

Oregon State Bar
Meeting of the Board of Governors
April 24, 2015
Open Session Minutes

The meeting was called to order by President Richard Spier at 1:08 p.m. on April 24, 2015. The meeting adjourned at 3:45 p.m. Members present from the Board of Governors were James Chaney, Guy Greco, R. Ray Heysell, Theresa Kohlhoff, Vanessa Nordyke, Ramon A. Pagan, Travis Prestwich, Kathleen Rastetter, Joshua Ross, Kerry Sharp, Simon Whang, Charles Wilhoite, Timothy Williams and Elisabeth Zinser. Not present were Per Ramfjord, Audrey Matsumonji, and John Mansfield. Staff present were Sylvia Stevens, Helen Hierschbiel, Rod Wegener, Susan Grabe, Dawn Evans, Kay Pulju, Mariann Hyland, Judith Baker, Dani Edwards, Terry Wright and Camille Greene. Also present was Carol Bernick, PLF CEO; Julia Manela, PLF Chair; Karen Clevering, ONLD Chair; Dana Sullivan, MBA President; Daniel Zene Crowe and Thomas Flaherty, OSB Military and Veterans Law Section; and Matthew Ellis, OSB Civil Rights Section.

1. Call to Order/Adoption of the Agenda

The board accepted the agenda, as presented, by consensus.

2. Report of Officers & Executive Staff

A. Report of the President

As written. Mr. Spier announced the retirement party for Ms. Stevens will take place on December 10, 2015.

B. Report of the President-elect

Mr. Heysell reported on the BLI leadership conference in Chicago and the value of connecting with other states' bar members who share similar concerns.

C. Report of the Executive Director

As written. Ms. Stevens also gave an update on the status of the AMS system, BOG reimbursements, and that there are 19 employees who have worked at OSB for 20 years or more.

D. Director of Regulatory Services

As written.

E. Director of Diversity & Inclusion

In addition to her written report, Ms. Hyland reported on the new Access to Justice Fellowship, and the Diversity Action Plan first year implementation report. Mr. Whang encouraged board members to attend the OLIO event in Bend this summer.

F. MBA Liaison Reports

Mr. Whang reported on the March 4, 2015 and April 2, 2015 MBA board meetings and the effectiveness of the good relationship between the MBA leadership and the BOG.

G. Oregon New Lawyers Division Report

In addition to the written report, Ms. Clevering reported on the success of the ONLD CLEs in Eugene and the Bingo social in Salem. The ONLD started a new law school outreach program with liaisons at each school. It has received a request for more information about the Practical Skills through Public Service program from the North Carolina bar association.

3. Professional Liability Fund

Ms. Bernick presented the PLF's request for approval of the changes to the PLF Policy 6.200(F).

Motion: Ms. Zinser moved, Ms. Nordyke seconded, that the board voted unanimously to approve the changes as requested. **[Exhibit A]**

4. Multnomah Bar Association

Ms. Sullivan updated the board on MBA activities, and facts about its members. The MBA conducted a survey on its 4200 members and found the majority are solo practitioners or in smaller firms. The MBA board is considering forming a section for this strata of the membership. The work of the MBA Courthouse Committee is coming to fruition: the Multnomah County Board of Commissioners has selected the site for the new courthouse near the Hawthorne Bridge. The MBA's Young Lawyer Section is active and offering several programs for new lawyers, veterans and mentors. The MBA is committed to diversity and supports the Explore the Law Program at PSU. Mr. Pagan agreed that the MBA is active with the specialty bars in Oregon.

5. OSB Committees, Sections and Councils

A. Legal Services Program Committee

Ms. Baker presented the committee's recommendation to not disburse any of the annual unclaimed client funds for 2015, so as to safeguard funds belonging to others and to ensure that those funds are available to return to the persons entitled.

Motion: Mr. Greco moved, Mr. Sharp seconded, and the board voted unanimously to approve the committee's recommendation. **[Exhibit B]**

B. Legal Ethics Committee

Ms Hirschbiel asked the board to consider the recommendation of the Legal Ethics Committee to adopt the Formal Ethics Opinion re: Third Party Payors. **[Exhibit C]**

Motion: Ms. Kohlhoff moved, Mr. Williams seconded, and the board voted unanimously to approve the committee's recommendation.

Ms Hirschbiel asked the board to consider the LEC's recommendation to adopt the proposed "housekeeping" amendments to the following formal ethics opinions: 2005-31, 2005-141, 2005-150, 2005-158, 2005-168, 2005-175, 2011-186, 2011-187, 2011-188. **[Exhibit D]**

Motion: Mr. Pagan moved, Mr. Greco seconded, and the board voted unanimously to approve the EOP updates as recommended by the committee.

C. OSB Military and Veterans Law Section

Mr. Flaherty and Mr. Crowe presented the section's request that it be allowed to solicit funds to establish the Oregon Veterans Legal Clinic at Willamette Law School with a view toward creating an endowment that would support the salary of a clinic administrator. Willamette would supply the space at no cost. Students would work in the clinic under the supervision of one or more adjunct professors who would be paid by a third party. **[Exhibit E]** Mr. Spier requested that Ms. Stevens arrange a future meeting to hear a further proposal from Mr. Crowe and Mr. Flaherty as to how this project fits in with the mission of bar sections.

D. OSB Civil Rights Section

Mr. Ellis presented background for the section's request to file a complaint with BOLI against Kaiser Permanente for the denial of the use of meeting space at the North Interstate Kaiser Permanente Town Hall. Mr. Wilhoite recommended the section try again to make contact with Kaiser to give them a chance to make amends. Mr. Chaney questioned the section's delay in bringing this to the board's attention. Mr. Ellis said the section was delayed as they gave Kaiser time to respond to the section's letter. Mr. Wilhoite offered to contact Kaiser on the section's behalf. The matter failed for lack of motion. Mr. Wilhoite will report back to the board after he is in contact with Kaiser.

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

A. Budget and Finance Committee

Ms. Kohlhoff gave a general committee update. In October the staff will present their 2016 draft budgets and the board will vote on the final budget in November.

B. Governance and Strategic Planning Committee

Mr. Heysell presented the committee's proposed amendments to OSB Bylaws regarding the Board of Bar Examiners. **[Exhibit F]**

Motion: Mr. Heysell moved, Mr. Greco seconded, and the board voted unanimously to waive the one meeting notice requirement for amending the bylaws.

Motion: The board unanimously approved the committee motion to amend the various bylaws.
Mr. Heysell briefly reviewed other issues under consideration by the Committee.

C. Public Affairs Committee

Mr. Prestwich and Ms. Grabe updated the board on the latest legislative activity and the status of the bar's law improvement proposals.

D. Executive Director Selection Special Committee

Mr. Heysell gave an update on the committee's progress.

7. Other Action Items

Ms. Edwards presented various appointments to the board for approval calling the board's attention to the two additional positions on the Legal Ethics Committee. **[Exhibit G]**

Motion: Mr. Greco moved, Ms. Nordyke seconded, and the board voted unanimously to approve the appointments.

Mr. Spier discussed the establishment of an annual Scholar in Residence and a President's Legal Scholarship Award and requested an OSB staff person study the issue and report back to the board.

Ms. Pulju presented the Public Service Advisory Committee's report on Workers Compensation in Lawyer Referral Service. The committee recommended that the BOG take no action until the completion of the Modest Means pilot program.

Ms. Hyland asked the board to consider whether to sign on to the ABA Commission on Disability Rights "Pledge for Change," designed to increase awareness of disability diversity in the legal profession. **[Exhibit H]**

Motion: Mr. Greco moved, Ms. Kohlhoff seconded, and the board voted unanimously to have the bar sign on the pledge.

Ms. Wright, OSB Legal Opportunities Coordinator, reported on the encouraging progress of her work.

Mr. Spier asked the board to consider whether to support the proposed ABA resolution to establish a privilege for confidential communications between a client and a lawyer referral service. **[Exhibit I]**

Motion: Mr. Chaney moved, Mr. Pagan seconded, and the board voted unanimously to support the proposed ABA resolution.

8. Consent Agenda

Motion: Mr. Greco moved, Mr. Pagan seconded, and the board voted unanimously to approve the consent agenda of past meeting minutes.

9. Closed Sessions – see CLOSED Minutes

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

Motion: Mr. Greco moved, Mr. Whang seconded, and the board voted unanimously to enter into a cease and desist agreement with Mr. Bolton

10. 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 24, 2015
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 Litigation

The UPL Committee recommends the Board approve the cease and desist agreement negotiated with Mr. Bolton.

Motion: Mr. Greco moved, Ms. Nordyke seconded, and the board voted unanimously to approve the cease and desist agreement as negotiated with Mr. Bolton.

B. Pending or Threatened Non-Disciplinary Litigation

Ms. Pulju reported on the five-year contract with Legal Interactive. We are three years into the contract and the company is non-responsive and our payment was returned. OSB sent a notice of intent to end the contract with Legal Interactive.

C. Other Action Items

Executive Session agenda item C1 was withdrawn.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 24, 2015
Memo Date: February 10, 2015
From: Carol Bernick – PLF CEO
Re: PLF Policy 6.200(F)



Action Recommended

Please approve the recommended changes to PLF Policy 6.200(F). These revisions were approved by the PLF Board of Directors at its February 6, 2015 board meeting.

Background

In a recent review of PLF Policy 6.200, it was revealed that Policy 6.200(F) had not been updated when some other OAAP policies and protocols were changed. To bring it into alignment with our current OAAP practices and policies, we are requesting that the board amend the policy as follows:

Current policy reads:

(F) The OAAP will not maintain records of participant's names or the nature of participation. Statistical data will be maintained including the number of people utilizing the OAAP. Statistical reports will be produced periodically as requested by the program Director.

Proposed amendment is as follows:

(F) The OAAP will maintain statistical data, including the number of people accessing the OAAP and the type of services provided. Statistical reports will be produced periodically as requested by the OAAP executive director. The reports will not disclose the identity of any person who has received assistance from the OAAP.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 24, 2015
Memo Date: April 10, 2015
From: Legal Services Program Committee
Re: 2015 Disbursal of Unclaimed Client Funds

Action Recommended

1) Approve the LSP Committee's recommendation to not disburse any of the annual unclaimed client funds for 2015.

2) Approve disbursing the Strawn v Farmers class action unclaimed client funds as outlined below.

Background

Unclaimed or abandoned client funds held in a lawyers' trust account are sent to the Oregon State Bar (OSB), pursuant to ORS 98.386. Revenue received is used for the funding of legal services by the legal aid providers, the payment of claims and the payment of expenses incurred by the OSB in the administration of the Legal Services Program.

In 2012 the BOG approved a disbursement and reserve policy for the unclaimed client funds. The policy was that \$100,000 be held in reserve to cover potential claims and distribute the revenue that arrives each year above that amount. The amount of funds disbursed changes from year to year depending on the unclaimed funds received and claims made each year. The OSB also entered into an agreement with the legal aid providers whereby the legal aid providers agree to reimburse the OSB if the reserve gets diminished or depleted. This disbursement and reserve policy was followed in 2013 and 2014.

Annual Unclaimed Fund

There is currently \$124,022 in the Annual Unclaimed Fund which is \$24,022 above the \$100,000 left in reserve to cover potential claims (see attached ULTA Report as of 2/28/15). There are two reasons not to follow the disbursement and reserve policy outlined above by disbursing the \$24,022. The two reasons are as follows:

- There have been several large claims made in 2014. It is becoming apparent that owners will eventually find the large outstanding claims. There are currently six claims outstanding each over \$10,000. (see attached Outstanding Unclaimed Funds)
- Since 2010, financial institutions have remitted to the Oregon State Bar \$40,851 from 63 lawyer trust accounts. Of this total, \$31,352 came from 26 lawyer trust accounts owned

by lawyers who are still active members of the Oregon State Bar. These lawyers have a professional obligation to safeguard funds belonging to others and to ensure that those funds are paid to persons entitled to receive them. RPC 1.15-1. The BOG is considering what steps if any need to be taken concerning the trust accounts forwarded by financial institutions.

Unclaimed Client Funds Strawn Farmers Class Action

2014

The LSP Program received approximately \$520,000 in one time unclaimed client funds from the Strawn v Farmers Class Action. On April 25, 2014 the BOG approved distributing the one-time funds in equal amounts over three years with 1/3 of the funds being disbursed in 2014 and the remainder of the funds held in reserve. The funds were allocated by poverty population with 6% going to the Center for Nonprofit Legal Services (CNPLS), 11% to Lane County Legal Aid and Advocacy Center (LCLAAC) and 1% to Columbia County Legal Aid (CCLA). The remaining 82% which is usually divided by Legal Aid Services of Oregon (LASO) and the Oregon Law Center (OLC) for statewide services was allocated entirely to LASO. CNPLS received its full three year allocation in 2014 because it was experiencing severe funding decreases.

2015

The Oregon State Bar has held the Strawn Farmers Class Action funds for over a year. As of February 28, 2015, there have been 15 claims made totaling \$16,767 and there is \$310,786 left in the fund. (See attached ULTA Report as of 2/28/15).

The 2015 recommendation is to continue last year's approved distribution method which is to distribute 1/2 of the remaining funds or \$155,000 leaving approximately \$155,000 in reserve to cover future claims. The funds will be allocated by poverty population with 11% to LCLAAC and 1% to CCLA. Similar to last year the remaining 82% will go to Legal Aid Services of Oregon (LASO) to cover statewide services. CNPLS will not receive funding because they received their full three year allocation in 2014.

Each program will received the following amounts:

LCLAAC - \$17,050
CCLA - \$1,550
LASO - \$136,400

[PROJECT 12-04]

PROPOSED FORMAL ETHICS OPINION NO. 2014-XXX**Lawyer Indemnification of Defendant for Failure to Reimburse,
or Set Aside Sufficient Funds to Reimburse Third Party Payer for
Medical Expenses Already Advanced, or for future Liability under
Medicare Secondary Payer Act****Facts:**

Lawyer A represents Party A against Party B in a personal injury case. Party A's Third Party Payers¹ have advanced funds to provide medical care for injuries related to the claims Party A asserts against Party B.

In order to settle Party A's case, Party B asks Lawyer A to join with Party A, as a condition of the disbursement and receipt of settlement proceeds, to agree to indemnify Party B, and his/her insurers, agents, and lawyers (collectively "representatives"), for any failure to reimburse, or set aside sufficient funds to reimburse, the Third Party Payer for medical expenses already advanced and for future liability under the Medicare Secondary Payer Act.

Questions:

1. As a condition of receipt and disbursement of settlement proceeds, may Lawyer A join with Party A in agreeing to indemnify Party B and her/his representatives for a failure to reimburse, or set aside sufficient funds to reimburse, Third Party Payers for medical expenses already advanced for Party A's care?²

2. As a condition of receipt and disbursement of settlement proceeds, may Lawyer A join with Party A in agreeing to indemnify Party B and her/his representatives for a failure to reimburse, or set aside sufficient funds to reimburse, Third Party Payers for future payment of Party A's care?³

¹ By "Third Party Payer" we mean Medicare under the current law. As mandatory insurance coverage expands, the definition of Third Party Payer may also change.

² Example of indemnification language: "I and my lawyer hereby agree to satisfy and hold defendant harmless from any and all bills, liens, subrogation claims, or other settlement rights or interests, whether known or unknown, including but not limited to any claims, demands, liens of Welfare, or conditional payment claims of Medicare or Medicaid, arising out of the above described incidents or events, the consequences thereof, or any medical care or treatment obtained as a result thereof or any expense incurred as a result."

³ Example of indemnification language: "I and my lawyer hereby agree to hold harmless, defend, and personally indemnify the settling party, as well as the settling party's corporations, hospital, clinics, officers, directors, shareholders, employees, agents, assigns, lawyers, and professional liability insurance companies, should the I and my lawyer fail to establish, obtain approval for, and/or fund a Medicare set-aside account."

Conclusions:

1. No.
2. No.

Discussion:

Question 1 involves a proposed indemnification for an amount hypothetically known, but not yet quantified or asserted by the Third Party Payer.⁴

Question 2 involves a proposed indemnification for an amount that is unknown and might never materialize. Under Question 2, a MSA may never be required because an amount may never materialize, in which case lawyer will never be liable for indemnification. If, however, the funds have been disbursed, and a MSA is then required, the client may be financially unable to deposit funds into the MSA when called upon to do so, making the lawyer squarely liable for indemnification.

Lawyer A's agreement to join with Party A to indemnify Party B as part of any settlement agreement is proscribed by Oregon RPC 1.7, which provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

⁴ Assume that: (i) Medicare is Party A's primary third party payer; (ii) Party A suffers from a pre-existing condition, chronic fibromyalgia; and (iii) Medicare pays for the pain management treatment. Party A's "claim" is based upon an automobile accident. Before submitting its claim for "conditional payment," Medicare must determine which portion of the current round of pain management was for treatment of the pre-condition (fibromyalgia) and which portion was related to the automobile accident. This situation will result in a delay of Medicare's "claim" for reimbursement for an undetermined period of time.

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.

By joining with Party A to indemnify Party B and his/her representatives, Lawyer A would become a surety for Party A and Party A's duty to pay present and future medical providers.⁵ As a surety, Lawyer A would have inchoate claims against Party A that could mature into claims against Party A if Party A fails to pay the third party payer or establish a required MSA.⁶ Those inchoate claims could include claims for reimbursement, restitution, and subrogation.⁷ As a result, there is a significant risk that Lawyer A's personal interest in avoiding such liability would materially limit Lawyer A's representation of Party A, the client. For example, lawyer may recommend that client reject an offer of settlement that is in the client's interest, but not in the lawyer's interest. Moreover, in advising client regarding whether to use settlement funds to pay Third Party Payer, lawyer's own interests in avoiding personal liability would likely interfere with lawyer's independent professional judgment in advising the client.

Notwithstanding the conflict, Oregon RPC 1.7(b) might allow Lawyer A to continue representation of Party A with Party A's informed consent, confirmed in writing.

⁵ *U.S. v. Frisk*, 675 F.2d 1079, 1083 (9th Cir,1982);

⁶ *South Trust Bank of Alabama, N.A. v. Webb-Stiles Co., Inc.*, 931 So.2d 706; 712 (2005)

⁷ Restatement (Third) of Surety and Guaranty §§ 22, 26, and 27 (1996)

Even if that were achieved, however, Oregon RPC 1.8(e) would still prevent Lawyer A from agreeing to indemnify Party B in either scenario. Oregon RPC 1.8(e) provides:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Lawyer A's agreement to indemnify Party B and his/her representatives for not yet quantified conditional medical payments advanced by Third Party Payers for Party A's expenses would constitute "financial assistance" to Party A. The indemnification agreement in Question 1 would require Lawyer A to pay the pre-settlement medical expenses if Party A fails to do so. Correspondingly, the indemnification agreement presented in Question 2 would require Lawyer A to fund a MSA for future medical expenses if Party A fails to do so. In either case, Lawyer A would be providing financial assistance to Party A, the client.

FORMAL OPINION NO. 2005-31
Information About Legal Services:
Improper Use of Titles

Facts:

Lawyer A is a part-time ~~justice of the peace~~ judge. Lawyer B is a member of the state legislature.

Questions:

1. Is it ethical for Lawyer A's ~~office secretary-receptionist~~ to answer the telephone at Lawyer A's legal office by stating "Judge _____'s office"?
2. Is it ethical for Lawyer B's ~~office secretary-receptionist~~ to answer the telephone at Lawyer B's legal office by stating "Senator _____'s office"?

Conclusions:

1. No.
2. No.

Discussion:

Oregon RPC 7.1(a) 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.~~

~~Similarly, Oregon RPC 8.4(a)(5) makes it professional misconduct for a lawyer to "state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law, . . ."~~

~~Although the name of a lawyer holding public office may be used as part of a law firm's name during the period in which the lawyer is actively and regularly practicing at the law firm, cf. Oregon RPC 7.5(c)¹, 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 Oregon RPC 7.5(c) provides:

~~The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.~~

____ (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; [or]

____ (5) ____ states or implies an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law.

Answering the public reception telephone at a private law office by referring to a lawyer's judicial or legislative position would violate both Oregon RPC 7.1(a)(1) and 8.4(a)(5). Cf. OSB Formal Ethics Op No 2005-7.²

Approved by Board of Governors, August 2005.

COMMENT: For more information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§2.9, 14.5 (Oregon CLE 2006~~3~~); and ABA Model Rule 7.1 (substantially shorter than Oregon's version). Cf. OSB Formal Ethics Op Nos 2005-169 (law firm may continue to use in firm's name the name of former partner who has retired from active practice of law, but continues to practice as mediator, if use of lawyer's name is not misleading), 2005-109 (Oregon law firm that contracts with Washington law firm to represent Washington law firm's clients in Oregon, whenever clients consent and RPCs permit, may identify Washington law firm on its letterhead as "associated office" and may permit itself to be advertised on Washington law firm's letterhead as associated office), 2005-12 (Lawyers A, B, and C, who maintain separate practices but share office space, may not hold themselves out as "associates" or "of counsel" and may not practice under name "A, B & C, Lawyers").

² As a part-time judge, Lawyer A's conduct may also be governed by the Oregon Code of Judicial Conduct. Lawyer A should be careful to not misuse the prestige of judicial office by attempting to gain personal advantage at a private law practice. See Oregon Code of Judicial Conduct Rule 2.2.

FORMAL OPINION NO. 2005-141
Information Relating to the Representation of a Client:
Recycling of Documents

Facts:

Law Firm would like to contract with a recycling service to dispose of legal documents and other office paper that may contain information relating to the representation of clients.

Question:

May Law Firm recycle client documents using a recycling service?

Conclusion:

Yes.

Discussion:

Except under limited circumstances, a lawyer is prohibited from revealing information relating to the representation of a client. Oregon RPC 1.6.¹

¹ Oregon RPC 1.6 provides:

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

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

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment

Oregon RPC 5.3 provides:

With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:

- (a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person,

information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6. 2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

~~to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve confidences and secrets of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.~~

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§6.2–6.7 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§11, 59–60 (2003); and ABA Model Rule 5.3.

and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The reality of modern law practice requires disposal of a great deal of paper, some of which will contain information protected by Oregon RPC 1.6. Oregon RPC 1.6(c) requires lawyers to take reasonable efforts to prevent the inadvertent or unauthorized access. As long as Law Firm makes reasonable efforts to ensure that recycling company's conduct is compatible with Law Firm's obligation to protect client information, the proposed contract is permissible. Reasonable efforts include, at least, instructing the recycling company about Law Firm's duties pursuant to Oregon RPC 1.6 and obtaining its agreement to treat all materials appropriately. *See also* OSB Formal Ethics [Op Nos 2005-129, 2005-44](#).

Approved by Board of Governors, August 2005.

FORMAL OPINION NO. 2005-150

Competence and Diligence: Inadvertent Disclosure of Privileged Information

Facts:

Lawyer A inadvertently includes a privileged document in a set of documents provided to Lawyer B in response to a discovery request. Lawyer A discovers the mistake, calls Lawyer B, and asks Lawyer B to return the privileged document without examining it further.

Question:

Must Lawyer B return the document?

Conclusion:

No, qualified.

Discussion:

Oregon RPC 4.4(b) provides:

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

~~(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.~~

~~It may be helpful to begin with what the rule does not say. It does not distinguish between litigation and nonlitigation situations, it is not limited to documents containing information protected by Oregon RPC 1.6, and it is not limited to documents sent by another lawyer.¹ Moreover, the rule applies whether or not the recipient lawyer reads the document before learning that it was inadvertently sent.~~

~~By its express terms, Oregon RPC 4.4(b) does not require the recipient of the document to return the original nor does it prohibit the recipient from openly claiming and litigating the right to retain the document if there is a nonfrivolous basis on which to do so. The purpose of the rule is to notify the sender and permit her ~~permit the sender~~ to take adequate protective measures, such as seek return of the documents through court order. ABA Model Rule 4.4(b) cmt. 2. The obligation of a lawyer to do anything beyond notify the sender, such as return the document, is a legal matter beyond the scope of the Oregon RPCs. Id.; see *Goldsborough v. Eagle Crest Partners, Ltd.*, 314 Or. 336, 343, 838 P.2d 1069, 1073 (1992) (establishing that the determination of waiver of privilege by inadvertent disclosure is a preliminary issue of fact to be determined~~

¹ Although Oregon RPC 4.4(b) requires notice to the “sender,” we assume that, pursuant to Oregon RPC 4.2, notice should be given to the sender’s counsel if the recipient knows that the sender has counsel.

~~by the trial court under OEC 104). ; whether the recipient lawyer is required to return the documents or take other measures is a matter of law beyond the scope of the Oregon RPC, as is the question of whether the privileged status of such documents has been waived. ABA Model Rule 4.4(b) comment [2].² Cf. ABA Formal Op Nos 94-382, 92-368. Cf. *Goldsborough v. Eagle Crest Partners, Ltd.*, 314 Or 336, 838 P2d 1069 (1992) (waiver by disclosure in response to discovery request; no evidence of mistake, inadvertence, or lack of client authorization); *GPL Treatment, Ltd. v. Louisiana Pacific Corp.*, 133 Or App 633, 638-639, 894 P2d 470 (1995), *aff'd on other grounds*, 323 Or 116 (1996) (no error in trial court's exclusion of evidence on determination of no waiver by inadvertent disclosure, no awareness by sender of recipient's intent to offer as evidence until offered at trial). Comment [3] to the ABA Model Rule 4.4(b), which Oregon RPC 4.4(b) follows, also suggests that a lawyer's decision on whether to return, destroy, or delete an inadvertently sent document unread is a matter of professional judgment ordinarily reserved to the lawyer.³~~

~~RPC 4.4(b) does not distinguish between litigation and non-litigation situations.— Further RPC 4.4(b) is not limited to documents containing information protected by Oregon RPC 1.6, and it is not limited to documents sent by another lawyer.⁴ Indeed, RPC 4.4(b) also applies to an electronic document's metadata that may be hidden within an electronic document. See OSB Formal Op. 2011-187 (2011). Moreover, the rule applies whether or not the recipient lawyer reads the document before learning that it was inadvertently sent.~~

~~However, if applicable court rules, stipulations or court orders, or substantive law require a lawyer to return documents or to cease reading documents as soon as the lawyer realizes that they were inadvertently produced, a lawyer who does not do so would be subject to discipline or disqualification on other grounds. See, e.g., Oregon RPC 3.3(a)(5) (lawyer shall not “knowingly . . . engage in other illegal conduct”); Oregon RPC 3.4(c) (lawyer shall not “knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists”); Oregon RPC 8.4(a)(4) (prohibiting “conduct that is prejudicial to the administration of justice”); *Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wa. 2001) (disqualifying counsel for retaining and using privileged materials). Further, when the delivery of privileged documents is the result of other circumstances aside from the sender's inadvertence, Oregon RPC 4.4(b) does not apply. See OSB Formal Op. No. 2011-186 (2011); ABA Formal Op. No. 06-440.~~

~~COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §6.9 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§120, 105, 110 (2003); and ABA Model Rule 4.4.~~

²~~—The comment to the ABA Model Rule also suggests that a lawyer's decision whether to return an inadvertently sent document unread is a matter of professional judgment ordinarily reserved to the lawyer in accordance with Oregon RPC 1.2 and 1.4.~~

~~—COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §6.9 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§120, 105, 110 (2003); and ABA Model Rule 4.4.~~

Approved by Board of Governors, August 2005.



FORMAL OPINION NO. 2005-158
Conflicts of Interest, Current Clients:
Representing Driver and Passengers in
Personal Injury/Property Damage Claims

Facts:

Lawyer is asked to represent both the driver and the passengers of the same motor vehicle in personal injury/property damage claims for negligence against the adverse driver.

Questions:

1. May Lawyer represent both the driver and the passengers if there is a question concerning the liability of the driver for any injury suffered by the passengers?
2. May Lawyer represent both the driver and the passengers if the passengers merely make claims against the driver's insurance for personal injury protection (PIP) benefits?
3. May Lawyer represent both the driver and the passengers if the aggregate available assets, including insurance, of the adverse driver are insufficient to cover all claims?

Conclusions:

1. No, qualified.
2. Yes.
3. No, qualified.

Discussion:

This opinion deals only with multiple current-client conflicts of interest in the specific context of a driver and passengers who are in the same motor vehicle that collides with another motor vehicle and have suffered personal injuries or property damage as a result of that collision. Other multiple current-client conflicts-of-interest problems are dealt with in various other opinions. *See* OSB Formal Ethics Op Nos 2005-27 (representing trade association and member), 2005-30 (representing insurer and insured), 2005-46 (group legal assistance plans), 2005-82 (representing multiple defendants in a criminal matter), 2005-86 (representing husband and wife in bankruptcy, wills, and dissolution).

Oregon RPC 1.7 provides:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client;
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
- (4) each affected client gives informed consent, confirmed in writing.

Oregon RPC 1.0(b) and (g) provide:

(b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

....

(g) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

Additionally, Oregon RPC 1.8(g) provides:

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

The analysis for determining the existence of conflicts between multiple current clients requires the following steps:

- (1) Determine who is or will be, and who is not and will not be, a client.
- (2) Determine whether there is direct adversity or other conflict within the meaning of Oregon RPC 1.7(a).
- (3) Determine whether any such conflict can or cannot be waived pursuant to Oregon RPC 1.7(b).

(4) Obtain any required waivers by informed consent and do not represent parties as to whom a nonwaivable conflict exists.

(5) Monitor the waivable conflicts of interest during the representation to determine whether additional disclosure or subsequent withdrawal is required.

Conflicts between multiple plaintiffs in motor vehicle cases can arise over both liability and damages issues.

1. *Simultaneous Representation When the Plaintiff Driver's Liability Is an Issue.*

If the driver has no liability for the injury of the passengers, there is no conflict that would limit or prohibit simultaneous representation of both the driver and the passengers. However, contributory fault is often asserted by the adverse driver or may be discovered during the course of the representation. This defense may create a nonwaivable conflict of interest that prohibits the simultaneous representation. If the nonwaivable conflict is discovered after the representation has commenced, it will require Lawyer to stop representing both the driver and the passengers unless either the driver or the passengers agree to become former clients and consent to Lawyer's continued representation of the other. *See Oregon RPC 1.9; OSB Formal Ethics Op Nos 2005-11, 2005-17.*

The mere fact that the defendant has alleged contributory fault by the driver does not necessarily create a nonwaivable conflict. The passengers may disagree with the adverse driver's factual contentions or, if the driver and the passengers are closely related, the passengers may not wish to pursue intrafamily claims. Assuming that these decisions not to pursue claims are made voluntarily and without influence arising from Lawyer's obligations to the driver, a nonwaivable conflict does not exist.

Nevertheless, and even in the limited situations in which the passengers do not wish to pursue a claim against the driver, the defendant's contributory fault claim may have a significant effect on the passengers' recovery. Although this possibility might not create a nonwaivable or even waivable conflict between the driver and the passengers, Lawyer should still consider the matter and, if appropriate, review it with the prospective clients and obtain any necessary consent.

2. *Simultaneous Representation and PIP Claims.*

There is no conflict of interest in this situation because personal injury protection (PIP) benefits are based on a per capita and not on an aggregate limit and are not based on the fault of the driver. ORS 742.520, 742.524. Lawyer may proceed to represent passengers in a claim against the driver's insurance carrier for PIP benefits.

3. *Simultaneous Representation When Resources Are Insufficient to Cover All Claims.*

There is no conflict of interest if Lawyer knows that the aggregate resources available to the driver and the passengers are adequate to cover all possible claims.¹ If, however, an

¹ Oregon RPC 1.0(h) provides:

aggregate ~~or all or nothing~~ settlement is offered, the special requirements of Oregon RPC 1.8(g), quoted above, must be met.²

If, over time, the client damages escalate and the aggregate resources become inadequate to cover all damages for all clients insofar as they can reasonably be estimated or assessed,³ Lawyer can continue the representation only if all clients consent after full disclosure to limit Lawyer's representation to collecting all possible resources from the adverse party or parties.⁴ This consent should be obtained no later than the time at which it is learned that the aggregate of defense resources is inadequate. The clients may agree, however, to accomplish any subsequent division of resources through mediation or arbitration. Lawyer can assist in establishing the mediation or arbitration process and in providing information to all affected clients but cannot actively represent one current client against another current client.

Approved by Board of Governors, August 2005.

“Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question, except that for purposes of determining a lawyer’s knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person’s knowledge may be inferred from circumstances.

² In *In re Gatti*, 356 Or 32 (2014), the Oregon Supreme Court adopted the following American Law Institute definition of “aggregate settlement,” as that term is used in RPC 1.8(g):

“Definition of a Non-Class Aggregate Settlement

‘(a) A non-class aggregate settlement is a settlement of the claims of two or more individual claimants in which the resolution of the claims is interdependent.

‘(b) The resolution of claims in a non-class aggregate settlement is interdependent if:

‘(1) the defendant’s acceptance of the settlement is contingent upon the acceptance by a number or specified percentage of claimants; or

‘(2) the value of each claim is not based solely on individual case-by-case facts and negotiations.’”

Gatti, supra, a 48 (quoting from PRINCIPALS OF LAW OF AGGREGATE LITIGATION § 3.16).

³ A lawyer is not required, for example, to value the cases on an unreasonably and unrealistically high basis.

⁴ See the discussion in THE ETHICAL OREGON LAWYER §§9.1, 9.9 (Oregon CLE 2003).

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER, *supra*, §§2.2, 3.5, 3.13, 9.14; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§121, 128 (2003); and ABA Model Rules 1.7–1.8.

FORMAL OPINION NO. 2005-168
Lawyer-Owned Lawyer Referral Service

Facts:

Lawyer wishes to open a for-profit lawyer referral service available to the public. The service will be called “XYZ Lawyer Referral Service.” Lawyer will be the sole owner of XYZ, which Lawyer plans to incorporate as an independent entity. Lawyer plans to advertise the service in the local media.

Lawyer intends to operate XYZ Lawyer Referral Service out of Lawyer’s own law office. Lawyer and Lawyer’s legal secretary will screen incoming calls to determine the issues raised by the callers. Lawyer has established several “panels” by substantive area to handle the matters referred. On occasion, however, Lawyer may provide legal advice directly to callers as well as through XYZ Lawyer Referral Service. Lawyers to whom work is referred are expected to remit 15% of the fees generated on referred work to XYZ Lawyer Referral Service, up to a maximum of \$5,000 per referral.

Questions:

1. May Lawyer have an ownership interest in a for-profit lawyer referral service?
2. May Lawyer participate in the management of a for-profit lawyer referral service?
3. May a lawyer referral service provide legal advice to callers in the course of “screening” their inquiries?
4. May a lawyer referral service split fees with the lawyers to whom it refers work?

Conclusions:

1. Yes, qualified.
2. Yes, qualified.
3. No.
4. No.

Discussion:

1. *Lawyer Ownership of For-Profit Lawyer Referral Service.*

The rules of professional conduct do not prohibit Oregon permits for-profit lawyer referral services. Oregon RPC 7.2(c) provides:

~~————(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.~~

Nevertheless, the referral service must not practice law and must not otherwise assist the lawyer-owner in violations of the Oregon RPCs. *See, e.g.,* OSB Formal Ethics [Op Nos 2005-10](#) (lawyer permitted to operate real estate firm and title insurance company), [2005-101](#) (lawyer and psychologist could form domestic relations mediation service), [2005-107](#) (lawyer may join nonlawyer in preparing and marketing audiotapes and videotapes on law-related subjects), [2005-137](#) (lawyer could participate in joint venture with nonlawyer to offer interactive, online legal information service). *But see* OSB Formal Ethics [Op Nos 2005-10](#), [2005-106](#), [2005-108](#) (lawyer cannot use other businesses for improper in-person solicitation of legal work or misrepresent nature of services provided).

2. *Lawyer Management of For-Profit Lawyer Referral Service.*

A lawyer-owner may provide general management and administration of a referral service. *See* OSB Formal Ethics [Op No 2005-138](#) (legal aid service could provide general administration over associated referral service). This would include, for example, hiring and supervising operations management for the referral service. Similarly, the lawyer-owner may operate the referral service at the same physical premises as the lawyer's law practice. *See* OSB Formal Ethics [Op No 2005-2](#) (lawyer may share office space with other businesses).

Even in these circumstances, however, a lawyer-owner should take precautions to avoid participating in the actual "screening" of incoming inquiries in light of the risk that a caller (1) might impart confidential information to the lawyer and thereby create potential conflicts with the lawyer's other clients or (2) would form the reasonable belief that the lawyer had become the caller's lawyer. *See* OEC 503(1)(a) (*client* means a person "who consults a lawyer with a view to obtaining professional legal services from the lawyer" for purposes of the lawyer-client privilege); OSB Formal Ethics [Op Nos 2005-100](#) (preliminary discussions with an eye

toward potential employment of a lawyer are protected by the lawyer-client privilege), [2005-138](#); *In re Weidner*, 310 Or 757, 770–771, 801 P2d 828 (1990) (outlining “reasonable expectations of the client” test for determining whether lawyer-client relationship has been formed).

At the other end of the spectrum is *In re Fellows*, 9 DB Rptr 197, 199–200 (1995). The disciplined lawyer in *Fellows* operated a referral service called “Case Evaluation & Referral Service” that was not an independent business but was merely an assumed business name for the lawyer. Such conduct violates both Oregon RPC 7.1 and Oregon RPC 8.4(a)(3). In addition, the operation of a lawyer-owned referral service in this manner would constitute doing business with a client within the meaning of Oregon RPC 1.8(a).

3. *Legal Advice by the Referral Service to Callers.*

Because a referral service itself is not licensed to practice law, it may not provide legal advice to the public. ORS 9.160 (only those licensed to practice law may provide legal advice to third parties). Similarly, a lawyer may not assist a nonlawyer in the unlawful practice of law. Oregon RPC 5.5(a). Consequently, a lawyer may not assist a referral service in its delivering legal advice to the public either. OSB Formal Ethics [Op No 2005-87](#).

4. *Fee-Splitting Between the [For-Profit Referral Service](#) and Participating Lawyers.*

Oregon RPC 5.4(a) prohibits lawyers from sharing fees with nonlawyers outside very narrowly defined exceptions not relevant to the question presented here. Because a referral service itself is not licensed to practice law, lawyers participating in such a service may not split their fees with the service. [RPC 5.4\(a\)\(5\) does allow for the splitting of fees with a bar-sponsored or not-for profit lawyer referral service, but not with a for-profit referral service such as the one here.](#)

Oregon RPC 7.2(~~ab~~) provides:

~~(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may~~

~~(1) pay the reasonable costs of advertisements or communications permitted by this Rule;~~

~~(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service; and~~

~~(3) pay for a law practice in accordance with Rule 1.17.(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.~~

Lawyers may therefore pay the marketing charges associated with participating in lawyer referral services. *See also* OSB Formal Ethics [Op No 2005-73](#) (acceptance of referrals). Payments made to a lawyer referral service, therefore, must be limited to marketing charges only and must not include a fee-split.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§2.13, 2.28 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§3, 10 (2003); and ABA Model Rule 7.3(d).

FORMAL OPINION NO. 2005-175
Information About Legal Services:
Lawyer Membership in Business Referral Clubs

Facts:

Lawyer has been asked to join the local chapter of a business and professional “networking association” (the Association). According to its published policies, the purpose of the Association is to facilitate the referral of business between members. Attendance at monthly meetings is emphasized and making referrals is a condition of maintaining membership. Members must follow up on referrals received through the Association, although the Association’s rules acknowledge that the formal standards of ethics of a profession supersede any Association rules.

Question:

May Lawyer participate in the activities of the Association?

Conclusion:

No.

Discussion:

Oregon RPC 7.2(~~ba~~) provides:

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service; and

(3) pay for a law practice in accordance with Rule 1.17.

~~(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 1.17.1~~

Similarly, Oregon RPC 5.4(e) provides:

A lawyer shall not refer a client to a nonlawyer with the understanding that the lawyer will receive a fee, commission, or anything of value in exchange for the referral, but a lawyer may accept gifts in the ordinary course of social or business hospitality.

Participation in the activities of the Association in accordance with its stated policies would violate both of those rules. The stated purpose of the Association is the exchange of business referrals between members. A business referral is a thing of value. If Lawyer ~~commits to refer~~refers Lawyer's clients to Association members, then in making the referrals Lawyer is giving something of value in exchange for the other member to promote, recommend, or secure Lawyer's employment. This exchange violates Oregon RPC 7.2(~~ba~~). OSB Formal Ethics [Op No 2005-2](#) similarly concludes that a lawyer cannot ethically enter into an agreement for reciprocal referrals between a lawyer and a trust company because the quid pro quo nature of the arrangement would violate this rule.

~~Moreover~~Further, if other Association members promise to refer clients to Lawyer, then Lawyer will receive something of value in exchange for making referrals of Lawyer's ~~own clients~~clients to other nonlawyer members of the Association. This exchange violates Oregon RPC 5.4(e).²

Business development is a fact of life for modern professionals and the rules of professional conduct do not prohibit participation in groups at which lawyers can network and learn about business opportunities. The problem with participation in the Association described here is not that it, like many civic groups, limits membership to one person in an occupation or profession. The ethical prohibition is against giving or receiving reciprocal referrals. Moreover, substance must rule over form and a lawyer cannot join a group such as the Association on the

¹ ~~Oregon RPC 7.2(c) governs the circumstances under which a lawyer may accept referrals from a prepaid legal services plan, lawyer referral service, legal service organization, or other similar plan, service, or organization. Oregon RPC 1.17(c) governs the sale of a law practice and allows the selling lawyer to recommend the purchasing lawyer if the selling lawyer "has made a reasonable effort to arrive at an informed opinion."~~

² This exchange of referrals is generally distinguishable from legal service organizations and similar plans. ~~As noted in footnote 1,~~ Oregon RPC 7.2(~~be~~)(2) expressly allows a lawyer or law firm to take part in a prepaid pay the usual charges of a legal services plan, or not-for-profit lawyer referral service, legal service organization, or other similar plan, service, or organization. See, e.g., OSB Formal Ethics [Op Nos 2005-79, 2005-168](#). The Association is not one of those allowed plans or services because the Association's referrals are not limited solely to referrals to lawyers.

premise that the rules are suspended for lawyers if, in fact, the referral requirements are a condition of membership.

Even in a group that does not require reciprocal referrals, lawyers must be careful that their follow-up on any referrals received is consistent with the rules of professional conduct. Oregon RPC 7.3(a) 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.

The Association's activities do not fall within any of the exceptions set forth in this rule. Accordingly, even if the networking group does not require reciprocal referrals, Lawyer cannot initiate any personal follow-up on a referral except in writing, unless Lawyer knows that the person making the referral has been expressly authorized by the prospective client to have the lawyer make the personal contact. *See* OSB Formal Ethics [Op No 2005-100](#); *In re Blaylock*, 328 Or 409, 978 P2d 381 (1999) (lawyer did not initiate contact with prospective client when he acted on good-faith belief that third party was conveying prospective client's request for contact). With regard to potential clients who are known to be in need of legal services in a particular matter, see also Oregon RPC 7.3(c) and OSB Formal Ethics [Op No 2005-127](#).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§2.15, 3.39 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §9 (2003); and ABA Model Rules 5.4, 7.2.

FORMAL OPINION NO. 2011-186

Receipt of Documents Sent without Authority

Facts:

Lawyer in an adversary proceeding receives documents or electronically stored information from a third party that may have been stolen or otherwise taken without authorization from opposing party.¹

Questions:

1. Must Lawyer notify the opposing party of the receipt of the documents?
2. Must Lawyer return the documents to the opposing party?

Conclusions:

1. No, qualified.
2. No, qualified.

Discussion:

Oregon RPC 4.4(b) provides that “A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”²

By its express terms ~~then~~, Oregon RPC 4.4(b) only applies in instances where documents or electronically stored information is sent to Lawyer inadvertently. In instances where the delivery of materials is not the result of the sender’s inadvertence, Oregon RPC 4.4(b) does not apply. See ABA

¹ For purposes of this opinion, it is assumed that Lawyer did not advise Client to, or otherwise participate in, obtaining the documents. *See* Oregon RPC 1.2(c) (a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent) and Oregon RPC 8.4(2)(4) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice).

~~² For purposes of the rule, *document* includes e-mail or other electronic communications subject to being read or put into readable form. ABA Model Rule 4.4(b), Comment [2].~~

Formal Op. No. 06-440. Oregon RPC 4.4(b) ~~does not~~does not require Lawyer to take or refrain from taking any particular actions with respect to documents that were sent purposely, albeit without authority. See OSB Formal Op. No. 2005-150. O³ ~~However, other rules,~~ however, may limit Lawyer's options or direct Lawyer's actions.

First, the circumstances in which the documents were obtained by the sender may involve criminal conduct. If so, Oregon RPC 1.6⁴ prohibits Lawyer from disclosing the receipt of the documents, as explained in OSB Formal Ethics Op No [2005-105](#):

A lawyer who comes into possession of information linking a client to a crime ordinarily is barred by the lawyer's duty of confidentiality from voluntarily disclosing that information to others. See, e.g., ORS 9.460(3) and Oregon RPC 1.6, discussed in OSB Formal Ethics Op No 2005-34.

This is true even if the documents came from a source other than Lawyer's own client, as the disclosure could nevertheless work to the detriment of the client in the matter.

~~OSB Formal Ethics Op No [2005-105](#) also warns that Oregon RPC 8.4(a)(4), prohibiting conduct prejudicial to the administration of justice, prevents a lawyer from accepting "evidence of a crime" unless the lawyer makes the evidence available to the prosecution. Further, to the extent that receiving stolen documents constitutes tampering with evidence, the lawyer may also be exposed to criminal or civil liability. Comment [m] of the Restatement (Third) of the Law Governing Lawyers §60 (2000) specifically notes "Where deceitful or illegal means were used to obtain the information, the receiving lawyer and that lawyer's client may be liable, among other remedies, for damages for harm caused or for injunctive relief against use or disclosure."~~

Second, the documents may be entitled to protection under substantive law of privilege or otherwise. *See Burt Hill, Inc.*, 2010 US Dist Lexis 7492 at 2–4, n 6. The scope and application of those substantive law protections are not questions of professional responsibility.

~~³ Following the promulgation of ABA Model Rule 4.4(b), the ABA withdrew its Formal Opinion 94-382 which suggested that documents sent by anyone without authorization were, from the opposing party's perspective, an "inadvertent disclosure." ABA Formal Op. No. 06-440 disavows the prior opinion and expressly holds that where the delivery of the materials is not the result of the sender's inadvertence, Rule 4.4(b) does not apply.~~

⁴ Oregon RPC 1.6(a): "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."

However, a lawyer who reviews, retains, or attempts to use privileged documents may be subject to disqualification or other sanctions under applicable court rules or substantive law.⁵

COMMENT: For additional information on this general topic, see Fla. Ethics Op. 07-1 (Fla. State Bar Ass'n Comm. Of Prof'l Ethics Sept. 7, 2007); D.C. Bar Legal Ethics Comm. Ethics Op. 3118 (2002); Va. State Bar Ethics Comm. Legal Ethics Op. 1141 (1988); Helen Hirschbiel, *Bar Counsel: Ill-Gotten Gains: Rules for Privileged or Purloined Documents*, Oregon State Bar Bulliten, July 2012; Mark J. Fucile, *Smoking Gun: Receiving Property Stolen by a Client*, Multnomah Lawyer, December 2012.

Approved by Board of Governors, November 2011.

⁵ *Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wa. 2001) (disqualifying counsel for retaining and using privileged materials); *In re Shell Oil Refinery*, 143 F.R.D. 105 (E.D. La. 1992) (lawyer may not use confidential documents supplied to him by opponent's employee), *amended and reconsidered on other grounds*, 144 FRD 73 (E.D. La. 1992); *Maldonado v. New Jersey*, 225 F.R.D. 120 (D.N.J. 2004) (plaintiff's counsel who reviewed privileged letter, received from unknown source, and without permission incorporated it by reference in amendment to complaint disqualified); Smallman, *The Purloined Communications Exception to Inadvertent Waiver; Publication and Preservation of Lawyer-Client Privilege*, 32 TORT & INS LJ 715. See also OSB Formal Ethics Op No [2005-150](#).

FORMAL OPINION NO. 2011-187

Competency: Disclosure of Metadata

Facts:

Lawyer *A* e-mails to Lawyer *B* a draft of an Agreement they are negotiating on behalf of their respective clients. Lawyer *B* is able to use a standard word processing feature to reveal the changes made to an earlier draft ("metadata"). The changes reveal that Lawyer *A* had made multiple revisions to the draft, and then subsequently deleted some of them.

Same facts as above except that shortly after opening the document and displaying the changes, Lawyer *B* receives an urgent request from Lawyer *A* asking that the document be deleted without reading it because Lawyer *A* had mistakenly not removed the metadata.

Same facts as the first scenario except that Lawyer *B* has software designed to thwart the metadata removal tools of common word processing software and wishes to use it to see if there is any helpful metadata in the Agreement.

Questions:

1. Does Lawyer *A* have a duty to remove or protect metadata when transmitting documents electronically?
2. May Lawyer *B* use the metadata information that is readily accessible with standard word processing software?
3. Must Lawyer *B* inform Lawyer *A* that the document contains readily accessible metadata?
4. Must Lawyer *B* acquiesce to Lawyer *A*'s request to delete the document without reading it?
5. May Lawyer *B* use special software to reveal the metadata in the document?

Conclusions:

1. See discussion.
2. Yes, qualified.
3. No.
4. No, qualified.
5. No.

Discussion:

Metadata generally means “data about data.” As used here, metadata means the embedded data in electronic files that may include information such as who authored a document, when it was created, what software was used, any comments embedded within the content, and even a record of changes made to the document.¹

Lawyer’s Duty in Transmitting Metadata

Oregon RPC 1.1 requires a lawyer to provide competent representation to a client, which includes possessing the “legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” Oregon RPC 1.6(a) requires a lawyer to “not reveal information relating to the representation of a client” except where the client has expressly or impliedly authorized the disclosure.² Information relating to the representation of a client may include metadata in a document. Taken together, the two rules indicate that a lawyer is responsible for acting competently to safeguard information relating to the representation of a client contained in communications with others. Competency in relation to metadata requires a lawyer utilizing electronic media for communication to maintain

¹ Joshua J. Poje, *Metadata Ethics Opinions Around the U.S.*, AMERICAN BAR ASSOCIATION, May 3, 2010, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/chartsfyis/metadachart.html.

² There are several exceptions to the duty of confidentiality in Oregon RPC 1.6, none of which are relevant here.

at least a basic understanding of the technology and the risks of revealing metadata or to obtain and utilize adequate technology support.³

Oregon RPC 1.6(c) requires that Aa lawyer must use reasonable care to avoid the disclosure of confidential client information, particularly where the information could be detrimental to a client.⁴ With respect to metadata in documents, reasonable care includes taking steps to prevent the inadvertent disclosure of metadata, to limit the nature and scope of the metadata revealed, and to control to whom the document is sent.⁵ What constitutes reasonable care will change as technology evolves.

The duty to use reasonable care so as not to reveal confidential information through metadata may be best illustrated by way of analogy to paper documents. For instance, a lawyer may send a draft of a document to opposing counsel through regular mail and inadvertently include a sheet of notes torn from a yellow legal pad identifying the revisions to the document. Another lawyer may print out a draft of the document marked up with the same changes as described on the yellow notepad instead of a “clean” copy and mail it to opposing counsel. In both situations, the lawyer has a duty to exercise reasonable care not to include notes

³ The duty of competence with regard to metadata also requires a lawyer to understand the implications of metadata in regard to documentary evidence. A discussion of whether removal of metadata constitutes illegal tampering is beyond the scope of this opinion, but Oregon RPC 3.4(a) prohibits a lawyer from assisting a client to “alter, destroy or conceal a document or other material having potential evidentiary value.”

⁴ Jurisdictions that have addressed this issue are unanimous in holding lawyers to a duty of “reasonable care.” *See, e.g.,* State Bar of Arizona Ethics Opinion 07-03. By contrast, ABA Formal Opinion 06-442 does not address whether the sending lawyer has any duty, but suggests various methods for eliminating metadata before sending a document. *Id.* But see ABA Model Rule 1.6, comment [17], which provides that “[w]hen transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.”

⁵ Such steps may include utilizing available methods of transforming the document into a nonmalleable form, such as converting it to a PDF or “scrubbing” the metadata from the document prior to electronic transmittal.

about the revisions (the metadata) if it could prejudice the lawyer's client in the matter.

Lawyer's Use of Received Metadata

If a lawyer who receives a document knows or should have known it was inadvertently sent, the lawyer must notify the sender promptly. Oregon RPC 4.4(b). Using the examples above, in the first instance the receiving lawyer may reasonably conclude that the yellow pad notes were inadvertently sent, as it is not common practice to include such notes with document drafts. In the second instance, however, it is not so clear that the "redline" draft was inadvertently sent, as it is not uncommon for lawyers to share marked-up drafts. Given the sending lawyer's duty to exercise reasonable care in regards to metadata, the receiving lawyer could reasonably conclude that the metadata was intentionally left in.⁶ In that situation, there is no duty under Oregon RPC 4.4(b) to notify the sender of the presence of metadata.

If, however, the receiving lawyer knows or reasonably should know that metadata was inadvertently included in the document, Oregon RPC 4.4(b) requires only notice to the sender; it does not require the receiving lawyer to return the document unread or to comply with a request by the sender to return the document.⁷ OSB Formal Ethics Op No [2005-150](#). Comment [3] to ABA Model Rule 4.4(b) notes that a lawyer may voluntarily choose to return a document unread and that such a decision is a matter of professional judgment reserved to the lawyer. At the same time, the Comment directs the lawyer to Model Rules 1.2 and 1.4. Model Rule 1.2(a) is identical to Oregon RPC 1.2(a) and requires the lawyer to "abide by a client's decisions concerning the objectives of the representation" and to "consult

⁶ See *Goldsborough v. Eagle Crest Partners*, 314 Or 336 (1992) (in the absence of evidence to the contrary, an inference may be drawn that a lawyer who voluntarily turns over privileged material during discovery acts within the scope of the lawyer's authority from the client and with the client's consent).

⁷ Comment [2] to ABA Model Rule 4.4(b) explains that the rule "requires the lawyer to promptly notify the sender in order to permit that person to take protective measures." It further notes that "[w]hether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived."

with the client as to the means by which the objectives are pursued.”⁸ Oregon RPC 1.4(a)(2), like its counterpart Model Rule, requires a lawyer to “reasonably consult about the means by which the client’s objectives are to be accomplished.” Thus, before deciding what to do with an inadvertently sent document, the receiving lawyer should consult with the client about the risks of returning the document versus the risks of retaining and reading the document and its metadata.

Regardless of the reasonable efforts undertaken by the sending lawyer to remove or screen metadata from the receiving lawyer, it may be possible for the receiving lawyer to thwart the sender’s efforts through software designed for that purpose. It is not clear whether uncovering metadata in that manner would trigger an obligation under Oregon RPC 4.4(b) to notify the sender that metadata had been inadvertently sent. Searching for metadata using special software when it is apparent that the sender has made reasonable efforts to remove the metadata may be analogous to surreptitiously entering the other lawyer’s office to obtain client information and may constitute “conduct involving dishonesty, fraud, deceit or misrepresentation” in violation of Oregon RPC 8.4(a)(3).

Approved by Board of Governors, November 2011.

⁸ Although not required by the Oregon RPCs, parties could agree, at the beginning of a transaction, not to review metadata as a condition of conducting negotiations.

FORMAL OPINION NO. 2011-188

Information Relating to the Representation of a Client: Third-Party Electronic Storage of Client Materials

Facts:

Law Firm contracts with third-party vendor to store client files and documents online on remote server so that Lawyer and/or Client could access the documents over the Internet from any remote location.

Question:

May Lawyer do so?

Conclusion:

Yes, qualified.

Discussion:

With certain limited exceptions, the Oregon Rules of Professional Responsibility require a lawyer to keep client information confidential. See Oregon RPC 1.6.¹ In addition, Oregon RPC 5.3 provides:

¹ Oregon RPC 1.6 provides:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
 - (2) to prevent reasonably certain death or substantial bodily harm;
 - (3) to secure legal advice about the lawyer's compliance with these Rules;
 - (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was

With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:

involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6. 2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

~~to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the 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.~~

(a) a lawyer having direct supervisor authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by the nonlawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Lawyer may store client materials on a third-party server so long as Lawyer complies with the duties of competence and confidentiality to reasonably keep the client's information secure within a given situation.² To do so, the lawyer must take reasonable steps to ensure that the storage company will reliably secure client data and keep information confidential.³ [See Oregon RPC 1.6\(c\)](#). Under certain circumstances, this may be satisfied through a third-party vendor's compliance with industry standards relating to confidentiality and security, provided that those industry standards meet the minimum requirements imposed on the Lawyer by the Oregon RPCs. This may include, among other things, ensuring the service

² Some call the factual scenario presented above "cloud computing." See Richard Acello, *Get Your Head in the Cloud*, ABA Journal, April 2010, at 28–29 (providing that "cloud computing" is a "sophisticated form of remote electronic data storage on the internet" and "[u]nlike traditional methods that maintain data on a computer or server at a law office or other place of business, data stored 'in the cloud' is kept on large servers located elsewhere and maintained by a vendor").

³ [In 2014, leaked documents indicated that several intelligence agencies had the capability of obtaining electronic data and monitoring electronic communications between, among others, attorneys and clients through highly sophisticated methods beyond the capabilities of the general public. Oregon RPC 1.6\(c\) would not require an attorney to protect a client's data against this type of advanced interception, as it only requires an attorney to take reasonable steps to secure client data. Nevertheless, an attorney may want to take additional security precautions if she handles clients or matters that involve national security interests.](#)

agreement requires the vendor to preserve the confidentiality and security of the materials. It may also require that vendor notify Lawyer of any nonauthorized third-party access to the materials. Lawyer should also investigate how the vendor backs up and stores its data and metadata to ensure compliance with the Lawyer's duties.⁴

Although the third-party vendor may have reasonable protective measures in place to safeguard the client materials, the reasonableness of the steps taken will be measured against the technology "available at the time to secure data against unintentional disclosure."⁵ As technology advances, the third-party vendor's protective measures may become less secure or obsolete over time.⁶ Accordingly, Lawyer may be required to reevaluate the protective measures used by the third-party vendor to safeguard the client materials.⁷

Approved by Board of Governors, November 2011.

⁴ See OSB Formal Ethics Op No [2005-141](#), which provides: "As long as Law Firm makes reasonable efforts to ensure that recycling company's conduct is compatible with Law Firm's obligation to protect client information, the proposed conduct is permissible. Reasonable efforts include, at least, instructing the recycling company about Law Firm's duties pursuant to Oregon RPC 1.6 and obtaining its agreement to treat all materials appropriately." See also OSB Formal Ethics Op Nos [2005-129](#), [2005-44](#).

⁵ See NJ Ethics Op 701 (discussing electronic storage and access to files).

⁶ See Arizona Ethics Op 09-04 (discussing confidentiality, maintaining client files, electronic storage, and the Internet).

⁷ A lawyer's obligation in the event of a breach of security of confidential materials is outside the scope of this opinion.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 24, 2015
Memo Date: April 22, 2015
From: Thomas Flaherty, Military and Veterans Law Section Chair
Re: Creation of a Veterans Law Clinic

Action Recommended

Approve a request from the Military and Veterans Law Section (MVLS) to work alongside several other stakeholders in establishing an Oregon Veterans Legal Clinic (OVLC) based at Willamette University College of Law, to associate the MVLS with the Clinic in promotional materials, and for MVLS Members to engage in soliciting funds on behalf the MVLS in order to ensure the OVLC is adequately resourced.

Background

Over the past several decades, law schools have made significant strides in pairing law students with a number of communities in need. Yet the Veteran community—a community in crisis—has been underserved. Throughout our Country, more and more Veterans Legal Clinics, in various forms, have been created¹; but the growth of Veterans Legal Clinics has not kept pace with the more than 2 million veterans who have returned or are returning from the wars in Iraq and Afghanistan.

Most importantly, Oregon currently has neither a Veterans Legal Clinic nor an active duty military presence. Consequently, the 331,632 military Veterans living in Oregon have very few ready legal resources to assist them in resolving legal challenges. Consequently, Oregon Veterans, Servicemembers, and their Families continue to struggle with civil legal barriers to stable and permanent family housing, often stemming from their military service. The Military and Veterans Law Section of the Oregon State Bar (OSB) considered this challenge and formed a committee to explore creation of an Oregon Veterans Legal Clinic. This engagement has already given the MVLS a direct say in the structure

¹ including at Chapman University School of Law (AMVETS Legal Clinic), Duquesne University School of Law (Veterans Clinic), Emory University School of Law (Emory Law Volunteer Clinic for Veterans), George Mason University School of Law (Mason Veterans & Servicemembers Legal Clinic), Harvard Law School (The WilmerHale Legal Services Center), John Marshall Law School (John Marshall Veterans Legal Support Center & Clinic), Marquette University Law School (Volunteer Legal Clinic for Veterans), North Carolina Central University Law School (Veterans Law Clinic), Ohio State University/Moritz College of Law (Captain Jonathan D. Grassbaugh Veterans Project), Stetson University College of Law (Veterans Law Institute), UC Davis School of Law (Smedley Butler Veterans Justice Project), University of Arizona/James E. Rogers College of Law (Veterans' Advocacy Law Clinic), University of Detroit Mercy School of Law (UDM Law Veterans Clinic), University of Missouri School of Law (Veterans Clinic), University of Pittsburgh School of Law (Veterans Legal Clinic Practicum), University of San Diego (Veterans Legal Clinic), University of Virginia School of Law (Veterans Medical Disability Appeals Pro Bono Program), University of Wisconsin Madison Law School (Veterans Law Center), Widener University School of Law (Veterans Law Clinic), William and Mary Law School (Lewis B. Puller, Jr. Veterans Benefits Clinic), and Yale University Law School (Veterans Legal Services Clinic)

and mission set of the nascent OVLC. Approval of this request will continue to ensure the OSB, through its subordinate organization (the MVLS), remains engaged in addressing civil legal challenges to Veteran housing stability. We believe the MVLS is the OSB's natural agent for this engagement, and that the depth and breadth of the need argues persuasively for OSB Permission for us to continue.

The need is obvious. We know that:

- approximately 33% of homeless males in the U.S. are Veterans;
- Every single night almost 58,000 Veterans in America are homeless, which equals the number of service members who died in the Vietnam War;
- Veterans are twice as likely as other Americans to become chronically homeless;
- Veterans represent 11% of the adult civilian population, but 26% of the homeless population;
- unemployment among male Iraq and Afghanistan Veterans rose from 5% in March 2007 to 15% in March 2010;
- one in ten Veterans is disabled, oftentimes by injuries sustained in combat;
- more than 20,000 Veterans were wounded during service in Iraq and Afghanistan;
- about 70% of homeless Veterans suffer from substance abuse problems, many because of drug use that commenced during treatment of combat injuries;
- 45% of homeless Veterans suffer from mental illness, including Post-Traumatic Stress Disorder (PTSD);
- 19% of Iraq Veterans report a mental health problem, and more than 11% of Afghanistan Veterans;
- the incidence of PTSD and suicide rates among Veterans is high and climbing: Veterans represent about 8% of the Oregon population, but account for 27% of all suicides;
- the risk of women Veterans becoming homeless is four times greater than for male Veterans; and
- one of every five female Veterans has been the victim of military sexual trauma, and about 26% of female Veterans seeking VA medical care report experiences of sexual assault.

Conversely, we know that Veterans:

- 65% of Veterans abstain from drug and alcohol use for at least six months while in a Housing Program;
- are more likely to successfully complete educational and vocational programs;
- are less likely to be fired or dismissed from a job once employed;
- make more, on average, than their non-Veteran counterparts (by \$6,642 for males and \$12,517 for females);
- are less likely to live in poverty than non-Veterans;
- are less likely to be incarcerated (and less likely to recidivate if incarcerated); and
- vote and participate civically at higher rates than non-Veterans.

In other words, we know that Veterans are at significant risk of getting trapped in downward spirals precipitated by civil legal challenges, and that supporting Veterans in avoiding or managing civil legal challenges results in highly productive, successful, value-adding citizens. There is an inarguable business case to be made that supporting Veterans has a positive rate of return on investment, a fact which few other charitable endeavors can claim.

In Oregon, outside of the Portland Metro Area, Veterans confronted with civil legal challenges usually go completely unrepresented. For many of them, their service has rendered them vulnerable to accelerating downward spirals of homelessness, loss of employment, hopelessness, substance abuse, and ultimately suicide. Tragically, many of the civil legal challenges that begin those downward spirals are easily resolved. Often, even the slightest legal intervention can transform those downward spirals into self-sustaining upward spirals, resulting in productive and law-abiding citizens.

By creating the Oregon Veterans Legal Clinic, Willamette University College of Law intends to introduce students to the practice of law while serving an at-risk, underserved population present in every community in Oregon. There are many formats and structures for Veterans Clinics: some Veterans Clinics operate as general legal aid clinics focused on the unique needs of veterans; others specialize in VA disability appeals, discharge upgrades, Merit Systems Protection Board cases, or impact litigation; and others operate as hybrid clinics, training both students and local practitioners in veterans law and pairing at-risk veterans with law students and volunteer attorneys on a case-by-case basis. In Oregon, the effort must begin with basic civil legal services which are tailored to the at-risk population. This means addressing civil legal barriers to stable housing, without which we know that most other interventions will fail.

The law has always been a vehicle to help those in need. Veterans Clinics offer law schools a pedagogical pathway to engage law students in skills-based learning while connecting them to local legal practitioners and clients truly in need.

Placing a Veterans Legal Clinic within the Willamette University College of Law Program would enable the OVLC to:

- leverage an already-established and well-respected clinical program; provide meaningful clinical training opportunities for future Oregon lawyers;
- be more cost-effective than creating a stand-alone Center, thus allowing more resources to be devoted directly to the client population;
- facilitate the delivery of legal services to Oregon Veterans and their families to whom we owe a profound debt;
- elevate the legal challenges Veterans are currently facing to wider awareness; allow currently-available legal services to be more efficiently publicized and delivered; and
- provide a center in Salem to raise awareness of the overall issue of Veterans unique challenges *vis-à-vis* civil law.

The Military and Veterans Law Section's Oregon Veterans Legal Clinic subcommittee therefore entered into consultations with Willamette University College of Law to host this Clinic earlier this year in response to underserving of Veterans, Servicemembers, and their Families confronting civil legal challenges throughout Oregon. These consultations have progressed sufficiently far that it is now

suitable that the MVLS begin to publicize the Clinic amongst our members and begin to encourage donations to the Clinic.

Having reached this point, we concluded that it was prudent to solicit the *imprimatur* of the OSB Board of Governors (BOG) for our efforts, since those efforts are now moving past the planning stage and into operationalizing this capability. We believe it is especially important to obtain BOG permission for our intended fundraising, which we envision will be directed by members of the section toward currently-serving Judge Advocates who are receiving OSB fee waivers by virtue of their military service, as well as other lawyers, citizens, and organizations which are supportive of Oregon Veterans, Servicemembers, and Military Families.²

The timeline upon which we are currently working is that we envision beginning limited operations in June of 2015. We are exploring whether or not broader universal legal screening is suitable under the auspices of the Supportive Services for Veteran Families (SSVF) Program, which manages eight grantees throughout Oregon assisting homeless Veterans in reducing and overcoming barriers to stable and permanent housing. In the meantime, following the model initially developed with the Oregon Department of Justice, Metro Public Defenders (which manages the legal portion of the SSVF Program in the Portland Metro Grant) will be seconding the Clinic Director and funding that position. We envision being fully functional in time for the Second Semester of the Law School year, beginning in January 2016.

The Clinic's Client Coordinator³ – a paralegal position – will serve to centrally collect requests for assistance from contractors already working under a contract with the National Guard Bureau and currently operating throughout Oregon in National Guard Armories. These positions are called Family Assistance Specialists (FAS), and they are contractually obligated to screen Veterans, Servicemembers, and Military Family Members in six crisis areas, to include self-identified legal challenges. The FAS screener will confirm that the applicant is indeed affiliated with the military and then refer to the OVLC Client Coordinator. At that time, the OVLC Client Coordinator will screen the referred candidate and determine whether the candidate is well-suited for direct representation by the law students currently participating in the Clinic, including determination of need. If yes, then the student will be assigned the case and work under the supervision of the Clinic Director. If not, then the Client Coordinator will screen the applicant and make an appropriate referral to either (a) the OSB Modest Means or Military Assistance Panel, (b) a suitable legal aid provider in the geographical area in the geographical area wherein the candidate resides, (c) a suitable attorney in the geographical area in the geographical area wherein the candidate resides who is willing to take the case on a pro bono or "low-bono" basis, who is willing to take the case on a *pro bono* or "low-bono" basis, or (d) a Veteran-assistance organization like the local SSVF Grantee.

² The MVLS's vision is that the OVLC will be resourced through an OVLC Fund into which all donations will flow. This OVLC Fund will be managed by a dedicated nonprofit which has on its board representatives of the MVLS, the Clinical Legal Community, and other stakeholders. The Innocent Warrior Project, which is an already-established Oregon Non-profit dedicated to assisting Oregon's Veterans, has agreed to alter its board structure to allow contributing stakeholders to continue to have directorial authority over funds which are raised for this purpose.

³ The original MVLS OVLC Prospectus tasked MVLS with securing funding for the OVLC Client Coordinator Position. We consider this obligation to be a moral, rather than a fiduciary, one. Our committee envisions MVLS's obligations to be encouraging contributions to the funding, and eventual endowment, of the OVLC. The MVLS cannot – and will not – commit either itself or the OSB to any legally binding provisions concerning the set-up or maintenance of the OVLC. These limitations have been clearly and consistently articulated to all other stakeholders.

The goal of the OVLC is to provide legal coverage for the entire state so that no impoverished Oregon Servicemember, Veteran, or Military Family Member is made homeless or remains homeless because of a civil legal barrier which could be reduced or overcome through adequate representation.

OVLC Mission Statement is as follows:

The Oregon Veterans Legal Clinic at Willamette University College of Law provides legal screening and no-cost advocacy to unrepresented, low-income Veterans (including currently-serving Servicemembers) and their Family Members throughout Oregon in order to reduce or overcome civil legal barriers to stable and permanent housing while also providing law students hands-on experience representing real clients and an opportunity to learn about, interact with, and give back to Oregon's military community.

The Oregon Veterans Legal Clinic also serves as a Center of Excellence to coordinate and rally Oregon's Legal Community around the principles of Legal Service to Veterans.

OVLC Purpose Statement is as follows:

The Oregon Veterans Legal Clinic is a student-centered teaching clinic where students gain real-world experience in client representation, case file management, and law office operations as they represent Veterans, Servicemembers, and their families confronting civil legal challenges. In addition to direct client representation, students will work cooperatively with community, state, and federal actors to identify solutions for legal issues that impact Veterans.

By engaging in careful client management, including referral to outside counsel when appropriate, the Oregon Veterans Legal Clinic will strive to ensure that no unstably-housed Oregon Veteran is made homeless – and that no currently homeless Oregon Veteran remains so – because of a lack of representation.

For those Veterans whom the Oregon Veterans Legal Clinic takes on: By providing skillful, zealous advocacy, the Oregon Veterans Legal Clinic seeks to increase access to justice and lower barriers to opportunity for those who served us—our country's Veterans.

Committee to Establish an Oregon Veterans Legal Clinic

Military and Veterans Law Section, Oregon State Bar

Daniel Zene Crowe, Chair

Thomas Flaherty

David Kramer

Oregon Veterans Legal Clinic

W I L L A M E T T E U N I V E R S I T Y C O L L E G E O F L A W

A Pro Bono Clinic Serving Servicemembers, Veterans, and Their Families

"SERVING THOSE WHO HAVE SERVED"



Oregon Veterans Legal Clinic (OVLC)



2015

Oregon Veterans Legal Clinic
Willamette University College of Law
790 State Street
Salem, OR 97301
(503) 370-6973

"Serving Those Who Served Oregon"

Real Experience in Veteran Advocacy

The Oregon Veterans Legal Clinic at Willamette University’s College of Law introduces students to the practice of law by serving an underrepresented population in great need — our country’s veterans. Clinical students gain first-hand experience in interviewing and counseling, case file management, and client advocacy ... all while serving those who first served us.

“Serving Those Who
Served Oregon”

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INTRODUCTION

Over the past few decades, law schools have made significant strides in pairing law students with a number of communities in need. Yet the veterans community—a community in crisis—has been underserved. Throughout our Country, more and more Veterans Legal Clinics, in various forms, have been created; but the growth of Veterans Legal Clinics has not kept pace with the more than 2 million veterans who have returned or are returning from the wars in Iraq and Afghanistan. In addition, Veterans from the first Gulf War, Vietnam, Korea, and even World War II continue to struggle with civil legal barriers to stable and permanent family housing, often stemming from their prior military service.

The need is obvious. We know that:

- approximately 33% of homeless males in the U.S. are Veterans;
- Veterans are twice as likely as other Americans to become chronically homeless;
- Veterans represent 11% of the adult civilian population, but 26% of the homeless population;
- the number of homeless Vietnam-era Veterans, male and female, is greater than the number of soldiers who died during the war;
- unemployment among male Iraq and Afghanistan Veterans rose from 5% in March 2007 to 15% in March 2010;
- one in ten Veterans is disabled, oftentimes by injuries sustained in combat;
- more than 20,000 Veterans were wounded during service in Iraq and Afghanistan; that about 70% of homeless Veterans suffer from substance abuse problems;
- 45% of homeless Veterans suffer from mental illness, including Post-Traumatic Stress Disorder (PTSD);

- 19% of Iraq Veterans report a mental health problem, and more than 11% of Afghanistan Veterans;
- the incidence of PTSD and suicide rates among Veterans is climbing;
- 65% of Veterans abstain from drug and alcohol use for at least six months while in a Housing Program;
- the risk of women Veterans becoming homeless is four times greater than for male Veterans; and
- 23–29% of female Veterans seeking VA medical care reported experiences of sexual assault.

Conversely, we know that Veterans:

- are more likely to successfully complete educational and vocational programs;
- are less likely to be fired or dismissed from a job once employed;
- make more, on average, than their non–Veteran counterparts (by \$6,642 for males and \$12,517 for females);
- are less likely to live in poverty than non–Veterans;
- are less likely to be incarcerated (and less likely to recidivate if incarcerated); and
- vote and participate civically at higher rates than non–Veterans.

In other words, we know that Veterans are more at risk of getting trapped in downward spirals, but those Veterans who don't get trapped in a downward spiral (or are helped to escape one in which they find themselves) are productive, successful, value–adding citizens. There is an inarguable business case to be made that supporting Veterans has a positive rate of return on investment, a fact which few other charitable endeavors can claim.

In Oregon, outside of the Portland Metro Area, Veterans confronted with civil legal challenges usually go completely unrepresented. For many of them, their service has rendered them vulnerable to accelerating downward spirals of

homelessness, loss of employment, hopelessness, substance abuse, and ultimately suicide. Tragically, many of the civil legal challenges that begin those downward spirals are easily resolved. Often, even the slightest legal intervention can transform those downward spirals into self-sustaining upward spirals, resulting in productive and law-abiding citizens.

By creating the Oregon Veterans Legal Clinic, Willamette University College of Law can introduce students to the practice of law while serving an at-risk, underserved population present in every community in Oregon. There are many formats and structures for Veterans Clinics: some Veterans Clinics operate as general legal aid clinics focused on the unique needs of veterans; others specialize in VA disability appeals, discharge upgrades, Merit Systems Protection Board cases, or impact litigation; and others operate as hybrid clinics, training both students and local practitioners in veterans law and pairing at-risk veterans with law students and volunteer attorneys on a case-by-case basis. In Oregon, the effort must begin with basic civil legal services, tailored to the at-risk population. This means addressing civil legal barriers to stable housing, without which we know that most other interventions will fail.

The law has always been a vehicle to help those in need. Veterans Clinics offer law schools a pedagogical pathway to engage law students in skills-based learning while connecting them to local legal practitioners and clients truly in need.

Placing a Veterans Legal Clinic within the Willamette University College of Law Program enables us to:

- leverage an already-established and well-respected clinical program; provide meaningful clinical training opportunities for future Oregon lawyers;
- be more cost-effective than creating a stand-alone Center, thus allowing more resources to be devoted directly to the client population;

- facilitate the delivery of legal services to Oregon Veterans and their families to whom we owe a profound debt;
- elevate the legal challenges Veterans are currently facing to wider awareness; allow currently-available legal services to be more efficiently publicized and delivered; and
- provide a center in Salem to raise awareness of the overall issue of Veterans unique challenges vis-à-vis civil law.

Our committee would be remiss if we didn't thank the efforts of Prof. Warren Binford, the Director of Willamette University's College of Law Clinical Program, for the help and guidance she has provided. Similarly, this project would never have gotten off the ground without the assistance of Prof. Susan Saidel, Director of Widener University School of Law's Veterans Law Clinic. Lastly, we would like to acknowledge our budding partnership with Mr. Rayme Nuckles, the Supportive Services for Veteran Families (SSVF) Regional Coordinator for the SSVF Regional, which includes Oregon. Oregon has a well-deserved reputation for excellence in the care of Veterans. Rayme has been instrumental in establishing the Pilot Project "Providing Uniform and Universal Legal Screening to All Oregon SSVF Participants," which is discussed herein and coordinating this Pilot Project with the National Leadership of the SSVF Program. With strong allies like Warren, Susan, and Rayme, Oregon Veterans continue to go from strength to strength.

Committee to Establish an Oregon Veterans Legal Clinic
Military and Veterans Law Section, Oregon State Bar
Daniel Zene Crowe, Chair
Thomas Flaherty
Dave Kramer

GETTING STARTED

According to the Carnegie Report, the “signature pedagogy” of law schools involves a connection between cognition, skills, and values. This connection primarily finds expression through doctrinal learning, skills learning, doctrine + skills assessment, and client interaction and confidence. In starting a new clinical program, law schools should place primary emphasis on their own signature pedagogical objectives. (*Educating Lawyers*, Carnegie Foundation, 2007).

This section provides a jumping off point for development of the Oregon Veterans Legal Clinic at Willamette University College of Law and addresses topics that will need to be explored in designing and opening the Oregon Veterans Legal Clinic. Foundationally, these topics include the clinic mission, the needs of local Veterans who will form the clinic’s clientele, student interest and instruction, programmatic funding, and community involvement.

This report is intended as a “work in progress” for creation of the Oregon Veterans Legal Clinic, but it also represents an iterative step on the way to establishing this much-needed capability for Oregon’s Veterans.

“To care for him who shall
have borne the battle,
and for his widow, and his
orphan.”

~ Abraham Lincoln

Mission

Mission Statement—Oregon Veterans Legal Clinic

The Oregon Veterans Legal Clinic at Willamette University College of Law provides legal screening and no-cost advocacy to unrepresented, low-income Veterans (including currently-serving Servicemembers) and their Family Members throughout Oregon in order to reduce or overcome civil legal barriers to stable and permanent housing while also providing law students hands-on experience representing real clients and an opportunity to learn about, interact with, and give back to Oregon’s military community.

The Oregon Veterans Legal Clinic also serves as a Center of Excellence to coordinate and rally Oregon's Legal Community around the principles of Legal Service to Veterans.

Purpose

Purpose Statement—Oregon Veterans Legal Clinic

The Oregon Veterans Legal Clinic is a student-centered teaching clinic where students gain real-world experience in client representation, case file management, and law office operations as they represent Veterans, Servicemembers, and their families confronting civil legal challenges. In addition to direct client representation, students will work cooperatively with community, state, and federal actors to identify solutions for legal issues that impact Veterans.

By engaging in careful client management, including referral to outside counsel when appropriate, the Oregon Veterans Legal Clinic will strive to ensure that no unstably-housed Oregon Veteran is made homeless – and that no currently homeless Oregon Veteran remains so – because of a lack of representation.

For those Veterans whom the Oregon Veterans Legal Clinic takes on: By providing skillful, zealous advocacy, the Oregon Veterans Legal Clinic seeks to increase access to justice and lower barriers to opportunity for those who served us—our country's Veterans.

Placement within Veteran Advocacy Community

From a community perspective, the Oregon Veterans Legal Clinic works cooperatively with the Military and Veterans Law Section of the Oregon State Bar, the Oregon Family Assistance Program, the eight Grantees of the

Supportive Services for Veteran Families (SSVF) Program throughout Oregon, the Veterans Affairs Administration, the Oregon Department of Veterans Affairs and its county Veterans Services Offices, the Veterans' Justice Project, Military OneSource, Army OneSource, the Innocent Warrior Project, the Office of the Staff Judge Advocate of the Oregon National Guard/Air National Guard, the Oregon State Bar's Modest Means and Veterans Assistance Panels, and the U.S. Army Reserve 6th Legal Operations Detachment.

In order to provide a deeper learning experience to our students and to address the absence of comprehensive legal screening for Participants in Oregon's Supportive Services for Veteran Families (SSVF) Grants, we will partner with the SSVF Grantees throughout Oregon to initiate the SSVF Pilot Project: "Providing Uniform and Universal Legal Screening to All Oregon SSVF Participants." This Pilot Project will involve student-centered screening – to include deconfliction under Oregon Rule of Professional Conduct 1.10 – of every new enrollee in the SSVF Program in order to identify civil legal barriers to stable and permanent housing and to identify a legal solution plan for each Participant for whom civil legal barriers are identified.

Because we are not a "mini law firm," our pedagogical function must take precedence. Meritorious cases that are commensurate with the students' current level of clinical training, which do not present any impermissible conflict, and are efficacious to our underlying instruction plan will be handpicked for in-clinic representation.

As part of our pedagogical function and our underlying mission to coordinate and rally Oregon's Legal Community around the principles of Legal Service to Veterans, we will act as a "clearinghouse" for the remainder of the screened Veterans whom we are unable to handle in-clinic and refer those cases out, when possible, to practicing *pro-bono* and "*low-bono*" attorneys throughout Oregon who are interested in representing Veterans with meritorious cases. In addition, students will lead in efforts to develop courses of instruction in-clinic

to train Oregon lawyers to better understand and serve the unique legal needs of Oregon's Veterans and their Families; students will be involved in advocating for reform of laws and regulations that impact Veterans and their families; and students and clinic staff will be encouraged to speak at local and national conferences.

Students will partner with other Veterans Clinics and law firms, when appropriate, to file amicus briefs on key Veterans issues, as well as cooperate with other Veterans Clinics to expand the range of clinical service throughout the United States.

Lastly, when appropriate, students will be given the opportunity to partner with Veterans Treatment Courts, a growing trend within the treatment court community designed to rehabilitate rather than simply punish veterans who commit criminal offenses.



Our Key Partner

Our Key Partner: [Oregon National Guard Service Member and Family Support](#) (SMFS)

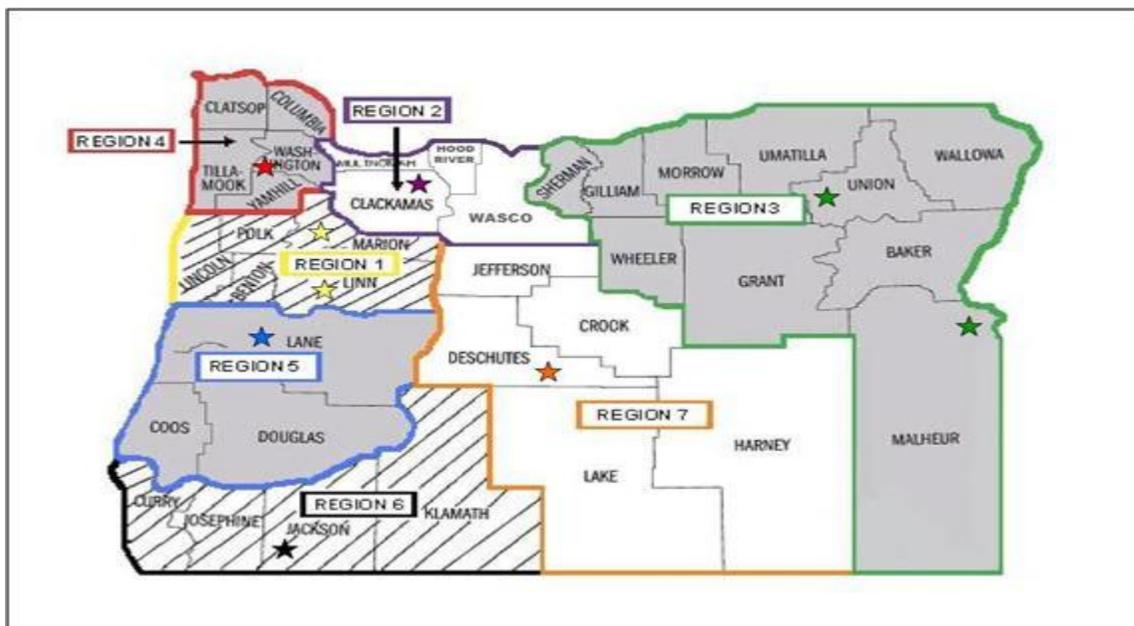
In Oregon, the National Guard Bureau has contracted to emplace ten Family Assistance Specialists (FAS) throughout Oregon, managed by the Oregon Family Assistance Coordinator. The FASs assist all Veterans, Servicemembers, and their Families, regardless of branch or service. They are available 24/7 and cover every part of Oregon.

The FASs serve as a conduit for referral to Service Providers, and are also equipped to follow up with each contact in order to ensure that the referred Service Provider was suitable and adequately addressed the challenge the Veteran, Servicemember, or Family Member was facing.

FASs serve the needs of Service Members and their Families by providing Six Essential Services. The Six Essential Services are provided by a team of Family Assistance Specialist in 6 regions across the state and include:

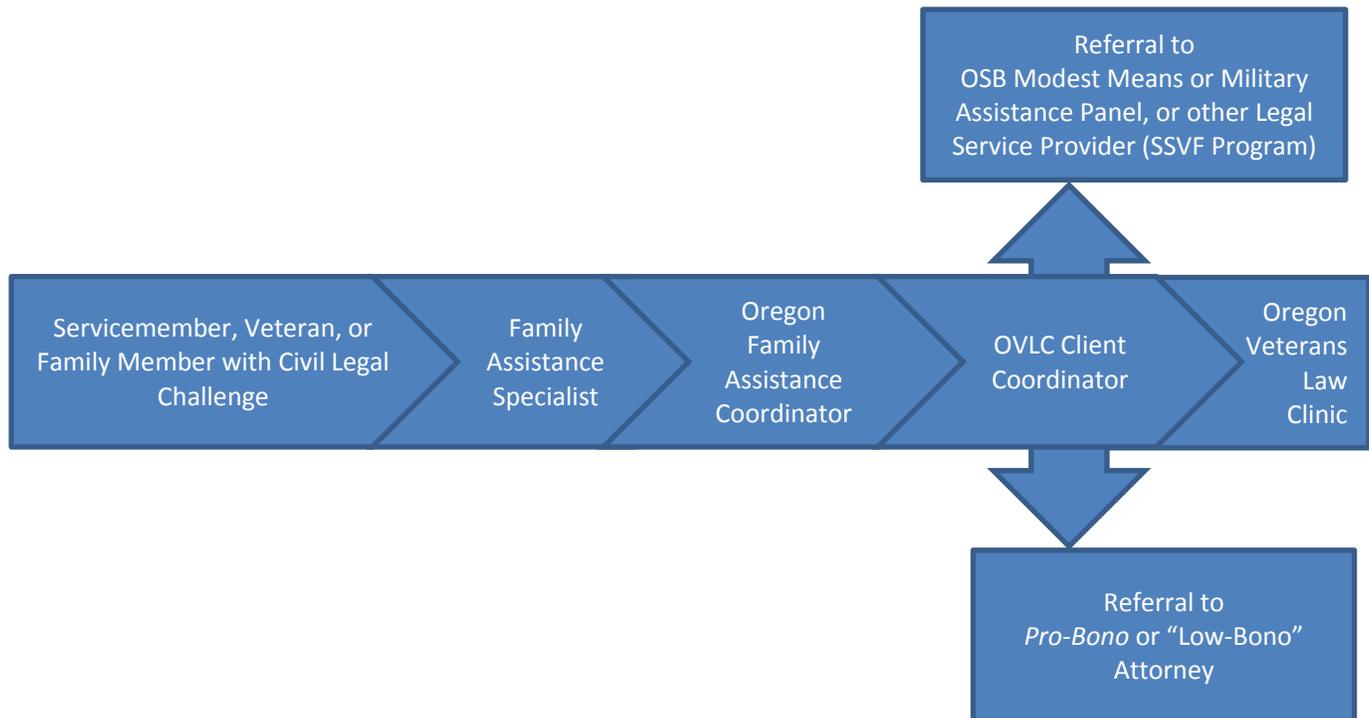
- Legal Resources and Referral
- ID and DEERS
- Financial Resources, Relief Fund Support (for active members of the Oregon National Guard who encounter financial emergencies), and Referral
- Tricare Resource and Referral
- Crisis Intervention and Referral
- Community Information and Outreach

FASs are tasked with Monthly Outreach to families during times of separation due to Military Service. If a service member is separated from his or her family for more than 30 days, the family member will receive a call by the FAS for the duration of the separation and at least 180 days after their return.



Proposed Map of Work Flow

Work Flow and Client Management



The initial entry point for all referrals to the Oregon Veterans Legal Clinic will flow through the FASs working for the SMFS. This is done to ensure that every referral has been pre-screened and validated as a Servicemember, Veteran, or their Family Member, as well as to ensure that FAS follow-up can occur.

At pre-screening, the FAS will verify military status and identify the Legal Issue which has precipitated the call. The FAS will pass this material to the Oregon Family Assistance Coordinator, who will consolidate the information and pass the consolidated list to the Paralegal Client Coordinator at the Oregon Veterans Law Clinic. (In emergent cases, the FAS will email the Paralegal Client Coordinator, cc'ing the Oregon Family Assistance Coordinator.)

Upon receipt of the daily consolidated list, the Paralegal Client Coordinator will follow-up with the Potential Client (if possible) and interview each Potential Client to sharpen the identified legal issue and ensure there are no others.

The Paralegal Client Coordinator will obtain income data from the Potential Client to ensure that the Potential Client’s income is less than or equal to 200% of the poverty line for the locality in which the Potential Client resides. For those above the 200% level or otherwise inappropriate for further representation (*e.g.*, not a legal problem, non-civil legal challenge, non-Oregon legal problem), the Paralegal Client Coordinator will refer that Potential Client to the Oregon State Bar Modest Means Program, the Oregon State Bar Military Assistance Panel, or other (Legal) Service Provider, as appropriate.

2015 Federal Poverty Guidelines

# OF FAMILY	GROSS AMOUNT	200% OF GROSS ANNUAL	MONTH	WEEK
1	\$11,770	\$23,540	\$1,962	\$453
2	\$15,930	\$31,860	\$2,655	\$613
3	\$20,090	\$40,180	\$3,348	\$773
4	\$24,250	\$48,500	\$4,042	\$933
5	\$28,410	\$56,820	\$4,735	\$1,093
6	\$32,570	\$65,140	\$5,428	\$1,253
7	\$36,730	\$73,460	\$6,122	\$1,413
8	\$40,890	\$81,780	\$6,815	\$1,573
Over 8 child, ADD	+\$4,160	+\$8,320	+\$693	+\$160

If the Potential Client is within income limits, the Paralegal Client Coordinator will evaluate the facts of the case for acceptance into the Oregon Veterans Legal Clinic, in light of the available student(s), their current level of proficiency, the subject-matter of the legal challenge(s), the location of the client, and the urgency/scheduling of the legal matter. This evaluation will be done in conjunction with the Clinical Director.

If the matter is not suitable for handling in the Oregon Veterans Legal Clinic, then it will be referred out to an attorney in the same geographical area as the Potential Client—ideally on a *pro bono*, or at least “low-bono,” basis.

If the matter is suitable for handling in the Oregon Veterans Legal Clinic, the case file will be forwarded to the appropriate student for setting up the Initial Client Meeting.



Clients

Identifying/Reaching Our Client Population

One of the significant challenges in coordinating Veteran Assistance in Oregon is the various ways in which a “Veteran” is defined. Oftentimes, otherwise-eligible persons confronting legal challenges are excluded because of insufficient time in service, level of discharge, wrong component, or various other technicalities. Our definition of eligible Client is a person who has reported to Basic Training, or a family member thereof, who is confronting a civil legal challenge. Veterans and Veteran Family Members may be prioritized for civil legal challenges which are directly caused or exacerbated by military Service, but no one will be excluded because of “inadequate” military service.

The purpose of our Clinic is to ensure representation is provided to Servicemembers, Veterans and their Families. We do not desire to put conscientious legal practitioners out of business or “underbid” them. For civil legal challenges for which legal representation is readily available in the same geographical area as the Potential Client, including representation available on a contingency fee basis, Potential Clients will be redirected back to their current representation. Potential Clients may be counseled, on a case-by-case basis, by the Clinic Director only, concerning their rights to counsel; but no further interventions will be undertaken.



Rightsizing Our Client Base

In building our client base, an important consideration is assessing how the number of cases we accept will impact our ability to model best-in-practice attorney skills for our students. Too few cases will limit our students' ability to experience the full scope of legal challenges typically encountered, while too many cases will impair the Clinic Director's ability to provide one-on-one, quality guidance to individual students. ABA Standards 302(b) requires that clinical experiences be "appropriately supervised" and "designed to encourage reflection by students":

(b) A law school shall offer substantial opportunities for:

(1) live–client or other real–life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one’s ability to assess his or her performance and level of competence[.]

ABA Standards for Approval of Law Schools (2012–2013), Rule 302(b). Clearly, pedagogical values and objectives will drive us in rightsizing our particular client base. Other factors, however, may at least partially influence this decision. These include the adequacy of existing community resources to meet veterans’ legal and non–legal needs, the number of students or volunteer attorneys associated with our clinic, and the resources and long–term mission of the law school.

The Oregon Veterans Legal Clinic at Willamette University College of Law is first and foremost a student–centered teaching clinic. We will judge the number and types of cases we accept with reference to the teaching value those cases have for our students. Part of our pedagogical approach, however, is oriented toward introducing our students to the importance of lawyering as a community service. Therefore, we also view ourselves as part of a larger legal and non–legal community committed to caring for our country’s Veterans. To that end, we will be active participants in community programs designed to help at–risk Veterans and their families.

In that capacity, we will partner with the Office of the Staff Judge Advocate of the Oregon National Guard and the U.S. Army Reserve 6th Legal Operations Detachment to establish in–clinic opportunities for drafting wills and advanced medical directives for eligible Veterans.

The intent of maintaining a robust *pro bono*/"low–bono" attorney referral capability is to allow us to screen far more cases, of greater variety, than we

could with only the Oregon Veteran Legal Clinic's limited resources, thereby exposing our students to a wider range of factual issues and legal challenges. For those cases that are simply unsuitable for our pedagogical requirements – either vis-à-vis the subject matter, the timing of the case, or the geographical location of the client – a *pro bono*/low-bono referral capability can ensure the Potential Client is not left with no representation at all.



Students

Approach to Instruction

For students, the highlight of a clinical experience is the opportunity to engage in live-client interactions under the direction of a supervising attorney. In criminal or environmental or civil law clinics, students often come to their clinical experience with at least some knowledge of the law they will be practicing. In Veterans Legal Clinics, students may come to the clinic with no knowledge of the areas of the law that impact Veteran housing stability or military culture.

In order to rapidly insert enrolled students in opportunities for advocacy, we will incorporate substantive areas of the applicable law and instruction on military culture into the classroom component of the clinic itself, teaching students both doctrine and skills during the course of a student's clinical experience.

At the Oregon Veterans Legal Clinic, we will incorporate the substance of the applicable law into the clinical experience without requiring students to first take a substantive course in the particular areas of the law in which we will be practicing. This combined approach to doctrinal and clinical instruction will allow us to offer a truly outstanding clinical experience to students who are interested in helping veterans but are unsure if they want to commit a significant portion of their law school career to a single clinic.



Funding/Staffing

A Multi-Part Solution

A substantial portion of the resources required to launch the Oregon Veterans Legal Clinic can be provided by the Clinical Program at Willamette University College of Law. We ask that office space, computers, telephones, *etc.*, be provided as Willamette's contribution to the creation of the Clinic, as well as malpractice coverage for participating students.

The Innocent Warrior Project is willing to modify its charter and board composition to make it suitable to support the project. As an already-established 501(c)(3) non-profit dedicated to Veterans Advocacy in Oregon, the Innocent Warrior Project is an ideal supporting/organizing entity in partnership with Willamette. In conjunction with the Metro Public Defender's Veterans' Justice Project, the Innocent Warrior Project is prepared to provide a director of the Oregon Veterans Legal Clinic (compensated at the level of \$110,000 per year, including salary and benefits), who would be employed by the Metro Public Defender and work as a volunteer adjunct professor at Willamette University College of Law to supervise students in the Oregon Veterans Legal Clinic.

The remaining requirement for creation of the Oregon Veterans Legal Clinic is funding for a Paralegal Client Coordinator. Our partnership with the Supportive Services for Veteran Families (SSVF) Program is intended to allow us to devote adequate resources to Client Coordination and Screening. We have identified Alisha Firestone as an ideal Designated Client Coordinator. Alisha is a graduate of Willamette Law and is well-respected there, in the bar, and within Oregon's community of Veterans. The position would be funded by a grant provided through the Innocent Warrior Project from SSVF Funding, and the person would

be to serve as a Supervisory Attorney within the Clinic on a volunteer basis, in addition to her role as Designated Client Coordinator.

The selection of both the Clinic Director and the Designated Client Coordinator would require approval from the appropriate authorities at Willamette University College of Law, and they would be supervised and their performance evaluated by the appropriate persons at Willamette with regard to their clinical responsibilities.

Over and above uniform and universal screening, the SSVF Program may be able to provide SSVF Participants with identified legal challenges support via the General Housing Stability Assistance Fund available to SSVF Case Managers. Establishing a habitual relationship with the eight SSVF Grantees in Oregon will allow counseling and occasional representation of SSVF Participants on a reduced-fee basis in order to facilitate the process by which the Oregon Veterans Legal Clinic becomes self-sustaining.

If the Clinic is successful, we will attempt to consolidate adequate resources to independently endow the Clinic in perpetuity. However, this step should wait until the Oregon Veterans Legal Clinic is established and can demonstrate a track record of efficient and effective Veteran Advocacy.



Outreach

The Veterans Community

Like many legal aid interests, Veterans Law revolves around a community of legal stakeholders, governmental and non-governmental organizations, non-attorney advocates, and academic spectators. An early task for the Oregon Veterans Legal Clinic is developing a plan for how our Clinic will integrate into

the local and national Veterans law community. Cooperative coordination with the Veterans community will, in large measure, facilitate the success of the Clinic, both as a helping community partner and as a center for student-focused, experiential learning.



Conclusion

An Underserved Community; An Unmatched Opportunity

At present, Oregon Veterans and Veteran Family Members who are confronted with civil legal challenges that jeopardize their ability to retain stable, permanent housing are largely left completely unrepresented. Those who have served us are expected to fend for themselves, which is a profound failure of the bar and of all Oregonians. The Oregon Veterans Legal Clinic aims to act as a resource to train future Oregon attorneys in advocating for this underserved community and to strive to ensure that no Veteran is made homeless because of his or her service to our Country.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 24, 2015
From: Ray Heysell, Chair, Governance & Strategic Planning Committee
Re: Amendments to OSB Bylaws re: Board of Bar Examiners

Action Recommended

Adopt amendments to the bylaws relating to the bar's admissions function and the role of the Board of Bar Examiners.

Discussion

For the past 2+ years, representatives of the BOG and bar staff worked with the Chief Justice and the Board of Bar Examiners to clarify the nature and role of the BBX. The objective was to confirm that admissions is a core function of the Bar and that the BBX, although appointed by the Supreme Court, oversees a bar program.

In February, the discussions resulted in agreement to the terms of a revision to the relevant Bar Act section and to the adoption of OSB Bylaws to replace the "Operating Principles" agreed to last spring.

Bar Act Amendment

The Bar Act amendment (SB 381) passed the Senate without controversy and is pending before the House Judiciary Committee. An emergency clause was added so that the amendments will be effective upon signing by the governor:

9.210 Board of bar examiners; fees of applicants for admission to bar. (1) The Supreme Court shall appoint ~~12 members of the Oregon State Bar to~~ a board of bar examiners to carry out the admissions functions of the Oregon State Bar as set forth in the bar bylaws and the rules of the Supreme Court. ~~The Supreme Court shall also appoint two public members to the board who are not active or inactive members of the Oregon State Bar.~~ The board shall examine applicants, investigate applicants' character and fitness, and recommend to the Supreme Court for admission to practice law those who fulfill the requirements prescribed by law and the rules of the Supreme Court. With the approval of the Supreme Court, the board may fix and collect fees to be paid by applicants for admission, which fees shall be paid into the treasury of the bar. The composition of the board of bar examiners shall be as provided in the rules, but shall include at least two public members.

(2) Applicants for admission and any other material pertaining to individual applicants are confidential and may be disclosed only as provided in the rules described in subsection (1) of this section. The board's consideration of individual applicants' qualifications are judicial proceedings for purposes of the Public Meetings Law.

New Bylaws

The proposed bylaws changes are designed to address much of what is in the current “Operating Principles”¹ and involve minor changes to existing sections and the addition of an entirely new Article 28:

Article 2 Board of Governors

Section 2.1 Duties and Responsibilities

* * *

Subsection 2.106 Indemnification

The Bar must indemnify its officers, board members, directors, employees and agents and defend them for their acts and omissions occurring in the performance of their duties, to the fullest extent permitted by ORS Chapter 30 relating to indemnification by public bodies, especially the provisions of ORS 30.285. The term "officers, board members, directors, employees and agents" of the Bar includes subordinate groups established by the Bar or the Supreme Court to perform one or more of its the Bar’s authorized functions, including the Board of Bar Examiners, the Professional Liability Fund, the State Professional Responsibility Board, the Disciplinary Board, the Local Professional Responsibility Committees and bar counsel and the State Lawyers Assistance Committee. The right to and method and amount of defense and indemnification are determined in accordance with the provisions of ORS 30.285 or comparable provisions of law governing indemnity of state agents in effect at the time of a claim.

* * *

Article 7 Financial Matters

* * *

Section 7.2 Annual Budget

* * *

Subsection 7.202 Approval by Supreme Court

The Board will establish each year the budget of the Bar’s admissions, discipline and Minimum Continuing Legal Education programs in conjunction with the budgets of the other activities of the Bar. The admissions, discipline and Minimum Continuing Legal Education components of the Board’s preliminary budget for the following year must be submitted to the Chief Justice of the Oregon Supreme Court for review and approval by the court. Any changes made by the court in the preliminary budgets of the Bar’s admissions, discipline and Minimum Continuing Legal Education programs must be incorporated into the final budget approved by the Board. Additional provisions pertaining to the development and approval of the budget for the admissions component are set out in Article 28.

¹ The Operating Principles replaced a 1989 “Agreement” between the OSB and the BBX.

* * *

Article 8 Public Records/Meetings

* * *

Section 8.2 Public Meetings

All regular and special meetings of the Board of Governors, [Board of Bar Examiners](#), committees, sections, and subcommittees or subsections thereof, are subject to the Public Meetings Law (ORS 192.610-192.690).

Subsection 8.201 Judicial Proceedings

(a) Disciplinary and contested reinstatement hearings and hearings conducted pursuant to Title 3 of the Rules of Procedure, are open to the public, subject to the authority of the presiding official to maintain proper decorum and to exclude witnesses at the request of the Bar, an accused or applicant. Panels of the Disciplinary Board and any presiding official will comply with UTCR 3.180 when presented with requests to allow media coverage of proceedings.

(b) Meetings of Local Professional Responsibility Committees and the SPRB, and the deliberations of Disciplinary Board trial panels are closed to the public, pursuant to the exemption set forth in ORS 192.690(l) for judicial proceedings.

(c) Meetings of the Board of Governors relating to disciplinary and reinstatement matters are closed to the public, pursuant to the exemption set forth in ORS 192.690(1) for judicial proceedings. Meetings of the Board of Governors may also be closed to the public in whole or part for consideration of any matter for which a closed session is authorized under ORS 192.660.

(d) The Board of Bar Examiners' consideration of individual applicants' qualifications are judicial proceedings for purposes of the Public Meetings Law.

* * *

Article 28 ~~Amendment of Bylaws~~ Admissions

Section 28.1 Board of Bar Examiners

Pursuant to ORS 9.210, the Supreme Court appoints a Board of Bar Examiners (BBX) to carry out the admissions function of the Oregon State Bar. The BBX recommends to the Supreme Court for admission to practice those who fulfill the requirements prescribed by law and the rules of the Court. The BBX's responsibilities include: investigating applicants' character and fitness, developing a bar examination, determining the manner of examination, determining appropriate accommodations for applicants, grading the bar examinations and setting standards for bar examination passage. The BBX may appoint co-graders to assist with the grading of examinations. The BBX may also recommend to the Court rules governing the qualifications, requirements and procedures for admission to the bar, by examination or otherwise, for law student appearance, and other subjects relevant to the responsibilities of the BBX.

Section 28.2 Nominations

The bar and the BBX will recruit candidates for appointment to the BBX and for appointment as co-graders. The BBX will solicit input from the Board of Governors before selecting co-graders and nominating candidates for appointment to the BBX.

Section 28.3 Liaisons

The Board of Governors shall appoint one of its members as a liaison to the BBX. The BBX may appoint one of its members as a liaison to the Board of Governors. The liaisons shall be entitled to attend all portions of the BBX and Board of Governor meetings, including executive and judicial sessions.

Section 28.4 Admissions Director

The Admissions Director shall report to and be supervised by the Director of Regulatory Services, under the overall authority of the Executive Director. The Executive Director and Director of Regulatory Services will make the hiring, discipline and termination decisions regarding the Admissions Director. The Executive Director and Director of Regulatory Services will solicit BBX's input into these decisions and give due consideration to the recommendations and input of the BBX. If the BBX objects to the final hiring decision for the Admission Director, recruitment will be reopened.

Section 28.5 Budget

With the approval of the Oregon Supreme Court, the BBX may fix and collect fees to be paid by applicants for admission. A preliminary annual budget for admissions will be prepared by the Admissions Director and Director of Regulatory Services in consultation with the BBX. Upon approval by the BBX, the budget will be submitted to the Board of Governors. The final budget presented to the Board of Governors will be provided to the BBX. Upon adoption by the Board of Governors, the budget will be submitted to the Supreme Court in accordance with Bylaw 7.202, and the BBX may make a recommendation to the Supreme Court regarding adoption of the budget. The budget will align with bar policy generally after consideration of the policy goals and objectives of the BBX.

Section 28.6 Amendments

Any proposed amendment to Article 28 shall be submitted to the BBX and Supreme Court for consideration and the BBX shall make its recommendation to the Supreme Court regarding adoption of the proposed amendment. Upon Supreme Court approval, the Board of Governors may adopt such amendments in accordance with Article 29.

Article ~~28~~ 29 Amendment of Bylaws

Any amendment of the Bar's Bylaws requires notice at a prior Board meeting unless two-thirds of the entire Board waives the notice requirement. The Bar's Bylaws may be amended by affirmative vote of a majority of the entire Board at any regular meeting or at any special meeting of the Board called for that purpose.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 24, 2015
Memo Date: April 10, 2015
From: Danielle Edwards, Director of Member Services
Re: Appointments to committees and board

Action Recommended

The following bar groups have vacant seats. Consider appointments to these groups as requested by the committee officers and staff liaisons.

Background

Legal Ethics Committee

Three members resigned from the Legal Ethics Committee. In addition to these vacancies the officers also request the addition of two member seats which would result in a total of 17 voting members. The committee officers and staff liaison recommend **Jay D. Brody** (100519) based on his experience practicing in other states. **Daniel L. Keppler** (923537) and **Jonathan W. Monson** (102650), and **Corey B. Tolliver** (075500) offer practice area experience not represented on the committee. **Michelle M. Sweet** (060015) brings federal practice experience and gender balance.

Recommendation: Jay D. Brody, member, term expires 12/31/2016

Recommendation: Daniel L. Kepper, member, term expires 12/31/2017

Recommendation: Jonathan W. Monson, member, term expires 12/31/2016

Recommendation: Michelle M. Sweet, member, term expires 12/31/2017

Recommendation: Corey B. Tolliver, member, term expires 12/31/2016

Public Service Advisory Committee

The committee officers and staff liaison recommend the appointment of **Richard H. Rizk** (901105) to the vacant member seat on the committee. Mr. Rizk indicated the PSAC as his first choice when applying through the OSB volunteer survey. He also offers balance to existing committee members with respect to practice areas and ethnicity.

Recommendation: Richard H. Rizk, member, term expires 12/31/2016

Uniform Civil Jury Instructions Committee

Three member seats are vacant. The committee officers recommend **Kenneth C. Crowley** (883554) who is a trial attorney at the DOJ, **Benjamin P. Kean** (141354) who brings experience from another state bar, and **William "Chad" Stavley** (034656). All three candidates have agreed to serve and will ensure a balance between plaintiff and defense sides.

Recommendation: Kenneth C. Crowley, member, term expires 12/31/2015

Recommendation: Benjamin P. Keane, member, term expires 12/31/2016

Recommendation: William "Chad" Stavley, member, term expires 12/31/2017

Uniform Criminal Jury Instructions Committee

One member resignation requires a new committee appointment. The officers and staff liaison recommend **Erik M. Blumenthal** (073240) for appointment. Mr. Blumenthal is a public defender in Salem, he offers geographic and ethnic diversity and balances the committee between prosecution and defense sides.

Recommendation: Erik M. Blumenthal, member, term expires 12/31/2017



**DISABILITY DIVERSITY IN THE LEGAL PROFESSION:
A PLEDGE FOR CHANGE**

As Legal Employers, Chief Legal Officers, Law Schools, State and Local Bar Associations, Judges, Court Administrators, Hiring Partners, and Hiring Personnel in the Legal Profession, we hereby affirm our commitment to diversity in the legal profession, including diversity with respect to individuals with mental, physical, and sensory disabilities. Our pledge is based on the need to enhance opportunity in the legal profession and our recognition that the legal and business interests of our clients and the populations we serve require legal representation that reflects the diversity of our employees, customers and the communities where we operate. In furtherance of this commitment, this is intended to be a Pledge for Change for the profession generally and in particular for our law departments, firms, agencies, law schools, state and local bar associations, courthouses, and organizations. We further pledge that we will encourage other law departments, firms, agencies, law schools, state and local bar associations, court systems, and/or organizations that we do business with to make a similar diversity commitment.

Organization: _____

Printed Name & Title :

_____ Date: _____

Signature: _____

Email Address & Phone Number: _____

You can return a signed copy via either e-mail
(cdr@americanbar.org) or fax (202-442-3439).

Amended February 07, 2014.

This Pledge was inspired by "A Call to Action," a diversity pledge for the legal profession, created by Rick Palmore, Esq.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON LAWYER REFERRAL AND INFORMATION SERVICE

CO-SPONSORS

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges state and territorial legislative bodies
2 and courts, including federal courts, to adopt rules to establish a privilege for confidential
3 communications between a client and a lawyer referral service, similar to the privilege that
4 currently exists for confidential communications between attorneys and clients, ensuring that a
5 client consulting a lawyer referral service for the purpose of retaining a lawyer or obtaining legal
6 advice from a lawyer may refuse to disclose, or prevent lawyer referral service staff from
7 disclosing, the substance of that consultation. Such a privilege should mirror the attorney-client
8 privilege applicable in that jurisdiction as closely as possible, including incorporating any
9 exceptions to the privilege, e.g. to prevent death or substantial bodily harm to someone.