

**Oregon State Bar**  
**Meeting of the Board of Governors**  
June 24, 2016  
**Open Session Minutes**

President Ray Heysell called the meeting to order at 1:05 p.m. on June 24, 2016. The meeting adjourned at 4:30 p.m. Members present from the Board of Governors were John Bachofner, Jim Chaney, Chris Costantino, Rob Gratchner, Guy Greco, Michael Levelle, John Mansfield, Vanessa Nordyke, Ramón A. Pagán, Per Ramfjord, Kathleen Rastetter, Julia Rice, Kerry Sharp, Kate von Ter Stegge, Tim Williams, and Elisabeth Zinser. Not present were Josh Ross, Richard Spier and Charles Wilhoite. Staff present were Helen Hierschbiel, Amber Hollister, Rod Wegener, Dawn Evans, Susan Grabe, Dani Edwards and Camille Greene. Present from the PLF were Carol Bernick and Tim Martinez. Also present was Colin Andries, ONLD Chair, Jennifer Nichols, ONLD, and Don Friedman, Incubator Study.

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

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

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

**A. Awards Special Committee**

Ms. Hierschbiel asked the board for volunteers to form an awards committee, chaired by the President, and including all interested board members. The following board members volunteered: Mr. Pagan, Mr. Greco, Ms. Nordyke and Mr. Ramfjord. Mr. Heysell will contact board members to form the committee and report back to the board in September.

**B. Policy and Governance Committee**

**Motion:** Mr. Ramfjord moved, Ms. Rice seconded, and the board voted unanimously to waive the one-meeting notice for all bylaw changes presented.

Mr. Levelle presented the committee's two requests regarding the Judicial Administration Committee as outlined in the committee memo **[Exhibit A]**:

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

**Motion:** The board voted unanimously in favor of the committee motion to approve changes to the strategies. The motion passed.

2. Sunset the Judicial Administration Committee.

**Motion:** The board voted unanimously in favor of the committee motion to sunset the Judicial Administration Committee. The motion passed.

Mr. Levelle presented the committee motion to approve the proposed language for new bylaws establishing retired membership status as a subcategory of inactive bar membership. The

adoption of these bylaws would be in lieu of the bylaws adopted by the Board on January 9, 2016. **[Exhibit B]**

**Motion:** The board voted unanimously in favor of the committee motion to approve the proposed language for the new bylaw. The motion passed.

Mr. Levelle presented the committee motion to approve the proposed language for a revision to Article 19 of the bylaws to clarify that information and materials provided to General Counsel as part of an ethics question or request for ethics opinion are not confidential, and may be shared with the public or other bar departments. **[Exhibit C]**

**Motion:** The board voted unanimously in favor of the committee motion to approve the proposed language for a revision to Article 19 of the bylaws. The motion passed.

Mr. Levelle presented the committee motion to waive the one meeting notice requirement and approve changes to the appellate screening bylaws in OSB bylaw 2.703. **[Exhibit D]**

**Motion:** The board voted unanimously in favor of the committee motion to approve the proposed changes to OSB bylaw 2.703 re: Appellate Screening Committee. The motion passed.

**C.** Board Development Committee

Ms. Nordyke presented the Board Development Committee's recommendation to appoint Nancy Cozine and reappoint Mark Comstock to the Oregon Law Commission.

**Motion:** The board voted unanimously in favor to accept the committee motion. The motion passed.

Ms. Nordyke presented the Board Development Committee's recommendation to appoint Scott Lucas, John Mellgren, James Nobel Miner, and Lish Whitson as new members to the OSB House of Delegates. **[Exhibit E]**

**Motion:** The board voted unanimously in favor to accept the committee motion. The motion passed.

Ms. Nordyke presented the committee's recommendations for lawyer representatives for the 9th Circuit Judicial Conference: Christopher Cauble, Nadia Dahab, Patrick Ehlers, Erin Galli and Charles Robinowitz. **[Exhibit E]**

Mr. Chaney recommended removing Mr. Cauble from the list of recommended lawyers.

**Motion:** Mr. Ramfjord moved, Mr. Williams seconded, to amend the committee recommendation and remove Mr. Cauble from the list of committee recommendations.

**Motion:** The board voted unanimously in favor of accepting the committee recommendation as amended. The motion passed.

**D.** Budget and Finance Committee

Mr. Mansfield presented a general financial update. The committee will present amendments to the bylaws at the June 24, 2016 BOG meeting. The review of the reserve and contingency funds revealed that uses of the funds are appropriate and prudent. Mr. Levelle suggested the committee develop standards for the use of these funds.

Mr. Mansfield presented the committee's request to review the recommendation from Budget & Finance Committee for changes to bylaw 7.4 Investment Policy and create an Investment Committee Policy. **[Exhibits F & G]**

**Motion:** The board voted unanimously in favor of the committee motion to approve the proposed changes to OSB bylaw 7.4 and create an Investment Committee Policy. The motion passed.

Mr. Mansfield noted that the committee discussed whether to adjust the Client Security Fund assessment and determined there would be no changes for the 2017 budget.

**E. Public Affairs Committee**

Mr. Williams gave a general update on legislative activity, the *Horton vs. OHSU* case, HB 4042, and the committee discussion about whether the OSB Public Affairs department needs greater staffing to do its work.

Mr. Williams noted that the committee does not have an action item from the Civil Rights Section for the board to consider at this meeting.

**3. Professional Liability Fund**

Mr. Martinez gave a financial update for the PLF. The PLF changed "retained earnings" to "net position" and are working on determining the assessment.

Ms. Bernick stressed the importance of a net position that allows them to not raise assessments when the market shifts. She announced there are two openings for the board and asked the BOG to get the word out. The PLF will continue to support Bar Books. The Excess Program was changed this year and for the first time in four years they had an increase in enrollment.

Ms. Bernick asked the board to approve proposed changes to PLF Policies 3.300 and 3.350 re: installment payments. **[Exhibit H]**

**Motion:** Mr. Greco moved, Mr. Mansfield seconded, and the board voted to approve the changes to the PLF policies. Mr. Bachofner and Mr. Chaney abstained.

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

**A. Discipline System Review Committee**

Ms. Evans gave the board an update on the current status of the draft changes to the disciplinary system process and the creation of a professional adjudicator position. Ms. Evans submitted a draft to the Court's general counsel, and hopes to have a final draft for the BOG's consideration at their September meeting.

Ms. Hirschbiel and Ms. Evans presented the Oregon Supreme Court's letter in response to the DSRC Report and BOG recommendations for changes to the disciplinary rules of procedure.

With respect to the Court's comments regarding DSRC Recommendation #4, Disciplinary Counsel's Office is working to enhance its ability to track and report information, as requested by the Court. With respect to DSRC Recommendation #19, Ms. Evans has drafted the proposed amended rules with the Court's concerns in mind.

Regarding DSRC Recommendation #31, the Court asked for clarification regarding the BOG's reason for declining to approve. Ms. Evans explained that the way the recommendation was worded, it effectively eliminated any ability of the parties to agree to waive a 3-person trial panel. The Court believes the parties should have a right to agree to waive the panel; however, the Court understood the recommendation to give the respondent the right to elect to proceed before a single adjudicator before other panel members are appointed, in addition to having the ability to agree to waiver thereafter.

In response to this explanation, board members expressed support for giving the respondent the right to unilaterally waive the trial panel prior to filing an answer. The board asked that Ms. Evans draft the rules in accordance with that interpretation if the Court so desires.

Regarding DSRC Recommendation #16, Ms. Hirschbiel reported that although the Court is in favor of establishing a professional adjudicator, the Court is not in favor of being the entity to hire and pay for a professional adjudicator. Ms. Hirschbiel asked the board to review the options presented in her memo [Exhibit ~~xx~~] for engaging a disciplinary system professional adjudicator (PA) and provide feedback on whether to proceed with exploring other options or to abandon the PA option entirely. Mr. Chaney suggested the bar hire the PA on a part-time basis from the Office of Administrative Hearings. Ms. Hirschbiel has received negative feedback from members when she proposed that solution. Mr. Pagan suggested the part-time PA not be an employee of the bar but be an independent contractor. Ms. Hirschbiel noted that option was one that bar staff recommended exploring further.

**Motion:** Mr. Ramfjord moved, Mr. Levelle seconded, to authorize Ms. Evans to work with the court to draft rules with one or more options for the professional adjudicator and funding options. The motion passed. Mr. Greco and Mr. Sharp abstained.

**B. Incubator Feasibility Study**

Ms. Hirschbiel introduced Mr. Friedman who presented the Oregon Incubator Status Report. Mr. Friedman researched the cost of programs designed to train law students to serve the underserved community. He learned that implementing incubator programs requires more resources and a higher level of participation than he anticipated. The Oregon law schools are interested but unwilling or unable to start a program on their own. Mr. Friedman recommended that the Board direct the Futures Task Force to further examine the creation of an incubator program.

Board members then discussed whether an incubator program should be focused on serving rural communities. Mr. Heysell said the rural communities are aging-out and this needs to be part of a larger Legal Futures discussion.

Ms. Hirschbiel asked the board to consider whether and how to proceed:

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

**Motion:** Mr. Bachofner moved, Mr. Greco seconded, and the board voted unanimously to continue exploring whether to start an incubator program in Oregon through the Futures Task Force. The motion passed.

**C. Oregon New Lawyers Division Report**

In addition to the written report, Mr. Andries encouraged the board to talk to the ONLD about the incubator program and Futures Task Force.

Jennifer Nicholls, the ONLD chair-elect, is researching what other states are doing to better serve rural communities, and would be interested in serving on the Task Force.

Mr. Andries presented the Oregon New Lawyers Division (ONLD) request for approval to introduce the ABA Standing Committee on Ethics and Professional Responsibility's Resolution and Report to the ABA Young Lawyer's Division General Assembly at the annual meeting in August. **[Exhibit I]**

Ms. Hollister pointed out that the ABA proposed bias rule does not include the word "knowingly", but the Oregon rule does.

Mr. Bachofner recommended the ONLD introduce the resolution including the word "knowingly." Mr. Andries did not think he could add an amendment to this resolution at this point in time. The Board feels bound to including the word "knowingly" or they cannot support the resolution.

**Motion:** Mr. Ramfjord moved, Mr. Mansfield seconded, that ONLD report back to the ABA that ONLD cannot sponsor the proposed ABA Model Rule because it conflicts with the existing OSB rule. However, the bar champions efforts to pass a rule on this subject. The final motion passed unanimously.

**D. Legal Services Program Committee**

Ms. Hirschbiel presented the committee request to approve the following recommendation forwarded from the Legal Services Program (LSP) Committee for disbursement of the \$200,000 general fund revenue held by the Oregon State Bar.

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

**Motion:** Mr. Greco moved, Ms. Zinser seconded, and the board voted unanimously in favor to accept the proposed recommendation to disburse the funds. The motion passed.

**E. Client Security Fund Committee**

Claim 2015-43 GERBER (Middleton)

Ms. Hirschbiel asked the board to consider the Client Security Fund Committee recommendation for reimbursement of \$8,500 to Kenneth Middleton for his loss resulting from the conduct of attorney Susan Gerber. **[Exhibit J]**

**Motion:** Mr. Greco moved, Mr. Mansfield seconded, and the board voted to approve the committee's recommendation for reimbursement. Ms. von Ter Stegge and Ms. Nordyke abstained.

Claim 2016-01 ECKREM (Smith)

Ms. Hirschbiel asked the board to consider the request of the Claimant that the BOG reverse the CSF Committee's denial of the claim, as presented in her memo. **[Exhibit K]**

**Motion:** Mr. Pagan moved, Mr. Greco seconded, and the board voted unanimously to uphold the committee's denial of the claim.

Claim 2015-19 WIESELMAN (Lowry)

Ms. Hirschbiel asked the board to consider the request of the Claimant that the BOG reverse the CSF Committee's denial of the claim, as presented in her memo. **[Exhibit L]**

**Motion:** Mr. Greco moved, Mr. Mansfield seconded, and the board voted unanimously to uphold the committee's denial of the claim.

Ms. Hirschbiel presented the committee's financials for information purposes.

**F.** Legal Ethics Committee

Ms. Hirschbiel presented the committee's request for board approval of proposed updates to formal ethics opinion 2005-73 re: lawyer referral gifts. **[Exhibit M]**

**Motion:** Mr. Pagan moved, Ms. Rastetter seconded, and the board voted to approve the amendments as recommended by the committee. Mr. Ramfjord abstained.

**G.** MCLE Committee

Ms. Hirschbiel presented the committee's request to review and approve proposed amendments to Rule 5.2 and Regulation 5.100 exempting Executive Branch statewide elected officials from the general CLE credit requirement during term of office. **[Exhibit N]**

There was much pro/con discussion about the necessity for attorneys who are elected officials to update their legal education when they are not practicing law.

**Motion:** Mr. Levelle moved, Mr. Pagan seconded, and the board voted to approve the amendments as recommended by the committee. Mr. Chaney, Ms. Costantine, Mr. Ramfjord, Mr. Sharp, Mr. Pagan, Mr. Levelle, Mr. Bachofner, Ms. Zinser, Mr. Williams, Mr. Greco, Ms. Rice, and Ms. Rastetter voted in favor. Mr. Mansfield, Mr. Gratchner and Ms. von Ter Stegge were opposed. Ms. Nordyke abstained.

**H.** OSB Sponsorship

Ms. Hirschbiel asked the board to approve sponsorship of the Access to Justice Conference up to \$5,000. **[Exhibit O]**

**Motion:** Mr. Ramfjord moved, Mr. Levelle seconded, and the board voted unanimously to approve the sponsorship.

**5. Consent Agenda**

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

Mr. Heysell reported on his three days of meeting with attorneys in Eastern Oregon.

Report of the President-elect  
None.

Report of the Executive Director  
As written.

Director of Regulatory Services  
As written.

MBA Liaison Report  
None.

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

**6. Closed Sessions – see CLOSED Minutes**

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

**Motion:** Ms. Rice moved, and Ms. Rastetter seconded, to recommend to the Supreme Court that Ms. Beach's reinstatement application be approved. The motion passed. Mr. Chaney abstained.

**Motion:** Mr. Greco moved, M seconded, and the board voted to deny the authority to the UPL Committee to file suit. The motion passed. Mr. Bachofner was opposed.

**7. Good of the Order (Non-action comments, information and notice of need for possible future board action)**

None.

**Oregon State Bar  
Board of Governors Meeting  
June 24, 2016  
Executive Session Minutes**

Discussion of items on this agenda is in executive session pursuant to ORS 192.660(2)(f) and (h) to consider exempt records and to consult with counsel. This portion of the meeting is open only to board members, staff, other persons the board may wish to include, and to the media except as provided in ORS 192.660(5) and subject to instruction as to what can be disclosed. Final actions are taken in open session and reflected in the minutes, which are a public record. The minutes will not contain any information that is not required to be included or which would defeat the purpose of the executive session.

A. Unlawful Practice of Law Litigation

Ms. Hollister asked the board to consider the UPL Committee request for authority to file suit and obtain an injunction against Angel Kavanaugh & Angel's Mobile Notary and Paralegal Services.

B. Pending or Threatened Non-Disciplinary Litigation

Ms. Hollister informed the board of non-action items.

C. Other Action Items

Ms. Hollister informed the board of non-action items.

**Oregon State Bar  
Board of Governors Meeting  
June 24, 2016  
Judicial Proceedings Minutes**

Reinstatements and disciplinary proceedings are judicial proceedings and are not public meetings (ORS 192.690). This portion of the BOG meeting is open only to board members, staff, and any other person the board may wish to include. This portion is closed to the media. The report of the final actions taken in judicial proceedings is a public record.

A. Reinstatements

1. Tami S.P. Beach – 964738

Ms. Evans presented information concerning the BR 8.1 reinstatement application of Ms Beach.

# OREGON STATE BAR

## Board of Governors Agenda

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

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### **Actions Recommended**

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

### **Background**

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

### ***Partner with Judiciary Function***

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

The mission of the Oregon State Bar is to serve justice by promoting respect for the rule of law, by improving the quality of legal services and by increasing access to justice.

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

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

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

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

### ***Revisions to strategies***

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

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

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

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

### ***Judicial Administration Committee***

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

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

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

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

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

- Council on Court Procedures

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

- Uniform Trial Court Rules Committee

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

- State Family Law Advisory Committee (SFLAC)

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

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

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

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

### ***Recommendation for the JAC***

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

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

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

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

# OREGON STATE BAR

## Board of Governors Agenda

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

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### **Action Recommended**

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

### **Discussion**

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

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

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

### **Recommendation**

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

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## **Article 6 Membership Classification and Fees**

### **Section 6.1 Classification of Members**

#### **Subsection 6.100 General**

Members of the Bar are classified as follows:

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

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

#### Subsection 6.102 Retired Status

##### (a) Purpose

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

##### (c) -Eligibility for Retired Status

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

##### (d) Membership Fees.

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

##### (e) Transfer of Membership

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

## **Other OSB Bylaws**

## **Article 3 House of Delegates**

**Section 3.4 Meeting Agenda**

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

**Article 17 Member Services<sup>1</sup>****~~Section 17.2 Insurance~~**

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

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

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

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

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

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

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

# OREGON STATE BAR

## Governance & Strategic Planning Committee Agenda

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

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### Action Recommended

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

### Background

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

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

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

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

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

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

### **Options**

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

## Article 19 Legal Ethics Questions and Opinions

### Section 19.1 General Counsel's Office

#### ***Subsection 19.100 Submission and Questions***

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

#### ***Subsection 19.101 Determination by General Counsel***

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

#### ***Subsection 19.102 Ethics Advice to Bar Members***

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

### ***Subsection 19.103 Application of Oregon RPC 8.6***

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

### **Section 19.2 Limitation of Advice**

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

## Section 2.7 Judicial Selection

### Subsection 2.703 Statewide Judicial Appointments

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

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

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

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

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

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

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

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

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** June 24, 2016  
**Memo Date:** June 24, 2016  
**From:** Vanessa Nordyke, Board Development Committee Chair  
**Re:** HOD Appointments and 9<sup>th</sup> Circuit Judicial Conference Recommendations

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### Action Recommended

Approve the Board Development Committee's recommendation to appoint new members to the OSB House of Delegates and to recommend members for appointment consideration as lawyer representatives for the Ninth Circuit Judicial Conference.

### Background

The **House of Delegates** has four vacant seats requiring appointment. The Board Development Committee unanimously recommends the following appointments:

**Scott Lucas**, Region 2 member, term expires 4/16/2018  
**John Mellgren**, Region 2 member, term expires 4/15/2019  
**James Nobel Miner**, Region 7, term expires 4/16/2018  
**Lish Whitson**, Region 8, term expires 4/16/2018

Chief Judge Michael Mosman requested recommendations for Lawyer Representatives for the Ninth Circuit Judicial Conference. The Board Development Committee unanimously recommends the following candidates:

**Christopher Cauble**, 962374  
**Nadia Dahab**, 125630  
**Patrick Ehlers**, 041186  
**Erin Galli**, 952696  
**Charles Robinowitz**, 691497

## Budget & Finance Committee

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

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

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#### CURRENT BYLAW WITH PROPOSED REVISIONS

##### Section 7.4 Investment Policy

###### *Subsection 7.400 Purpose*

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

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

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

###### *Subsection 7.401 Investment Management*

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

###### *Management and Monitoring of Performance*

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

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

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

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

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

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

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

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

### ***Subsection 7.402 Approved Investments***

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

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

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

#### ***Subsection 7.403 Limitations***

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

#### ***Subsection 7.404 Prudent Investor Rule***

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

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

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

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

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

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

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

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

### 3.300 INSTALLMENT PRIVILEGES

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

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

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

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

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

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

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

### 3.350 PAYMENT DEFAULT AND LATE PAYMENT CHARGES

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

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

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

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

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

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

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

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

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

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

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

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

# OREGON STATE BAR

## Board of Governors Agenda

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

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### **Action Recommended**

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

### **Background**

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

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

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

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

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

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

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

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

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

### Options

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

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Exhibit I

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

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

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

4  
5 Rule 8.4: Misconduct

6  
7 It is professional misconduct for a lawyer to:

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

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

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

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

16  
17 (e) state or imply an ability to influence improperly a government agency or official or to  
18 achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~

19  
20 (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable  
21 rules of judicial conduct or other law; or

22  
23 (g) harass or discriminate on the basis of race, sex, religion, national origin, ethnicity,  
24 disability, age, sexual orientation, gender identity, marital status or socioeconomic status in

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

29

30 Comment

31

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

37

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

49

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

56

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

67

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

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

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

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

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

95

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## **REPORT**

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

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

### **I. Introduction and Background**

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

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

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

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

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<sup>1</sup> ABA MISSION AND GOALS, [http://www.americanbar.org/about\\_the\\_aba/aba-mission-goals.html](http://www.americanbar.org/about_the_aba/aba-mission-goals.html) (last visited May 9, 2016).

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

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

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

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

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

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

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

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

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

## II. Process

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

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

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

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

[http://www.abajournal.com/magazine/article/inclusion\\_exclusion\\_understanding\\_implicit\\_bias\\_is\\_key\\_to\\_ensuring](http://www.abajournal.com/magazine/article/inclusion_exclusion_understanding_implicit_bias_is_key_to_ensuring).

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

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

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

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

At the Roundtable and in subsequent written communications SCEPR received numerous comments about the Working Discussion Draft. After studying the comments and input from the Roundtable, SCEPR published in December 2015 a revised draft of a proposal to amend Rule 8.4(g), together with proposed new Comments to Rule 8.4. SCEPR also announced to the Association, including on the House of Delegates listserv, that it would host a Public Hearing at the Midyear Meeting in San Diego in February 2016.<sup>7</sup> Written comments were also invited.<sup>8</sup> President Brown and past President Laurel Bellows were among those who testified at the hearing in support of adding an anti-discrimination provision to the black letter Rule 8.4.

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

### **III. Need for this Amendment to the Model Rules**

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

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

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<sup>7</sup> *American Bar Association Public Hearing* (Feb. 7, 2016), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_model\\_rule%208\\_4\\_comments/february\\_2016\\_public\\_hearing\\_transcript.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.authcheckdam.pdf).

<sup>8</sup> MODEL RULE OF PROFESSIONAL CONDUCT 8.4 DEC. 22 DRAFT PROPOSAL COMMENTS RECEIVED, [http://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8\\_4.html](http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4.html) (last visited May 9, 2016).

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

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

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

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

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

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

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

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

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

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

#### IV. Summary of Proposed Amendments

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

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

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

<sup>14</sup> The Florida Bar, *Results of the 2015 YLD Survey on Women in the Legal Profession* (Dec. 2015),

[http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/13AC70483401E7C785257F640064CF63/\\$FILE/RESULTS%20OF%202015%20SURVEY.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/13AC70483401E7C785257F640064CF63/$FILE/RESULTS%20OF%202015%20SURVEY.pdf?OpenElement).

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

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### **A. Prohibited Activity**

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

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

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

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

### **B. Mens Rea Requirement**

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

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

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

<sup>18</sup> MODEL RULES OF PROF'L CONDUCT, Preamble & Scope [5] (2016).

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

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

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

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

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

### **C. Scope of the Rule**

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

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

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

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

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

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

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

<sup>21</sup> MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. [2].

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

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

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

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

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

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<sup>24</sup> MODEL RULES OF PROF’L CONDUCT, Preamble [3].

<sup>25</sup> MODEL RULES OF PROF’L CONDUCT R. 8.4 cmt. [2].

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

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

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

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

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

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

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

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

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

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<sup>29</sup> See MODEL RULES OF PROFESSIONAL CONDUCT R. 7.1 - 7.6.

<sup>30</sup> ABA HOUSE OF DELEGATES RESOLUTION 10A (Aug. 2007).

<sup>31</sup> ABA HOUSE OF DELEGATES RESOLUTION 117 (Feb. 1992).

<sup>32</sup> MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [10].

<sup>33</sup> MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [19].

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

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

#### **D. Protected Groups**

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

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

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<sup>34</sup> MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [20].

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

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

[http://www.americanbar.org/groups/sexual\\_orientation/policy.html](http://www.americanbar.org/groups/sexual_orientation/policy.html).

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

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

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

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

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

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

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

## E. Promoting Diversity

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

<sup>40</sup> [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm)

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

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

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

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

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

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

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

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<sup>42</sup> American Bar Association, *Lawyer Demographics Year 2016* (2016), [http://www.americanbar.org/content/dam/aba/administrative/market\\_research/lawyer-demographics-tables-2016.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf).

<sup>43</sup> *Id.*

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

### **G. Legitimate Advocacy**

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

### **H. Peremptory Challenges**

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

## **V. CONCLUSION**

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

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

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

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

Respectfully submitted,

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

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## **GENERAL INFORMATION FORM**

Submitting Entity: Standing Committee on Ethics and Professional Responsibility

Submitted By: Dennis Rendleman, Ethics Counsel

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

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

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

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

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

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

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

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

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

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

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

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

Myles V. Lynk, Chair  
Standing Committee on Ethics and Professional Responsibility  
Arizona State University College of Law  
Armstrong Hall  
P.O. Box 877906  
Phoenix, AZ 85287-7906  
W: 480-965-0433  
C: 480-721-4062  
[Myles.lynk@asu.edu](mailto:Myles.lynk@asu.edu)

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## **EXECUTIVE SUMMARY**

### 1. Summary of the Resolution

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

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

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

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

### 2. Summary of the Issue that the Resolution Addresses

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

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

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

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

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

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

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

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

4. Summary of Minority Views

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

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

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

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

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

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

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

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

# OREGON STATE BAR

## Board of Governors Agenda

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

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### **Action Requested**

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

### **Discussion**

#### Background

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

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

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

#### Kenneth Middleton

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

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

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

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

### Analysis

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

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

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

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

# OREGON STATE BAR

## Board of Governors Agenda

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

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### Action Requested

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

### Discussion

#### *Summary of Facts*

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

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

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

#### *CSF Committee Analysis*

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

# OREGON STATE BAR

## Board of Governors Agenda

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

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### Action Requested

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

### Discussion

#### *Summary of Facts*

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

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

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

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

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

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

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

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

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

### *CSF Committee Analysis*

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

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

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

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

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

**FORMAL OPINION NO. 2005-73****Information aAbout Legal Services:  
Acceptance of Referrals****Facts:**

Lawyer is social friends with X, is known to Y as a competent professional, and has a lawyer-client relationship with Z. Lawyer is aware that, from time to time, X, Y, and Z may refer potential clients to Lawyer. Although Lawyer has thanked X, Y, and Z for doing so, Lawyer has not compensated X, Y, or Z for their referrals and has not affirmatively requested that future referrals be made. Lawyer would like to send a small gift to X, Y, and Z after learning about the referrals as a token of appreciation.

**Question:**

1. May Lawyer accept future referrals from X, Y, and Z?
- 1.2. May Lawyer send a small gift to X, Y, and Z as a token of appreciation?

**Conclusion:**

1. Yes.
- 1.2. Yes, qualified.

**Discussion:**

Oregon RPC 7.2 provides, in pertinent part:

(a) ~~A lawyer may pay the cost of advertisements permitted by these rules and may hire employees or independent contractors to assist as consultants or advisors in marketing a lawyer's or law firm's services. A lawyer shall not otherwise compensate or give anything of value to a person or organization to promote, recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except as permitted by paragraph (c) or Rule 1.17.~~ Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

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(b) ~~A lawyer shall not request or knowingly permit a person or organization to promote, recommend or secure employment by a client through any means that involves false or misleading communications about the lawyer or the lawyer's firm. If a lawyer learns that employment by a client has resulted from false or misleading communication about the lawyer or the lawyer's firm, the lawyer shall so inform the client. A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may~~

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

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

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

On the facts as presented, there does not appear to be a violation of any Oregon RPC by accepting referrals, so, ~~There is no reason~~ Lawyer may ~~not~~ continue to accept the referrals. *See also* OSB Formal Ethics Op No 2005-35 (rev 2015).

Lawyer also may provide de minimis gifts in the ordinary course of social or business hospitality as long as the proposed gifts are not payments in exchange for X, Y, or Z recommending the Lawyer's services.<sup>1</sup> Lawyer should therefore be careful to not run afoul of the rule by providing something of value *in exchange for* the referral. Where the intent is not compensation for the referral, it does not violate the rule.

**Approved by Board of Governors, August 2005.**

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COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 2.6-4 (limitations on obtaining employment

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<sup>1</sup> See, e.g., Arizona Ethics Op 02-01; Phil. Ethics Op. 93-26. Lawyer should be advised that many other states prohibit an attorney from giving any gift to a person in exchange for a client referral, no matter how de minimis. See, e.g., Conn. Informal Op. 92-24 (noting lawyer could not discount services as compensation for clients for referring another client); Rhode Island Op. 89-05 (5/29/89) (noting gift of less than \$100 ran afoul of the rule against giving anything of value for recommending a lawyer's services); Alabama Formal Op. 1999-01 (prohibiting attorney from paying another attorney's advertising expenses in exchange for receiving referrals).

through the recommendation of a third party), § 2.6-5 (lawyer-referral services, prepaid legal-services plans, and legal-services organizations)§~~2.27~~ 2.28, § 13.2-1(d) (group legal plans)12.8 (Oregon CLE 2003OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 47 (2000~~3~~) (supplemented periodically); and ABA Model RPCRule 7.2.

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** June 24, 2016  
**From:** MCLE Committee  
**Re:** CLE Credit for Service - Executive Branch Statewide Elective Office

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### Action Recommended

Review and approve proposed amendments to rules and regulations exempting Executive Branch statewide elected officials from the general CLE credit requirement during term of office.

### Background

The MCLE Committee recommends amending Rule 5.2 and Regulation 5.100 to exempt members who serve in certain statewide public offices in the Executive Branch from MCLE credit requirements other than those credits required in Rules 3.2(b) and (c) -- ethics, access to justice, child abuse and elder abuse reporting. This exemption would apply to the following offices in Oregon: Governor, Secretary of State, Commissioner of the Bureau of Labor and Industries, Attorney General and Treasurer.

Applying the exemption to those whose term in office includes all or part of a reporting period will prevent an unintended consequence of leaving an official with an abbreviated amount of time to complete a three-year credit requirement after a term in office.

MCLE Committee members recognize that statewide elected officials in the Executive Branch provide a tremendous service to our state, and are closely engaged in the legislative process and administration of law. Therefore, the Committee recommends amending Rule 5.2 and Regulation 5.100 as follows:

#### MCLE Rule 5.2 Other CLE Activities

(e) Legislative Service. General credit hours may be earned for service as a member of the Oregon Legislative Assembly while it is in session.

(f) Service in Executive Branch Statewide Elected Office. Members serving as statewide elected officials in Oregon's Executive Branch, whose term in office includes all or part of a reporting period, are exempt from all MCLE requirements except those credits required in Rules 3.2(b) and (c).

~~(f)~~ (g) New Lawyer Mentoring Program (NLMP)

(1) Mentors may earn CLE credit for serving as a mentor in the Oregon State Bar's New Lawyer Mentoring Program.

(2) New lawyers who have completed the NLMP may be awarded CLE credits to be used in their first three-year reporting period.

~~(g)~~ (h) Jury instructions Committee Service. A member serving on the Oregon State Bar Uniform Civil Jury Instructions Committee or Uniform Criminal Jury Instructions Committee may earn two general credits for each 12 months of service.

~~(h)~~ (i) A member seeking credit for any of the activities described in Rule 5.2 must submit a written application on the form designated by the MCLE Administrator for Other CLE Activities.

**Regulation 5.100 Other CLE Activities.** The application procedure for accreditation of Other CLE Activities shall be in accordance with MCLE Rule 5.2 and Regulation 4.300.

(a) With the exception of panel presentations, when calculating credit for teaching activities pursuant to MCLE Rule 5.2, for presentations where there are multiple presenters for one session, the number of minutes of actual instruction will be divided by the number of presenters unless notified otherwise by the presenter. Members who participate in panel presentations may receive credit for the total number of minutes of actual instruction. Attendance credit may be claimed for any portion of an attended session not receiving teaching credit.

(b) Credit for legislative service may be earned at a rate of 1.0 general credit for each week or part thereof while the legislature is in session.

(c) Members serving as Governor, Secretary of State, Commissioner of the Bureau of Labor and Industries, Attorney General and Treasurer during all or part of a reporting period are required to complete the minimum credit requirements in the following categories – ethics, access to justice, child abuse and elder abuse reporting -- during the reporting periods set forth in MCLE Regulation 3.300(d). These members are exempt from any other credit requirements during the reporting period in which they serve.

~~(e)~~ (d) Members who serve as mentors in the Oregon State Bar's New Lawyer Mentoring Program (NLMP) may earn eight credits, including two ethics credits, upon completion of the plan year. If another lawyer assists with the mentoring, the credits must be apportioned between them.

~~(d)~~ (e) Upon successful completion of the NLMP, new lawyers may earn six general/practical skills credits to be used in their first three-year reporting period.

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** June 24, 2016  
**From:** Helen Hirschbiel, CEO/Executive Director  
**Re:** Sponsorship of Access to Justice Conference

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### Action Requested

Approve sponsorship of the Access to Justice Conference up to \$5,000.

### Discussion

The Oregon Supreme Court Chief Justice Balmer has recommended that Oregon hold an Access to Justice Conference in the fall of 2016 as a means for the courts, the bar, legal aid providers, and others working on access to justice issues, to share information, evaluate efforts, and generate new ideas. A small group of representatives from the Court, the Campaign for Equal Justice, Legal Aid, and the OSB have met several times this year to discuss the details and planning of such a conference. Mercy Corps has offered to donate its space in downtown Portland for a conference on Thursday, September 8. We anticipate that other expenses (food, bringing in national speakers, etc.) could be as much as \$10,000. The Oregon Law Foundation has committed to providing \$2,500 toward those costs, and we anticipate the Court will contribute funds as well. The CEJ will provide staff support for planning the logistics of the conference. The group is now turning to the bar for additional financial support.

At its April 22, 2016 meeting, the Board of Governors approved amendments to OSB Bylaw 7.203 as follows:

The bar does not generally accept proposals for grants, contributions or sponsorships to non-profit or charitable organizations, including law-related organizations. The bar may provide financial support to the Classroom Law Project (CLP) and the Campaign for Equal Justice (CEJ) or any other organization that is germane to the Bar's purposes as set forth in Section 12.1 of these Bylaws. The bar's annual budget shall include an amount dedicated to providing such financial support, although that amount may change from year to year based upon the overall financial needs of the bar. This budgeted amount shall be in addition to any amounts budgeted to allow bar leadership and staff attendance at local bar and community dinners and similar events.

The Board has not yet established a budget or a policy for implementation of this bylaw. Therefore, I am bringing this request for sponsorship to the Board, rather than making the decision on my own. Sponsoring an Access to Justice Conference is clearly germane to the purposes for which the bar exists. OSB Bylaw 12.1 provides that bar activities be focused on, among other things, "improving the functioning of the courts... [and] making legal services available to society..." Therefore, I recommend that the Board approve sponsorship of the conference up to \$5,000.