LASO have both incorporated best practices for reviewing client need that determine the program's priorities. LASO and OLC report that the priority setting process happens approximately every two years at a regional office level and includes a periodic regional needs assessment to seek input from a wide variety of stakeholders including people who are income-eligible to be clients, former and current clients; local attorneys and county bar associations; government and non-profit partner agencies serving people who are income-eligible to be clients; local judges; and other community partners. The primary mechanism for input is a survey questionnaire distributed by a variety of methods, including on-line, mail and email, telephone calls, on-site availability of surveys for current clients and interviews and focus groups with clients. After survey information is collected and analyzed, each office conducts priority setting meetings involving office staff and others. The established priorities guide the work plans for each office, guide outreach/intake and become an integral part of each office's case acceptance decisions. LASO and OLC's priorities are adopted by the LASO and OLC Boards on an annual basis. Board policy is that LASO and OLC should implement the statewide program priorities through local office priority setting that contain more specific goals tailored to local considerations.

OLC and LASO report that local offices change priorities in response to changing client needs. Examples are the Bend office added housing cases for disabled clients to its list of priorities and the Pendleton office added three case priorities: guardianships; homeless rights issues; and pro se and pro bono assistance for expungement cases.

- b) **LCLAC:** LCLAC reports that the primary method of assessing client community needs is through “Case Priority Planning Sessions” which is an analysis of statistics at intake, surveys, and staff observations and communications with other agency representatives and potential clients. In 2014, the process involved analysis of statistics and staff discussion. The last thorough assessment of Lane County clients and their legal service needs was conducted in 2011 by the LASO Regional Lane County Legal Aid office. After gathering the information, LASO coordinated their priority setting process with LCLAC to avoid duplication of services. The LASO Lane County Regional office closed in 2012.

Recommendation: In order to meet the OSB LSP Standards and Guidelines it is recommended that LCLAC develop tools, methods and policies to establish a more formal and periodic Client Needs Assessment. The Assessment periodically appraises the needs of the eligible clients in the Lane County area. The appraisal should seek to include information from income-eligible to be clients, former and current clients, employees, social service agencies, the private bar and other interested persons. The appraisal should include surveying those populations that are eligible for services but have not traditionally sought LCLAC services.

- c) **CNPLS:** CNPLS reports that they conduct a legal needs assessment for Jackson County at least once every two years using assessment questionnaires to seek input from former and current clients, judges, local attorneys, government and non-profit agencies and other community stakeholders. They also pay particular attention to community needs assessments conducted by ACCESS, local Community Action Agency and United way. CNPLS conducts priority setting meetings with staff and the board of directors. Once established, the priorities guide employee work plans and become a part of the case acceptance decisions.

Recommendation: Although CNPLS has recently conducted a client assessment and set priorities, it is recommended that CNPLS seek to understand the legal needs of those populations that are eligible for services but have not traditionally sought CNPLS services. It is also recommended that CNPLS be prepared to change priorities and implement a response to changing client need.

Both LCLAC and CNPLS have service delivery models whereby staff attorneys are very specialized in the area of law they practice. This may inhibit a response to a new area of law that emerges and calls for substantive knowledge and strategic approaches that are unfamiliar to a specialized attorney. As indicated in the recommendations above CNPLS and LCLAC need to be prepared to change priorities and implement a response to emerging client need even if outside their specialization.

All providers should strive to incorporate best practices in how they assess community need, set priorities and incorporate service changes for changing client need for all communities. Consistency statewide is important to achieve an understanding of the most pressing client need and understand how resources should be spent.

3). Performance Area Three: Achieving Efficient and Effective Delivery of Services

Performance Area Three speaks to how effectively legal aid represents its clients and that it achieves the results with minimum waste of resources and effort. “Efficient and effective” is a phrase used throughout the ABA Standards. This includes those standards that address joint planning by providers around access and service delivery models; the importance of statewide training opportunities; and choosing advocacy methods that both accomplish a meaningful result and are a cost effective use of resources. Joint planning and statewide training opportunities were discussed under Performance Area One. This section will focus on advocacy methods that both accomplish a meaningful result and are a cost effective use of resources. The following are examples from the providers that highlight effective and efficient advocacy methods.

- a). **OLC:** Safe, decent and affordable housing is important for low-income Oregonians. Housing is typically the first or second highest priority in the community based on client needs assessments. OLC reported that they and the housing law task force strategically targeted limited resources to better protect and improve affordable housing for low income Oregonians by using a broad range of advocacy tools to improve the applicable statutes, case law and practice at the local and statewide lever. They did this by working with landlords and housing authorities to implement new housing law; litigating to protect government subsidized housing units from loss; working with partners to improve policies and practices to comply with state and federal foreclosure protection for tenants; setting legal precedent at the Oregon Supreme Court to Protect Tenants from Retaliation and participating in legislative advocacy to support housing.
- b). **LASO:** LASO’s Portland Regional Office worked with community partners in Clackamas County for several years to establish a new family justice center where survivors of domestic abuse, sexual assault, and vulnerable adults can access many of their services under one roof. The family justice center opened in December 2013. Throughout 2014 LASO attorneys and intake workers met with survivors at the justice center. The one-stop model is an efficient and effective model that benefits clients by providing comprehensive, holistic services.
- c). **LCLAC:** The Survivor’s Justice Center continues to work closely with the University of Oregon School of Law Domestic Violence Clinic to facilitate a coordinated approach and to avoid duplication of services. This division of cases promotes efficiency both for the University and for Lane County Legal Aid & Advocacy Center. The Survivor’s Justice Center is the hub for legal services for survivors in Lane County. They triage all cases once a week and determine which are appropriate for full or limited representation from their attorneys and which should be referred to the University’s program.
- d). **CNPLS:** CNPLS’s housing attorney has been working with the statewide Legal Aid Foreclosure Help Project since its inception in 2013 and has been collaborating with four attorneys from OLC and LASO and with the local and regional agencies and the private bar. She also has a good working relationship with ACCESS housing counselors in Jackson County. She has attended the most number of resolution conferences of the 5 project attorneys and has developed an expertise for holding the creditors accountable and negotiating favorable outcomes. She attended the May Project training session in Eugene where she was the trainer on resolution

conferences. She has also developed an expertise in seeking LRAPP. Due to her skill and knowledge, clients have received loan modifications. Cases without fee waivers are electronically filed in other Oregon counties.

Outcome Measures

The providers were also asked to report on outcome measures for cases closed in 2014 that involved litigation or settlement to show how effective the legal service was. The measure and results are as follows (includes outcomes from LASO, OLC and LCLAC) and reflect the excellent work that legal aid does for their clients:

LASO

- Client achieved a positive result - 93%
- As a result of our representation and as relevant to the client's individual situation, in the attorney's reasonable assessment:
 1. The client is physically safer – 82%
 2. The client is better able to keep children safe - 94%
 3. The client has obtained or maintained housing - 73%
 4. The client has improved housing conditions - 67%
 5. The client is more economically secure - 87%
 6. The case benefitted the client's family or household members - 94%
 7. The case will benefit other low-income clients - 18%
 8. Where a positive result was not achieved, cases filed for strategic reason - 13%

OLC

- Client achieved a positive result - 93%
- As a result of our representation and as relevant to the client's individual situation, in the attorney's reasonable assessment:
 1. The client is physically safer – 77%
 2. The client is better able to keep children safe - 68%
 3. The client has obtained or maintained housing - 71%
 4. The client has improved housing conditions - 63%
 5. The client is more economically secure - 71%
 6. The case benefitted the client's family or household members - 77%
 7. The case will benefit other low-income clients - 53%
 8. Where a positive result was not achieved, cases filed for strategic reason – 12.5%

LCLAC

- Client achieved a positive result - 92%
- As a result of our representation and as relevant to the client's individual situation, in the attorney's reasonable assessment:
 1. The client is physically safer – 90%

2. The client is better able to keep children safe - 100%
3. The client has obtained or maintained housing - 98%
4. The client has improved housing conditions - 75%
5. The client is more economically secure - 65%
6. The case benefitted the client's family or household members - 87%
7. The case will benefit other low-income clients - 90%
8. Where a positive result was not achieved, cases filed for strategic reason - 50%

4) Performance Area Four: Achieving a Full Spectrum of Legal Services

Performance area four reflects the principle expressed in the OSB LSP Standards and Guidelines that providing a wide range of legal services for the poor promotes fairness as well as efficiency and effectiveness. Enforcing broader rights of low-income communities is a function of legal services advocates, as well as providing individuals with representation in day-to-day matters. Providing community legal education and helping people represent themselves are also important functions.

All the programs provide a full range of legal services which include phone/walk-in intake and advice, direct legal representation for individuals by staff and pro bono lawyers, complex litigation, community legal education, assistance to self-represented litigants and legislative or administrative advocacy. Also the providers make extensive use of other resources in the service area including community-based organizations that serve the same population.

In 2014 the providers closed a total of 13,626 cases which includes staff and pro bono cases. 35% were family law cases, 28% were housing cases and 9% were consumer/finance cases. Approximately 83% were closed as advice and/or brief service.

The providers outlined cases that reflect the full spectrum of legal services given. Examples of typical cases are as follows:

Self-Represented Litigants: LCLAC reports a married couple with irregular income received advice and counsel from staff attorney. They appeared in court pro se and were successful in receiving a trial period plan (TPP), made all the payments, and then received a permanent modification of their loan. The wife later started work as a housing counselor.

Community Legal Education: CNPLS reports that their immigration attorney teaches citizenship classes to clients and community members at the First Presbyterian Church every Monday. Ten to twelve students attend these classes and 100% are deemed to be ready to pass the naturalization test to become citizens.

Direct Representation: LCLAC reports they represented a widow, age 75, with significant hearing problems, was listed on the deed with her deceased husband but was not on the home loan note. After significant negotiations, including citing applicable law and a resolution conference, the lender agreed to allow client to assume the loan and to modify its terms, making it more affordable.

LASO reports they represented Ruth who was recovering from surgery in a wheelchair when her husband of several decades grabbed her and yelled at her in a public place. She felt deeply humiliated, and the reaction from those around her was a life-changing moment. "Unless we have someone to enlighten us about abused women, we have no idea what to do, or that you can walk

out the door,” says Ruth. She contacted LASO to help her get protection from his abuse for herself and her teenage son, who is autistic. Ruth and her son have been thriving apart from the abuser. Ruth says, “I have a right to enjoy my life and our son has a right to explore every avenue out there and not be held back.” She wants everyone to know legal aid may have saved her life.

Major Cases and Projects That Have Systemic Impact: LASO, Oregon Law Center and the National Housing Law Project filed suit in federal court in an effort to preserve the only affordable housing complex in Merrill, Oregon. The complex is operated under the U.S. Department of Agriculture's Rural Development housing subsidy program. The plaintiffs filed a complaint and preliminary injunction motion to enjoin USDA from accepting the final payment on the property's mortgage in advance of the date the mortgage was originally supposed to mature. Accelerated payment of the mortgage would prematurely remove the complex from the affordable housing program. USDA responded to the motion by conceding that the agency would not accept a premature final payment on the mortgage. This decision by USDA has already helped stop the premature final payment on another 42 unit affordable housing complex in Oregon and may help to stop the premature mortgage maturity of at least 70 other properties across the country. Other issues in the case remain to be litigated.

Legislative Efforts That Have Systemic Impact: LCLAC attorney John VanLandingham leads two coalitions of landlord and tenant advocates that have negotiated, drafted and gotten adopted into state law, consensus bills amending landlord/tenant law in every legislative session but one since 1983. John is the chief tenant advocate, chief drafter, electronic secretary and lead advocate within the Legislature for both coalitions. Oregon is the only state in the nation which amends its landlord/tenant laws through a coalition process; as a result, issues which require litigation in other states are usually addressed by state statute in Oregon.

Integrating the Resources of the Legal Profession: The legal profession is a valuable resource in addressing the needs of the low-income community and should be integrated to the greatest extent possible into a provider's efforts to provide a full spectrum of legal services that respond to its clients' needs. Oregon legal aid providers all report that pro bono attorney involvement is an integrated part of the structure used to deliver high quality legal services. The following are examples of how volunteer lawyers are used:

- The Volunteer Lawyer Project of the Portland Regional Office of LASO has existed for over 30 years. The bankruptcy clinic of the VLP serves clients in Multnomah, Washington, Clackamas, Yamhill, Columbia, Wasco and Hood River counties.
- The LASO Pendleton office uses pro bono attorneys for intake at several locations throughout its geographically wide service area.
- LCLAC uses both non-lawyers and lawyers for intake, to provide staffing in both the main office and Florence office.

Recommendation: Those attorneys who were pro bono volunteers and answered the survey agreed that they received adequate training and supervision and had positive experiences

volunteering. That said only 50% of those volunteers reported their volunteer hours to the organization. As this is a critical piece of information for the Oregon State Bar, the organizations should ensure that each volunteer reports his/her hours and that those hours are reported to the Oregon State Bar's Pro Bono Coordinator.

5) Achieving High Quality of Legal Services

Delivering high quality legal services is a fundamental requirement of the OSB LSP and the providers meet the requirements set out by the OSB LSP Standards and Guidelines. This area includes approaches for reviewing/supervising legal work, methods for assigning cases to legal staff, supervising support and fiscal staff, technical support, evaluating staff, training staff, recruiting and retaining diverse qualified staff and ensuring zealous advocacy of clients.

- a) **Technology:** Providers should utilize technology to support efficient operations and promote high quality and responsive service. The rapid and ongoing changes brought about by technology have a dramatic impact on how low income persons interact with their environment and with the legal system. Each provider has a responsibility to plan effectively how it will use technology in providing assistance to low income persons in its service area and in supporting its internal operations, including the production and management of legal work and the training and support of its staff. *ABA Standards for the Provision of Civil Legal Aid Standard 2.10 Use of Technology.*

LASO and OLC: LASO and OLC have incorporated the technologies that should be in a modern legal aid office today. They engage in adequate planning around needs and capacities; they have adequate funds budgeted for technology; they both use a robust case management system (CMS) that includes reporting features and access to client and case data and is available in real time in all regional offices. The CMS does document production, timekeeping, calendaring and conflicts checks. The CMS allows staff to generate reports, extract meaningful data for case supervision, plan, and evaluate programs and other purposes. All staff can access the system and database remotely. OLC and LASO work closely in development and innovation relating to the two statewide legal aid community websites OregonLawHelp and Oregon Advocates. OregonLawHelp is a statewide website that contains information for the client community. Oregon Advocates is a website to provide staff and pro bono lawyers with access to sample pleadings, briefs, motions and other documents. OLC and LASO coordinate closely in both planning and purchasing systems which achieves greater efficiencies.

LCLAC: LCLAC reports that its CMS system is old and its replacement is a high priority but additional grant funds must be sought to be able to buy a good CMS in the future. Some funds have also been set aside as a start on this need. LCLAC reports referring clients to Oregon Law Help but does not report using the Oregon Advocates website to access sample pleadings, briefs and other documents to assist practitioners.

Recommendation: It is recommended that LCLAC make it a priority to budget and plan for incorporating those technologies that should be in a legal aid office today. This includes an upgraded CMS and upgrading computer security systems.

CNPLS: CNPLS does not currently have the technologies that should be in a modern legal aid office today. This is due to the lack of resources. CNPLS was recently awarded a Meyer

Memorial Trust Foundation grant for \$85,000 to plan and implement a CMS system together with software and hardware needed to run the system. CNPLS reports referring clients to Oregon Law Help but does not report using the Oregon Advocates website to access sample pleadings, briefs and other documents to assist practitioners.

Recommendation: Use the grant funds to plan for and implement a new CMS system.

b) **Management Systems:** The providers report that they have systems in place to adequately review/supervise legal work, assign cases to legal staff and procedures for evaluating staff performance. They also report systems for appropriate legal research and investigation, provisions for ensuring client confidentiality and conflicts checks and provisions for zealous advocacy of clients' interests.

OLC and LASO: OLC and LASO specifically report that they have the same policies in place to assure that the regional offices provide quality services. The policies are outlined in two documents called Criteria for Operation of Offices and Criteria for Manager Evaluation. The criteria in both documents are the same because the regional managing attorneys are evaluated against whether the office criteria are met. The criteria covers important areas such as effectiveness of advocacy, setting advocacy goals, intake, management of legal work, community visibility, accessibility, private bar involvement, training and career development, office systems, OSB Standards and Guidelines and financial matters. Staff evaluations take place. LASO and OLC's collective bargaining agreement and the personnel policies for managers provide procedures for staff evaluations with regional managers evaluated every other year.

Every quarter LASO and OLC conduct quarterly managers meetings for all the managing attorneys. The agendas include topics such as "how to conduct a proper needs assessment" and "overcoming barriers to doing more systemic advocacy". The regional manager from Marion/Polk County commented on how helpful he finds the managers meetings both in substance and as a forum to interact with other managing attorneys.

Recommendation: LASO and OLC have incorporated best practices to assure the regional offices provide quality services. It is recommended that all providers adopt a similar set of criteria for operation of an office and for manager evaluation.

CNPLS: CNPLS reported that they have adequate systems in place for reviewing and supervising legal work, assigning cases to legal staff, supervising the work of fiscal and support staff and staff evaluation. It is not clear whether CNPLS has written management policies in place similar to LASO and OLC.

Recommendation: It is recommended that CNPLS adopt a set of criteria similar to that of LASO and OLC for operation of an office, and for manager and staff evaluations.

LCLAC: LCLAC's executive director retired the end of June, 2015. Two long time employees of LCLAC, John VanLandingham and Jean Beachdel, were appointed as co-directors on 10/1/2014. Mr. VanLandingham has taken on the responsibility of supervising the lawyers and Ms. Beachdel the support staff. LCLAC reports that in 2013 they developed a system for conducting staff evaluations for all staff which was replicated in 2014 and was slated again for July, 2015. LCLAC does not have written management policies in place similar to LASO and OLC.

Recommendation: It is recommended that LCLAC adopt a set of criteria similar to that of LASO and OLC for operation of an office, and for manager and staff evaluations.

Subcommittee Review of LCLAC: A LSP subcommittee is conducting a review of the delivery of legal services at LCLAC. The subcommittee will forward a report to the LSP Committee for further discussion.

Peer Survey: A peer survey was conducted of attorney partners, clients, judges, opposing counsel and community partners, all of whom are identified by the providers. A summary of the results are attached. The results are helpful for this review and also provide feedback to the providers from community stakeholders.

DRAFT

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 22, 2016
From: Helen Hirschbiel, Executive Director
Re: CSF Claim No. 2015-38 CAIN (Mitchell) Request for BOG Review

Action Requested

Consider claimant's request for BOG review of the CSF Committee's denial of his claim for reimbursement.

Discussion

In early 2013, James R. Mitchell and his renter had a dispute over the lease with an option to buy agreement between them. Mr. Mitchell filed a claim against the renter in small claims court and obtained a judgment in the amount of \$1,709.

Disappointed in the amount of the judgment, Mr. Mitchell consulted with attorney Jessica Cain to determine the viability of pursuing a motion for reconsideration. Mr. Mitchell gave Ms. Cain \$500 and his file materials and met with Ms. Cain once. He says he never heard from Ms. Cain after that initial meeting.

Ms. Cain reports that she agreed to review Mr. Mitchell's case for a flat fee of \$500. Her case notes from their meeting include a notation of "\$500 ff," but there is no written fee agreement. Ms. Cain says she spent approximately three hours reviewing the file documents and the recording of the hearing. She also maintains that she either left a message for Mr. Mitchell or spoke to him shortly thereafter to convey that she believed a request for reconsideration was not warranted. She says she heard nothing from Mr. Mitchell until a year later, when he left a couple of messages, which she acknowledges she did not return.

The Committee investigator reviewed the file provided by Ms. Cain. It contained approximately 60 pages of documents, photos, and the audio recording from the hearing (which was approximately 1.75 hours long). The file did not contain any notes indicating the date or time that Ms. Cain conveyed her opinion to Mr. Mitchell.

Mr. Mitchell requested an award of \$500 from the Client Security Fund—the full amount of money he paid to Ms. Cain. In order for a loss to be eligible for reimbursement, it must result from a lawyer's dishonest conduct. CSF Rule 2.2.1. Further, reimbursement of a legal fee is only allowed if the lawyer provided no legal services whatsoever or if the legal services were minimal or insignificant. CSF Rule 2.2.3.

The CSF Committee concluded that Ms. Cain did perform legal services for Mr. Mitchell, and that such services were more than de minimus. Moreover, the Committee found no evidence of dishonesty on Ms. Cain's part. Instead, the Committee determined that any claim Mr. Mitchell might have is, at best, a fee dispute.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 22, 2016
From: Helen Hierschbiel, Executive Director
Re: CSF Claim No. 2016-08 ALLEN (Reitz) Request for BOG Review

Action Requested

Consider claimant's request for BOG review of the CSF Committee's denial of his claim for reimbursement.

Discussion

In April 2012, Gregory A. Reitz engaged Sara Allen to represent him in his divorce. He paid her a \$3,000 retainer and signed a written fee agreement providing for services at the rate of \$225 per hour.

Shortly thereafter, Mr. Reitz's wife's lawyer, Mark Cottle, filed a Petition for Dissolution of Marriage. Ms. Allen prepared and filed a response and a motion and order for temporary support. Mr. Reitz contends that Ms. Allen was largely unprepared at the hearing for temporary support. In addition, she failed to file a Uniform Support Declaration, resulting in the Motion being denied. Ms. Allen subsequently filed the Uniform Support Declaration on Mr. Reitz's behalf, but Mr. Reitz was so disappointed in her performance at the hearing, that he fired her shortly after the hearing. Mr. Cottle's recollection of the hearing differed from that of Mr. Reitz. He said that Ms. Allen knew the materials and the case, but that Mr. Reitz was a difficult client.

Ms. Allen has entered a Stipulation for Discipline, stemming from six separate bar complaints, including a complaint by Mr. Reitz. According to the stipulation, Mr. Reitz asked for a refund, but Ms. Allen failed to pay any refund and failed to timely account for his \$3,000 deposit. The stipulation did not include a discussion of the services performed by Ms. Allen.

Mr. Reitz requested an award of \$3,000 from the Client Security Fund—the full amount of money he paid to Ms. Allen. In order for a loss to be eligible for reimbursement, it must result from a lawyer's dishonest conduct. CSF Rule 2.2.1. Further, reimbursement of a legal fee is only allowed if the lawyer provided no legal services whatsoever or if the legal services were minimal or insignificant. CSF Rule 2.2.3.

The CSF Committee denied the claim on several grounds. First, it concluded that Ms. Allen did perform legal services for Mr. Reitz, and that such services were more than de minimus. The Committee also found no evidence of dishonesty on Ms. Allen's part. Instead, the Committee determined that any claim Mr. Reitz might have is, at best, a fee dispute. Finally, Mr. Reitz failed to file the claim within two years of the discovery of Ms. Allen's conduct, as

required by CSF Rule 2.8. Mr. Reitz made no effort to collect from Ms. Allen in the meantime, and provided no good reason for his delay.

In his request for review, Mr. Reitz reiterates much of his original complaints about Ms. Allen. He does, however, provide additional explanation for the delay in submitting his claim for reimbursement from the Client Security Fund. He says that he suffers from PTSD which affects his memory.

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OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 22, 2016,
From: Helen Hierschbiel, Executive Director
Re: CSF Claim No. 2015-32 LANDERS (Koepke) Request for BOG Review

Action Requested

Consider claimant's request for BOG review of the CSF Committee's denial of his claim for reimbursement.

Discussion

In October 2011, Gregory Koepke hired Mary Landers to represent him in defense of multiple criminal charges in Josephine County Court. Judith Koepke (Mr. Koepke's mother) paid Ms. Landers \$15,075 for the representation, but never received a written fee agreement from her. Mr. Koepke is dissatisfied with the representation and seeks a full refund of the money his mother paid. He says she was sick a lot prior to trial and did not work on his case during that time.

Ms. Landers agrees that she was sick, but maintains that she worked on his case. She says that she and her investigator visited him several times and spoke with him on the phone almost daily. Mr. Koepke admits that she visited him three or four times and that her investigator visited him three times, and that he spoke with Ms. Landers on the phone three times. The court docket shows a release hearing was held on December 8, 2011, and trial was on December 20 and 21, 2011. There is no dispute that Ms. Landers represented Mr. Koepke at the hearing and trial. Mr. Koepke was found guilty on the assault II and menacing charges, and not guilty on the strangulation charge.

In his request for review, Mr. Koepke admits that he did receive a "new client information sheet" which set forth Ms. Lander's hourly rate at \$175 per hour, and her staff rate at \$75 per hour. He expresses particular concern that he never received any bills from Ms. Landers or accounting of her time. He concedes that she is entitled to payment "to some extent," but doesn't believe she is entitled to the full \$15,000 paid.

The CSF Committee investigator acknowledged problems with the representation and expressed understanding of Mr. Koepke's dissatisfaction with Ms. Lander's services. Nonetheless, the investigator found no evidence of dishonesty.

In order for a loss to be eligible for reimbursement, it must result from a lawyer's dishonest conduct. CSF Rule 2.2.1. Further, reimbursement of a legal fee is only allowed if the lawyer provided no legal services whatsoever or if the legal services were minimal or insignificant. CSF Rule 2.2.3.

The CSF Committee denied Mr. Koepke's claim on several grounds. First, it concluded that Ms. Landers did perform legal services for Mr. Koepke, and that such services were more than de minimus. The Committee also found no evidence of dishonesty on Ms. Lander's part. Instead, the Committee determined that any claim Mr. Koepke might have is, at best, a fee dispute. Finally, Mr. Koepke failed to file the claim within two years of the discovery of Ms. Lander's conduct, as required by CSF Rule 2.8. Mr. Koepke identifies his date of loss as January 2012, which is when his sentencing occurred. Mr. Koepke did not submit the claim until September 2015, over three years later. Mr. Koepke made no effort to collect from Ms. Landers in the meantime, and provided no good reason for his delay.

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FORMAL OPINION NO. 2005-106

Information ~~About~~about Legal Services:
Purchase of Tax Preparation Business ~~or Private Law Practice~~

Facts:

Lawyer ~~A~~ represents clients in tax matters. Lawyer ~~A~~ would like to purchase the tax preparation business of Tax Consultant, a licensed non-lawyer tax consultant. ~~Lawyer A also would like to purchase the private practice of Lawyer B because this practice is similar to Lawyer A's practice.~~

Question:

May Lawyer ~~A~~ make the purchases?

Conclusion:

See discussion Yes.

Discussion:

Neither the Oregon RPCs nor ORS chapter 9 prohibits the purchase of businesses by lawyers.¹ ~~such purchases. In fact, Oregon RPC 1.17 expressly contemplates the purchase and sale of a law practice.~~

~~However, Lawyer~~ Prior to the purchase of the business lawyer cannot ~~may not engage in improper~~ solicitation. ~~solicitation. Cf. Oregon RPC 5.6(a).~~² ~~However, Lawyer A,~~ however, Lawyer cannot use ~~this~~ these acquisitions directly or indirectly to engage directly or indirectly in improper in-person solicitation of additional clients. See Cf. Oregon RPC 8.4(a)(1) ~~(making it~~

¹ Oregon RPC 1.17 however does specify ethical rules related to the sale or purchase of a law practice.

² Oregon RPC 5.6(a) provides that a lawyer shall not participate in offering or making "a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except as agreement concerning benefits upon retirement." The present hypothetical involves none of the agreements listed above, nor a partnership.

professional misconduct for a lawyer to violate the Oregon RPCs “through the acts of another”); Oregon RPC 7.3 (generally limiting in-person, telephone, or real-time electronic solicitation);³ Oregon RPC 8.4(a)(1) (making it professional misconduct for a lawyer to violate

³ Oregon RPC 7.3 provides:

~~— (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 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.~~

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

~~— (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 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;

the Oregon RPCs “through the acts of another”). For example, Lawyer A could not, for example, make it an expressed or implied condition of the acquisition that Tax Consultant or Lawyer B solicit clients for Lawyer A.⁴ Oregon RPC 7.2;⁵ OSB ~~Formal Ethics~~ Formal Ethics Op No

(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 of the 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).

(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.

⁴ We express no opinion as to whether Tax Consultant is under any obligations of confidentiality that would prevent disclosure to Lawyer A.

⁵ Oregon RPC 7.2 provides:

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(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.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content. —(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 (c) 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

2005-2. Without endorsement or influence from Lawyer, Tax Consultant, however, and Lawyer B could, however may, inform their clients of their possible need for legal services respective transactions and inform them of Lawyer A's availability to do their work. without endorsement. However, if clients of the Lawyer are clients of the tax preparation business after purchase, Lawyer may solicit them as a prior business relationship exists.

If clients of Lawyer are also clients of the tax preparation business of Tax Consultant, Lawyer may be required to determine if Lawyer's business interest in the tax preparation business gives rise to a conflict of interest under RPC 1.7(a)(2).⁶ or RPC 1.8(a).⁷ Lawyer B,

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;

(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; and

(4) such plan, service or organization does not make communications that would violate Rule 7.3 if engaged in by the lawyer.

We express no opinion as to whether Tax Consultant is under similar obligations of confidentiality that would prevent disclosure to Lawyer A.

⁶ 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:

(1) . . .

(3) 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; . . .

⁷ RPC 1.8(a) provides

(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:

however, may be bound to See, e.g., Oregon RPC 1.17(c), which provides:

———The notice may describe the purchasing lawyer or law firm’s qualifications, including the selling lawyer’s opinion of the purchasing lawyer or law firm’s suitability and competence to assume representation of the client, but only if the selling lawyer has made a reasonable effort to arrive at an informed opinion.

If so, Lawyer may be required to obtain informed consent in writing from the client under RPC 1.7(b)(4) or RPC 1.8(a)(3), or may be required to withdraw from representation if the conflict may not be waived. A more detailed analysis of the ethical concerns and potential conflicts of a lawyer acting in multiple roles may be found in OSB Formal Ethics Op. No. 2006-176.

———~~Note, too, that a~~ Although Lawyer B is generally prohibited from disclosing information relating to the representation of a client, Oregon RPC 1.6(b)(6)⁸ permits the

(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;

(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.

⁸—Oregon RPC 1.6(b)(6) provides:

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

~~(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~~

~~disclosure to a potential purchaser of Lawyer B's practice by imposing the same duty of confidentiality on Lawyer A.~~

~~For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§2.6, 2.13–2.15, 2.23–2.27, 2.31, 12.9–12.11, 12.35, 12.39 (Oregon CLE 2003); and ABA Model Rules 7.2–7.3, 5.6(a), 8.4(a). See also Washington Formal Ethics Op No 192; Washington Informal Ethics Op. Nos. 927, 1260, 1953 (2001), 1965 (2001), 1998, 2055 (unpublished 2004), 2098 (2005).;~~

~~Approved by Board of Governors, August 2005 _____ 2016.~~

~~the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.~~

~~COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§2.6, 2.13–2.15, 2.23–2.27, 2.31, 12.9–12.11, 12.35, 12.39 (Oregon CLE 2003); and ABA Model Rules 7.2–7.3, 5.6(a), 8.4(a). See also Washington Formal Ethics Op No 192; Washington Informal Ethics Op Nos 927, 1260, 1953, 1965, 1998, 2055 (unpublished).~~

FORMAL OPINION NO. 2005-169
Information About Legal Services:
Firm Names—Retired Partner Mediator

Facts:

Lawyer *A* is a former partner in the *AB&C* Law Firm. Lawyer *A* has retired from the active practice of law but continues to practice as a mediator. Lawyer *A* also consults with members of the *AB&C* Law Firm and receives a salary from the firm. Lawyer *A*'s name continues to be used in the firm name and Lawyer *A* is identified on the firm's letterhead as "available solely as mediator." Lawyer *A* has ceased to maintain PLF coverage under ORS 9.080(2)(a), which requires coverage for lawyers "engaged in the private practice of law."

Questions:

1. May the *AB&C* Law Firm continue to use Lawyer *A*'s name in the firm name and list Lawyer *A* on the firm's letterhead as a mediator?
2. May Lawyer *A* work as a consultant within the firm if Lawyer *A* no longer maintains PLF coverage?

Conclusions:

1. Yes.
2. Yes, qualified.

Discussion:

Oregon RPC 7.5 provides:

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(e) 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 partner or associate. A lawyer may be designated as "General Counsel" or by a similar professional reference on stationery of a client if the lawyer of the lawyer's firm devotes a substantial amount of professional time in the representation of the client.

(a) — A lawyer may use professional announcement cards, office signs, letterheads, telephone and electronic directory listings, legal directory listings or other professional notices so long as the information contained therein complies with Rule 7.1 and other applicable Rules.

~~(c) A lawyer in private practice:~~

~~(1) shall not practice under a name that is misleading as to the identity of the lawyer or lawyers practicing under such name or under a name that contains names other than those of lawyers in the firm;~~

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~~_____ (3) _____ may use in a firm name the name or names of one or more of the retiring, deceased or retired members of the firm or a predecessor law firm in a continuing line of succession. The letterhead of a lawyer or law firm may give the names and dates of predecessor firms in a continuing line of succession and may designate the firm or a lawyer practicing in the firm as a professional corporation.~~

~~_____ (d) _____ Except as permitted by paragraph (c), a lawyer shall not permit his or her name to remain in the name of a law firm or to be used by the firm during the time the lawyer is not actively and regularly practicing law as a member of the firm. During such time, other members of the firm shall not use the name of the lawyer in the firm name or in professional notices of the firm. This rule does not apply to periods of one year or less during which the lawyer is not actively and regularly practicing law as a member of the firm if it was contemplated that the lawyer would return to active and regular practice with the firm within one year.~~

~~_____ (e) _____ Lawyers shall not hold themselves out as practicing in a law firm unless the lawyers are actually members of the firm.~~

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. (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;~~

~~_____ ...~~

~~_____ (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;~~

~~_____ ...~~

~~_____ (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.~~

These rules permit the use of Lawyer A's name in the firm name as long as the use of the name is not false or misleading. Because Lawyer A's professional activities are limited to mediation, which is not the practice of law, Lawyer A is retired within the meaning of Oregon RPC 7.5(e)(3). Although RPC 7.5 has been amended to more closely resemble the current version of ABA Model Rule 7.5, the ABA comments make it clear that a law firm may still use a retired lawyer's name in the firm name.¹ Accordingly, the AB&C Law Firm may continue to

¹ See, e.g., RPC 7.5 cmt [1] which provides in part: "it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer" (emphasis added). Other jurisdictions are in accord. See, e.g., DC Ethics Opinion 277 (November 1997), which concludes that "[a] law firm may retain in its

use Lawyer A's name in the firm name because Lawyer A is a former partner of the Firm, Lawyer A retired from the active practice of law (e.g. Lawyer A is not practicing at another law firm), and the Firm is clear about the services that Lawyer A may provide.

The firm may hold out Lawyer A as “available [to clients] solely as a mediator” if this representation is true and Lawyer A’s conduct is lawful. Under Oregon law, PLF coverage is required only of lawyers who engage in the private practice of law. ORS 9.080. Because mediation is not the practice of law, a lawyer who limits services to mediation is not required to have PLF coverage. *Cf. In re Kluge*, 332 Or 251, 27 P3d 102 (2001); *Balderree v. Oregon State Bar*, 301 Or 155, 719 P2d 1300 (1986). Moreover, Lawyer A can provide consulting advice to others engaged in the firm’s legal practice without personally practicing law. *See also* OSB Formal Ethics Op No 2005-65 (nonlawyer personnel may be listed as such on letterhead). Affected clients should be informed that Lawyer A’s participation is advisory only, and that Lawyer A does not assume responsibility for the handling of any client’s matter.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§ 2.19, 12.16 (Oregon CLE 2003~~6~~); ~~RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 58, 98 (2003)~~; and ABA Model Rules 7.1, 7.5.

name the name of a former partner, except where the former partner is practicing law elsewhere or where the firm is prohibited by law from retaining the name.” The Opinion explained that “at least as regards retired or deceased partners, ethics law has been clear since at least the time of the predecessor Code of Professional Responsibility that the names of such partners could ethically be included in law firm names.” See also Ethics Comm. of the Mass. Bar Assoc., Op. No. 81-5, (April 14, 1981) (concluding that it would be permissible to include the names of retired partners in firm name); Washington Advisory Opinion 2164 (2007) (providing that “[p]rior opinions of the Committee make clear that a firm may continue to use the name of a former partner where the former partner is deceased, fully retired or inactive, or maintains some ownership stake in the firm”).