

Oregon State Bar
Special Open Session of the Board of Governors
July 21, 2017
Minutes

President Michael Levelle called the meeting to order at 12:05 p.m. on July 21, 2017. The meeting adjourned at 2:15 p.m. Members present from the Board of Governors were John Bachofner, Jim Chaney, Chris Costantino, Eric Foster, Guy Greco, John Mansfield, Eddie Medina, Vanessa Nordyke, Tom Peachey, Kathleen Rastetter, Liani Reeves, Julia Rice, Kerry Sharp, and Elisabeth Zinser. Not present were Ray Heysell, Rob Gratchner, Per Ramfjord and Traci Rossi. Staff present were Helen Hirschbiel, Amber Hollister, Rod Wegener, Dawn Evans, Kay Pulju, Susan Grabe, Dani Edwards, Kateri Walsh, and Camille Greene. Present from the Fee Mediation Task Force were Rich Spier and Sam Imperati.

1. Call to Order

Ms. Nordyke reminded the board that we will hold our 4th Annual Richard Spier Memorial Talent Show at the BOG retreat in November. Mr. Spier will MC the event. Ms. Nordyke encouraged every BOG member to participate.

2. Fee Mediation Task Force Report

Mr. Spier introduced Mr. Imperati, presented the Fee Mediation Task Force Report and asked the board to consider and adopt the recommendations therein. **[Exhibit A]**

Mr. Levelle thanked the task force for their work and the report.

Motion: Mr. Peachey moved, Mr. Chaney seconded, and the board voted unanimously in favor of accepting the task force report.

Motion: Mr. Peachey moved, Mr. Chaney seconded, and the board voted unanimously in favor of sending the proposed changes to the Rules of Professional Conduct to the Legal Ethics Committee and the remaining recommendations to the BOG Policy & Governance Committee.

3. Ad Hoc Awards Committee

Mr. Levelle presented the committee's recommended award recipients. **[Exhibit B]**

Motion: The board voted unanimously in favor of approving the award recommendations.

4. Appointments to Council on Court Procedures

In the absence of Mr. Ramfjord, Ms. Costantino presented the Board Development Committee recommendations for appointments to the Council on Court Procedures (COCP).

Motion: The board voted unanimously to accept the committee motion to reappoint Travis Eiva, Jennifer Gates, Shenoa Payne, and Deanna Wray who have expressed an interest in continuing on the COCP.

Motion: The board voted unanimously to accept the committee motion to appoint Kelly L. Andersen and Sharon Rudnick.

Motion: Mr. Bachofner moved, Ms. Costantino seconded, and the board voted unanimously to table any further committee motions.

5. Futures Task Force Report

Mr. Levelle deferred to Ms. Hirschbiel to lead the discussion on the task force's recommended actions for the board. Ms. Hirschbiel presented a proposed approach for considering the recommendations and suggested next steps. **[Exhibit C]**

Mr. Chaney suggested the board consider the budgetary impact of recommendations.

Motion: Ms. Rice moved, Mr. Mansfield seconded, and the board voted unanimously in favor to adopt Action Items I A., and B., and place proposed rules on the House of Delegates Agenda in November 2017.

Motion: Ms. Rice moved, Ms. Costantino seconded, and the board voted unanimously in favor to send Action Item I C. to the Legal Ethics Committee for further action.

Motion: Ms. Rice moved, Ms. Costantino seconded, and the board voted unanimously in favor to send Action Items III A. - E. to the OSB CEO/E.D. to further flesh them out.

Motion: Mr. Bachofner moved, Ms. Reeves seconded, and the board voted unanimously in favor to send Action Item IV E. to the PLF for further action.

Motion: Ms. Rice moved, Ms. Nordyke seconded, and the board voted unanimously in favor to send Action Items IV A. - D. to the OSB CEO/E.D. to further flesh them out.

Motion: Mr. Mansfield moved, Mr. Chaney seconded, and the board voted unanimously in favor to send Action Items V A. 1-3 to the BOG Policy & Governance Committee, and Action Item V A. 4 to the OSB CEO/E.D. to further flesh them out.

Motion: Mr. Chaney moved, Ms. Rice seconded, and the board voted unanimously in favor to table Action Items VI A. 1-2. Mr. Chaney suggested that before taking any action on Action Items VI A. 1-2, the Board should seek more information and coordinate with the Budget & Finance Committee for budgetary concerns.

Motion: Mr. Mansfield moved, Mr. Foster seconded, and the board voted unanimously in favor to send Action Items II B & C to the BOG Public Affairs Committee for further study and possible proposed legislation.

Motion: Mr. Mansfield moved, Mr. Chaney seconded, and the board voted unanimously in favor to request Mr. Levelle and Ms. Hirschbiel to identify the possible stakeholders for a committee, as outlined in Action Item IIA, and then send Action Item IIA to the BOG Policy & Governance Committee for further action.

6. Document Access Fees for eCourt

Ms. Rastetter presented the committee's recommended actions [**Exhibit D**] and asked the board for approval to have Mr. Levelle send a letter to the Supreme Court requesting additional time to review and comment on the proposed order.

Motion: The board voted unanimously to approve the committee motion to review proposed document access fee increases in CJO 17-037 and send a letter to the court requesting that the comment period be extended.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: July 21, 2017

From: Richard G. Spier, Chair, BOG Fee Mediation Task Force

Re: Report of the Fee Mediation Task Force

Action Recommended

Consider and adopt the recommendations of the Fee Mediation Task Force (Task Force) to the Board of Bar Governors (BOG) as follows:

1. RPC 8.3(c) should be amended to create an additional exception to RPC 8.3(a)'s reporting requirement for mediators in the OSB's fee dispute program (the program), when the knowledge or evidence of attorney misconduct comes from mediation communications as defined by ORS 36.110(7)¹ and made confidential by ORS 36.220.²

¹ "Mediation communications" means:

- (a) All communications that are made, in the course of or in connection with a mediation, to a mediator, a mediation program or a party to, or any other person present at, the mediation proceedings; and
- (b) All memoranda, work products, documents and other materials, including any draft mediation agreement, that are prepared for or submitted in the course of or in connection with a mediation or by a mediator, a mediation program or a party to, or any other person present at, mediation proceedings.

See also Alfieri v Solomon, 358 Or 383 (2015) (construing legislature's intended meaning of "mediation communications").

² ORS 36.220 provides:

- (1) Except as provided in ORS 36.220 to 36.238:
 - (a) Mediation communications are confidential and may not be disclosed to any other person.
 - (b) The parties to a mediation may agree in writing that all or part of the mediation communications are not confidential.
- (2) Except as provided in ORS 36.220 to 36.238:
 - (a) The terms of any mediation agreement are not confidential.
 - (b) The parties to a mediation may agree that all or part of the terms of a mediation agreement are confidential.
- (3) Statements, memoranda, work products, documents and other materials, otherwise subject to discovery, that were not prepared specifically for use in a mediation, are not confidential.
- (4) Any document that, before its use in a mediation, was a public record as defined in ORS 192.410 remains subject to disclosure to the extent provided by ORS 192.410 to 192.505.
- (5) Any mediation communication relating to child abuse that is made to a person who is required to report child abuse under the provisions of ORS 419B.010 is not confidential to the extent that the person is required to report the communication under the provisions of ORS 419B.010. Any mediation communication relating to elder abuse that is

2. Once the changes outlined in recommendation 1 are adopted, any references to the reporting requirement in RPC 8.3 should be removed from Oregon Fee Dispute Resolution Rule (Rule) 10.4 and from all other program rules (*e.g.* Rule 7.5, 10.5, 10.6 and 10.8) and materials addressing program-conducted mediation (program mediation).
3. Any program mediation should center on the reasonableness of the fee and the return of client property. Evidence of alleged malpractice or unethical conduct may be considered during mediation in addressing whether the fee charged is reasonable, and the fee may be adjusted accordingly in any mediated resolution, but no other affirmative monetary relief should be permitted in any program mediation.
4. Mediators participating in the program should complete at least a 32-hour integrated mediation course and complete three mediations before being enrolled in the program. Mediators should also agree to be bound by the ethical requirements in section 1.4 of the Chief Justice’s order on qualification of mediators for court-connected mediation programs.³
5. The BOG should ask the Legal Ethics Committee to address appropriately, whether by an ethics opinion, rule amendment, or other vehicle, the inconsistency between the prohibition from disclosing confidential mediation communications under ORS 36.220 and a lawyer mediator’s duty under RPC 3.4(c) and the duty under RPC 8.3 to report certain ethical misconduct when knowledge of the perceived misconduct is based solely on “confidential mediation communication.”

made to a person who is required to report elder abuse under the provisions of ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under the provisions of ORS 124.050 to 124.095.

- (6) A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or substantial bodily injury to a specific person.
- (7) A party to a mediation may disclose confidential mediation communications to a person if the party’s communication with that person is privileged under ORS 40.010 to 40.585 or other provision of law. A party may disclose confidential mediation communications to any other person for the purpose of obtaining advice concerning the subject matter of the mediation, if all parties to the mediation so agree.
- (8) The confidentiality of mediation communications and agreements in a mediation in which a public body is a party, or in which a state agency is mediating a dispute as to which the state agency has regulatory authority, is subject to ORS 36.224, 36.226 and 36.230.

³ [https://www.ojd.state.or.us/web/OJDPublications.nsf/Files/05cER001sh.pdf/\\$File/05cER001sh.pdf](https://www.ojd.state.or.us/web/OJDPublications.nsf/Files/05cER001sh.pdf/$File/05cER001sh.pdf).

6. The BOG should further consider whether mediators in the OSB's program should be required to carry professional liability insurance for mediator malpractice through the PLF (part-time lawyer mediator) or other carrier (full-time lawyer mediator).

Background Information

The OSB has run a mediation and arbitration fee dispute program for many years. The OSB's program provides a quick, inexpensive means for attorneys and clients to resolve fee disputes. It is voluntary, except that lawyers who receive the underlying referral from the OSB must participate. A petitioner who wishes to resolve a fee dispute submits an application, which is sent to the respondent. If the respondent agrees to arbitrate, or if they must participate, the petitioner pays the filing fee and an arbitrator or panel is assigned.

Although the arbitration program is popular and effective, it is as formal as any arbitration. Clients, in particular, have asked over the years for a simpler process that would let them "tell their story" more effectively than is possible in formal testimony. In response, the BOG implemented a pilot fee mediation part to the OSB's program. In 2016, the BOG adopted rules to make that change permanent.

Lawyer mediators⁴ have expressed concern about material in the OSB's program documents indicating that a lawyer mediator involved in the OSB's program was still subject to RPC 8.3(a)⁵ in circumstances where reporting attorney misconduct was required by that rule. As currently formulated, Rule 10.8 provides that "[m]ediators and parties who agree to participate in this program expressly waive the confidentiality provisions of ORS 36.222 to the extent necessary to allow disclosures pursuant to Rule 7.5, 10.4, 10.5 and 10.6."⁶ Whether the parties actually understand and appreciate the

⁴ A mediator is "a third party who performs mediation." ORS 36.110(9). Mediation itself is "a process in which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy . . ." ORS 36.110(5).

⁵ "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Oregon State Bar Client Assistance Office." RPC 8.3(a).

⁶ Rule 10.4 addresses the duty to report violations of RPC 8.3. The rule provides:

[L]awyer mediators and arbitrators shall inform the Client Assistance Office when they know, based on information obtained during the course of an arbitration proceeding, that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

This rule, on its face, does not mention mediation, though it refers to "mediators." To fully implement the

“waiver” language is of additional concern because mediation is based upon the principles of full disclosure, informed consent, and self-determination. These principles are undermined when parties must agree to the “waiver” or not have access to the OSB mediation program.

Where a lawyer mediator knows, based on confidential mediation communications, that another lawyer has committed a violation of the RPCs that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer, RPC 8.3’s duty to report is inconsistent with ORS 36.220(1)(a). The BOG created the Task Force to study that and related issues.⁷

Discussion

Members of the Task Force

Rich Spier, Chair
Thom Brown
Mark Comstock
Bob Earnest, public member
Dawn Evans
Dorothy Fallon, public member
Mark Friel
Judy Henry
Sam Imperati
Chris Kent
Bruce Schafer
Jim Uerlings
Pat Vallerand
Cassandra Dyke, Program Administrator (staff)
Mark Johnson Roberts, Deputy General Counsel (staff)

Meetings of the Task Force

The Task Force met five times between November 2016 and April 2017. A subcommittee of the Task Force was created and met with OSB staff. The subcommittee then deliberated and adopted a final draft of this report that was then considered and

Task Force’s recommendations, the BOG should delete the reference to “mediators” in the rule.

⁷ “The Fee Mediation Task Force is charged to evaluate the current fee mediation rules and make proposals for changes to the Board of Governors where appropriate. The Fee Mediation Task Force shall also make recommendations to General Counsel regarding fee mediation training and fee mediation forms” (9 Sep 2016).

approved by the entire Task Force.

Recommendations of the Task Force

1. RPC 8.3(c) should be amended to create an additional exception to RPC 8.3(a)'s reporting requirement for lawyer mediators in the OSB's fee-dispute program, when the knowledge or evidence of attorney misconduct comes from mediation communications as defined by ORS 36.110(7) and made confidential by ORS 36.220.

The BOG created the Task Force because lawyer mediators questioned whether a lawyer serving as a mediator had an obligation to report an attorney in the circumstances covered under RPC 8.3(a) in light of ORS 36.220. Specifically, lawyer mediators observed that, to the extent the reporting obligation depended on information obtained through "mediation communications," RPC 8.3(a) was inconsistent with ORS 36.220(1)(a), which prohibits the disclosure of mediation communications by a lawyer mediator "to any other person" in the absence of an agreement by all mediation parties or a legislatively created exception. *See also* ORS 36.222(1) and (3) (to same effect). Moreover, lawyer mediators also observed that the program materials, and related form agreement to mediate, set forth the RPC 8.3 reporting obligation explicitly notwithstanding ORS 36.220.

To address the concerns raised by lawyer mediators, the Task Force recommends that the BOG ask the Supreme Court to amend RPC 8.3(c)⁸ to add an exception for lawyer mediators participating in a program mediation. The recommended revised RPC 8.3(c) would read as follows:

This rule does not require disclosure of information otherwise protected by Rule 1.6 or ORS 9.460(3), or apply to lawyers who obtain such knowledge or evidence while:

⁸ In the course of the Task Force's work, OSB's General Counsel brought to the Task Force's attention an important issue. As a separate branch of government, the judicial branch possesses certain inherent powers necessary to ensure the courts' functioning. In Oregon, "[n]o area of judicial power is more clearly marked off and identified than the courts' power to regulate the conduct of the attorneys who serve under it." *Ramstead v. Morgan*, 219 Or 383, 399 (1959). Although the Oregon Supreme Court has acknowledged its inherent power to regulate the practice of law, it has also recognized that the legislature has the power to regulate "some matters which affect the judicial process." *Id.* The court held that "[t]he limits of legislative authority are reached, however, when legislative action unduly burdens or unduly interferes with the judicial department in the exercise of its judicial functions." *Id.* The Task Force takes no position on whether—or to what extent—the issue raised by OSB's General Counsel is implicated by the inconsistency between ORS 36.220 and RPC 8.3(a) addressed in this report.

(1) acting as a member, investigator, agent, employee or as a designee of the State Lawyers Assistance Committee;

(2) acting as a board member, employee, investigator, agent or lawyer for or on behalf of the Professional Liability Fund or as a Board of Governors liaison to the Professional Liability Fund;
~~or~~

(3) participating in the loss prevention programs of the Professional Liability Fund, including the Oregon Attorney Assistance Program; *or*

(4) *acting as a mediator in the Fee Dispute Resolution Program, if the disclosure would be based on information protected by the confidential mediation communications provisions of ORS 36.220.*

(Italics reflect recommended change.)⁹

The Task Force's recommended change to RPC 8.3(c) implements its view that ensuring the legislature's protection of confidential mediation communication exists in any program mediation is critically important for the following reasons:

- The parties in the mediation have a well-established reasonable expectation of confidentiality in mediation.
- The statute-versus-rule conflict presents a potential hazard for all lawyer mediators, who could be vulnerable to accusation of violating the RPCs (e.g., RPC 3.4(c)) and Rule 10.4 while complying with the requirements of ORS 36.220.
- The success of mediation, in large part, depends on the parties' justified expectation of confidentiality, consistent with the policies set out in ORS

⁹ RPC 8.3(c) already contains exceptions for SLAC, the PLF, and the PLF loss prevention programs including OAAP. The Task Force believes that the need for confidentiality in any program mediation is similarly weighty in light of the importance confidentiality plays in mediation and in light of the legislative policy statement supporting mediation in other contexts. See ORS 36.100 (“[W]hen two or more persons cannot settle a dispute directly between themselves, it is preferable that the disputants be encouraged and assisted to resolve their dispute with the assistance of a trusted and competent third party mediator, whenever possible, rather than the dispute remaining unresolved or resulting in litigation.”).

36.220.

- Volunteer mediators should not be compelled to testify and participate in hearings when all other mediators in the State of Oregon are not required to do so.
- Asking the volunteer mediators in the program to have to get involved after the mediation session is an unfair burden.

2. Once the changes outlined in recommendation 1 are adopted, any references to the reporting requirement in RPC 8.3 should be removed from Rule 10.4 and from all other program rules (e.g. Rule 7.5, 10.5, 10.6 and 10.8) and materials addressing program-conducted mediation (program mediation).

To fully implement the Task Force's first recommendation, the Task Force strongly feels that it is essential that the RPC 8.3 language be removed from all rules and materials covering in any way a program mediation.

3. Any program mediation should center on the reasonableness of the fee and the return of client property. Evidence of alleged malpractice or unethical conduct may be considered during mediation in addressing whether the fee charged is reasonable, and the fee may be adjusted accordingly in any mediated resolution, but no other affirmative monetary relief should be permitted in any program mediation.¹⁰

The Task Force examined at some length the appropriate scope of mediation within the program. While the group recognized mediation's core principle of self-determination,¹¹ it also recognized that the central purpose of any program mediation is

¹⁰ Consistent with the full implementation of the this recommendation, the Task Force recommends that the program's rules, handbook, and documents should be amended to clearly advise the potential mediation participants, before selecting the OSB program, that evidence of alleged malpractice or unethical conduct may be considered during mediation in addressing whether the fee charged is reasonable, and the fee may be adjusted accordingly in any mediated resolution, but no other affirmative monetary relief should be permitted in any program mediation. The amendments should also specifically recommend the available alternatives for resolving malpractice claims (including mediation outside the program) and the appropriate ways to address ethics issues.

¹¹ See Oregon Judicial Dep't Court-Connected Mediator Qualifications Rules § 1.4 (ethical requirements), available at [www.ojd.state.or.us/web/OJDPublications.nsf/Files/05cER001sh.pdf/\\$File/05cER001sh.pdf](http://www.ojd.state.or.us/web/OJDPublications.nsf/Files/05cER001sh.pdf/$File/05cER001sh.pdf); Oregon Mediation Ass'n, *Core Standards of Mediation Practice 2* (rev April 23, 2005), available at www.omediate.org/docs/2005CoreStandardsFinalP.pdf.

to determine the appropriate fee, taking into consideration the quality of the services rendered, while avoiding any mediated resolution of malpractice or ethics issues that are too complex to address in this context.

The Task Force's consensus was that a program mediation should center only on the amount of the fee and the return of client property. However, evidence of alleged malpractice or unethical conduct may be discussed when addressing whether the fee charged is reasonable, and the fee may be adjusted accordingly in mediation, but no other affirmative monetary relief should be permitted in any program mediation.¹²

The program rules, handbook, and documents should be amended where necessary to fully implement the Task Force's consensus including, but not limited to, the inclusion of a clear statement that no program mediation results in any release, waiver, estoppel, or preclusion for issues pertaining to professional liability or unethical conduct.¹³

4. Mediators participating in the program should complete at least a 32-hour integrated mediation course and complete three mediations before being enrolled in the program. Mediators should also agree to be bound by the ethical requirements in section 1.4 of the Chief Justice's order on qualification of mediators for public mediation programs.

The Task Force next considered the issue of participating mediators' qualifications. The OSB's program has no formal experience requirements at present, although staff looks in general for people who have either formal mediation training or substantial experience. The consensus of the Task Force was that mediators in this program should

¹² The Task Force discussed, but is not addressing, the applicability of this language to arbitration because it concluded that issue went beyond the Task Force's charge. In the course of that discussion, the Task Force noted that Rule 5.2 states that "[t]he sole issue to be determined in all fee dispute proceedings under these rules shall be whether the fees or costs charged for the services rendered were reasonable in light of the factors set forth in RPC 1.5." RPC 1.5 does not explicitly state that malpractice or unethical conduct may be discussed when addressing whether the fee charged is reasonable, and the fee may be adjusted accordingly. However, both the program mediator and arbitrator handbooks state clearly that those issues can be discussed and the fee may be adjusted. To ensure full implementation of the Task Force's recommendations, the Task Force hopes that the BOG considers whether Rule 5.2, RPC 1.5, and all related program provisions should be changed to clearly reflect the current practice in all aspects of the program as outlined in the handbooks.

¹³ The Task Force discussed, but is not addressing, the applicability of this language to arbitration because it concluded that the issue went beyond the Task Force's charge. To ensure full implementation of the Task Force's recommendations, the Task Force hopes that the BOG considers whether similar language (with the addition of "findings") should be contained in the fee-arbitration program.

be qualified like mediators in court-connected mediation programs. The Chief Justice has issued an order for this purpose.

The Task Force discussed deferring to the Chief Justice's order, but decided instead to recommend that mediators in the OSB's program complete at least a 32-hour integrated mediation course and have facilitated three mediations before being enrolled in the program. Mediators would also agree to be bound by the ethical requirements in section 1.4 of the Chief Justice's order. (A copy of the Chief Justice's order accompanies this memorandum.)

5. The BOG should ask the Legal Ethics Committee to address appropriately, whether by an ethics opinion, rule amendment, or other vehicle, the inconsistency between the prohibition from disclosing confidential mediation communications under ORS 36.220 and a lawyer mediator's duty under RPC 3.4(c) and the duty under RPC 8.3 to report certain ethical misconduct when knowledge of the perceived misconduct is based solely on "confidential mediation communication.,

During the Task Force's work, OSB's General Counsel raised the issue that lawyers have a duty under RPC 3.4(c) not to "knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists." While that conflict would be eliminated through the Supreme Court's implementation of the Task Force's recommend change to RPC 8.3 for any program mediation, the conflict would remain in all other mediations involving a lawyer mediator.

The Task Force was not asked to resolve this broader conflict between ORS 36.220 and RPC 3.4(c) and RPC 8.3(a). Nevertheless, the Task Force concluded that the presence of that broader conflict is a significant concern that should be addressed by the BOG. Accordingly, the Task Force recommends that, as soon as feasible,¹⁴ the BOG ask the Supreme Court to resolve the conflict between ORS 36.220 and all implicated RPCs including, but not limited to, RPC 3.4 and RPC 8.3, by acknowledging that ORS 36.220 protects "confidential mediation communications" in all mediations involving a lawyer mediator just as it would in a program mediation upon implementation of the Task Force's recommend change to RPC 8.3 in that specific context.

6. The BOG should further study whether mediators in the program should be required to carry professional liability insurance for mediator malpractice

¹⁴ The Task Force believes the BOG's consideration of this broader issue should follow only after input is obtained from all appropriate stakeholders including, but not limited to, the OSB ADR Section Executive Committee or its designee(s).

through the PLF (part-time lawyer mediator) or other carrier (full-time lawyer mediator).

A question arose about insurance coverage for mediators participating in the program. The OSB does not require that its participating mediators hold professional liability insurance but, as a practical matter, most of them are attorneys and most have liability insurance coverage.

The Oregon State Bar Professional Liability Fund provides coverage through its approved coverage plan for those attorneys who conduct mediations as an adjunct to the private practice of law, but it does not cover full-time lawyer mediators. The Task Force discussed that mediators in the OSB's program might want liability insurance coverage, notwithstanding their limited liability under ORS 36.210. This issue is again beyond the scope of the Task Force's charge, but the Task Force suggests that the BOG may wish to consider giving it further study.

Oregon Judicial Department Court-Connected Mediator Qualifications Rules

**Effective
August 1, 2005**



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OREGON JUDICIAL DEPARTMENT COURT-CONNECTED MEDIATOR QUALIFICATIONS RULES

PREFACE

Historical Background:

Court-Connected Mediator Qualifications were first adopted by the Oregon Dispute Resolution Commission (ODRC) between 1992 and 1998. In October 2003, the legislature abolished the ODRC and transferred responsibility for establishing such rules on qualifications to the Oregon Judicial Department (OJD). At that time, Chief Justice Wallace P. Carson, Jr., adopted a version of these rules as Uniform Trial Court Rules Chapter 12.

Prior to its abolition, the ODRC had begun a process of reviewing and revising the substance of these qualifications. Upon receiving the responsibility for these rules, the OJD convened the Court-Connected Mediator Qualifications Advisory Committee to continue the work begun by the ODRC. The committee included representatives from each of the kinds of court-connected mediation, as well as advocates for users of mediation.

The committee included mediation coordinators from urban and rural trial courts; domestic relations mediators from county-based agencies and independent contractor panels; private mediators; mediation trainers; and representatives of the Oregon Association of Community Dispute Resolution Centers, Oregon Association of Family Court Services, Oregon Department of Justice, Oregon Mediation Association, Oregon State Bar Alternative Dispute Resolution Section Executive Committee, Oregon State Bar Family Law Section Executive Committee, State Family Law Advisory Committee, and University of Oregon Law School Office for Dispute Resolution.

During the development of this proposal, public comment was solicited through a variety of channels, including all of the groups represented above plus trial court administrators, Oregon State Bar Litigation Section Executive Committee, Oregon Trial Lawyers Association, and Oregon Association of Defense Counsel.

After consideration of comments received, the Chief Justice decided to remove these rules from under the structure of the Uniform Trial Court Rules (UTCRC) and issue them as a separate policy. Final rules were adopted by Chief Justice Order effective on August 1, 2005. These rules are not part of the UTCRC and are not subject to the UTCRC process.

Process for Revision:

The rules will be updated as necessary. Questions or comments can be submitted at any time to:

Statewide Appropriate Dispute Resolution Analyst
Supreme Court Building
1163 State Street
Salem, OR 97301-2563
503.986.4539
ojd.adr@ojd.state.or.us

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**OREGON JUDICIAL DEPARTMENT
COURT-CONNECTED MEDIATOR QUALIFICATIONS RULES**

1: GENERAL REQUIREMENTS FOR ALL COURT-CONNECTED MEDIATORS

SECTION 1.1 APPLICABILITY

Sections 1.1 to 3.6 of these rules:

- (1) Establish minimum qualifications, obligations, and mediator disclosures, including education, training, experience, and conduct requirements, applicable to:
 - (a) General civil mediators as provided by ORS 36.200(1).
 - (b) Domestic relations custody and parenting mediators as provided by ORS 107.775(2).
 - (c) Domestic relations financial mediators as provided by ORS 107.755(4).
- (2) Provide that a mediator approved to provide one type of mediation may not mediate another type of case unless the mediator is also approved for the other type of mediation.
- (3) Do not:
 - (a) In any way alter the requirements pertaining to personnel who perform conciliation services under ORS 107.510 to 107.610.
 - (b) Allow mediation of proceedings under ORS 30.866, 107.700 to 107.732, 124.005 to 124.040, or 163.738, as provided in ORS 107.755(2).
 - (c) In any way establish any requirements for compensation of mediators.
 - (d) Limit in any way the ability of mediators or qualified supervisors to be compensated for their services.

SECTION 1.2 DEFINITIONS

As used in these rules:

- (1) "Approved mediator" means a mediator who a circuit court or judicial district of this state officially recognizes and shows by appropriate official documentation as being approved within that court or judicial district as a general civil mediator, domestic relations custody and parenting mediator, or domestic relations financial mediator for purposes of the one or more mediation programs operated under the auspices of that court or judicial district that is subject to Section 1.1.
- (2) "Basic mediation curriculum" means the curriculum set out in Section 3.2.
- (3) "Continuing education requirements" means the requirements set out in Section 3.6.

- (4) "Court-system training" means a curriculum or combination of courses set out in Section 3.5.
- (5) "Determining authority" means an entity that acts under Section 1.3 concerning qualification to be an approved mediator.
- (6) "Domestic relations custody and parenting mediation curriculum" means the curriculum set out in Section 3.3.
- (7) "Domestic relations custody and parenting mediation supervisor" means a person who is qualified at the level described in Section 2.2.
- (8) "Domestic relations custody and parenting mediator" means a mediator for domestic relations, custody, parenting time, or parenting plan matters in circuit court under ORS 107.755 who meets qualifications under Section 2.2 as required by ORS 107.775(2).
- (9) "Domestic relations financial mediation supervisor" means a person who is qualified at the level described in Section 2.3.
- (10) "Domestic relations financial mediation training" means a curriculum or combination of courses set out in Section 3.4.
- (11) "Domestic relations financial mediator" means a mediator for domestic relations financial matters in circuit court under ORS 107.755 who meets qualifications under Section 2.3 as required by ORS 107.755(4).
- (12) "General civil mediator" means a mediator for civil matters in circuit court under ORS 36.185 to 36.210, including small claims and forcible entry and detainer cases, who meets qualifications under Section 2.1 as required by ORS 36.200(1).
- (13) "General civil mediation supervisor" means a person who is qualified at the level described in Section 2.1.
- (14) "Independent qualification review" means the process described in Section 3.1.
- (15) "Mediation" is defined at ORS 36.110.

SECTION 1.3 DETERMINING AUTHORITY, DETERMINING MEDIATOR QUALIFICATIONS, OTHER RESPONSIBILITIES AND AUTHORITY

- (1) The determining authority:
 - (a) Is the entity within a judicial district with authority to determine whether applicants to become an approved mediator for courts within the judicial district meet the qualifications as described in these rules and whether approved mediators meet any continuing qualifications or obligations required by these rules.
 - (b) Is the presiding judge of the judicial district unless the presiding judge has delegated the authority to be the determining authority as provided or allowed by statute. Delegation under this paragraph may be made to an entity chosen by the presiding

judge to establish a mediation program as allowed by law or statute. A delegation must be in writing and, if it places any limitations on the presiding judge's ultimate authority to review and change decisions made by the delegatee, must be approved by the State Court Administrator before the delegation can be made.

- (2) Authority over qualifications. Subject to the following, a determining authority, for good cause, may allow appropriate substitutions, or obtain waiver, for any of the minimum qualifications for an approved mediator.
 - (a) Except as provided in paragraph (b) of this subsection, a determining authority that allows a substitution must, as a condition of approval, require the applicant to commit to a written plan to meet the minimum qualifications within a specified reasonable period of time. A determining authority that is not a presiding judge must notify the presiding judge of substitutions allowed under this subsection.
 - (b) For good cause, a determining authority, other than the presiding judge for the judicial district, may petition the presiding judge for a waiver of specific minimum qualification requirements for a specific person to be an approved mediator. A presiding judge may waive any of the qualifications to be an approved mediator in an individual case with the approval of the State Court Administrator.
- (3) The determining authority may revoke a mediator's approved status at his or her discretion, including in the event that the mediator no longer meets the requirements set forth in these rules.
- (4) The determining authority may authorize the use of an evaluation to be completed by the parties, for the purpose of monitoring program and mediator performance.
- (5) In those judicial districts where a mediator is assigned to a case by the court, or where mediators are assigned to a case by a program sponsored or authorized by the court, the determining authority shall assure that parties to a mediation have access to information on:
 - (a) How mediators are assigned to cases.
 - (b) The nature of the mediator's affiliation with the court.
 - (c) The process, if any, that a party can use to comment on, or object to the assignment or performance of a mediator.
- (6) The minimum qualifications of these rules have been met by an individual who is an approved mediator at the time these rules become effective if the individual has met the minimum requirements of the Uniform Trial Court Rules in effect prior to August 1, 2005.
- (7) The State Court Administrator may approve the successful completion of a standardized performance-based evaluation to substitute for formal degree requirements under Sections 2.2 or 2.3 upon determining an appropriate evaluation process has been developed and can be used at reasonable costs and with reasonable efficiency.

SECTION 1.4 MEDIATOR ETHICS

An approved mediator, when mediating under ORS 36.185 to 36.210 or 107.755 to 107.795, is required to:

- (1) Disclose to the determining authority and the participants at least one of the relevant codes of mediator ethics, standards, principles, and disciplinary rules of the mediator's relevant memberships, licenses, or certifications. It is not the court's responsibility to enforce any relevant codes of mediator ethics, standards, principles, and/or rules;
- (2) Comply with relevant laws relating to confidentiality, inadmissibility, and nondiscoverability of mediation communications including, but not limited to, ORS 36.220, 36.222, and 107.785; and
- (3) Inform the participants prior to or at the commencement of the mediation of each of the following:
 - (a) The nature of mediation, the role and style of the mediator, and the process that will be used;
 - (b) The extent to which participation in mediation is voluntary and the ability of the participants and the mediator to suspend or terminate the mediation;
 - (c) The commitment of the participants to participate fully and to negotiate in good faith;
 - (d) The extent to which disclosures in mediation are confidential, including during private caucuses;
 - (e) Any potential conflicts of interest that the mediator may have, i.e., any circumstances or relationships that may raise a question as to the mediator's impartiality and fairness;
 - (f) The need for the informed consent of the participants to any decisions;
 - (g) The right of the parties to seek independent legal counsel, including review of the proposed mediation agreement before execution;
 - (h) In appropriate cases, the advisability of proceeding with mediation under the circumstances of the particular dispute;
 - (i) The availability of public information about the mediator pursuant to Section 1.5; and
 - (j) If applicable, the nature and extent to which the mediator is being supervised.

SECTION 1.5 PROVIDING AND MAINTAINING PUBLICLY AVAILABLE INFORMATION

- (1) Information for court use and public dissemination: All approved mediators must provide the information required to the determining authority of each court at which the mediator is an approved mediator. Reports must be made using the form located in Appendix A of these rules, or any substantially similar form authorized by the determining authority.

- (2) All approved mediators must update the information provided in Section 1.5 at least once every two calendar years.
- (3) The information provided in Section 1.5 must be made available to all mediation parties and participants upon request.

2: QUALIFICATIONS FOR COURT-CONNECTED MEDIATORS BY CASE TYPE

SECTION 2.1 QUALIFICATION AS AN APPROVED GENERAL CIVIL MEDIATOR, ONGOING OBLIGATIONS

To become an approved general civil mediator, an individual must establish, to the satisfaction of the determining authority, that the individual meets or exceeds all the following qualifications and will continue to meet ongoing requirements as described:

- (1) Training. An applicant must have completed training, including all the following:
 - (a) The basic mediation curriculum described in Section 3.2, or substantially similar training; and
 - (b) Court-system training in Section 3.5, or substantially similar training or education.
- (2) Experience. An applicant must have:
 - (a) Observed three actual mediations; and
 - (b) Participated as a mediator or co-mediator in at least three cases that have been or will be filed in court, observed by a person qualified as a general civil mediation supervisor under this section and performing to the supervisor's satisfaction.
- (3) Continuing Education.
 - (a) During the first two calendar years beginning January 1 of the year after the mediator's approval by the determining authority, general civil mediators must complete at least 12 hours of continuing education as follows:
 - (i) If the approved mediator's basic mediation training was 36 hours or more, 12 hours of continuing education as described in Section 3.6.
 - (ii) If the approved mediator's basic mediation training was between 30 and 36 hours, then one additional hour of continuing education for every hour of training fewer than 36 (i.e., if basic mediation training was 30 hours, then 18 hours of continuing education; if the basic mediation training was 32 hours, then 16 hours of continuing education).
 - (b) Thereafter, as an ongoing obligation, an approved general civil mediator must complete 12 hours of continuing education requirements every two calendar years as described in Section 3.6.

- (4) **Conduct.** An applicant and, as an ongoing obligation, an approved general civil mediator must subscribe to the mediator ethics in Section 1.4.
- (5) **Public information.** An applicant and, as an ongoing obligation, an approved general civil mediator must comply with requirements to provide and maintain information as provided in Section 1.5.
- (6) **Supervision.** A qualified general civil mediation supervisor is an individual who has:
 - (a) Met the qualifications of a general civil mediator as defined in this section, and
 - (b) Mediated at least 35 cases to conclusion or completed at least 350 hours of mediation experience beyond the experience required of an approved general civil mediator in this section.

SECTION 2.2 QUALIFICATION AS AN APPROVED DOMESTIC RELATIONS CUSTODY AND PARENTING MEDIATOR, ONGOING OBLIGATIONS

To become an approved domestic relations custody and parenting mediator, an individual must establish, to the satisfaction of the determining authority, that the individual meets or exceeds all the following qualifications and will continue to meet ongoing requirements as described.

- (1) **Education.** An applicant must possess at least one of the following:
 - (a) A master's or doctoral degree in counseling, psychiatry, psychology, social work, marriage and family therapy, or mental health from an accredited college or university.
 - (b) A law degree from an accredited law school with course work and/or Continuing Legal Education credits in family law.
 - (c) A master's or doctoral degree in a subject relating to children and family dynamics, education, communication, or conflict resolution from an accredited college or university, with coursework in human behavior, plus at least one year full-time equivalent post-degree experience in providing social work, mental health, or conflict resolution services to families.
 - (d) A bachelor's degree in a behavioral science related to family relationships, child development, or conflict resolution, with coursework in a behavioral science, and at least seven years full-time equivalent post-bachelor's experience in providing social work, mental health, or conflict resolution services to families.
- (2) **Training.** An applicant must have completed training in each of the following areas:
 - (a) The basic mediation curriculum in Section 3.2;
 - (b) The domestic relations custody and parenting mediation curriculum in Section 3.3; and
 - (c) Court-system training in Section 3.5, or substantially similar training.

- (3) Experience. An applicant must have completed one of the following types of experience:
- (a) Participation in at least 20 cases including a total of at least 100 hours of domestic relations mediation supervised by or comediated with a person qualified as a domestic relations custody and parenting mediation supervisor under this section. At least ten cases and 50 hours of the supervised cases in this paragraph must be in domestic relations custody and parenting mediation. At least three of the domestic relations custody and parenting mediation cases must have direct observation by the qualified supervisor; or
 - (b) At least two years full-time equivalent experience in any of the following: mediation, direct therapy or counseling experience with an emphasis on short-term problem solving, or as a practicing attorney handling a domestic relations or juvenile caseload. Applicants must have:
 - (i) Participated as a mediator or comediator in a total of at least ten cases including a total of at least 50 hours of domestic relations custody and parenting mediation, and
 - (ii) An understanding of court-connected domestic relations programs.
- (4) Continuing education. As an ongoing obligation, an approved domestic relations custody and parenting mediator must complete 24 hours of continuing education every two calendar years, beginning January 1 of the year after the mediator's approval by the determining authority, as described in Section 3.6.
- (5) Conduct. An applicant and, as an ongoing obligation, an approved domestic relations custody and parenting mediator must subscribe to the mediator ethics in Section 1.4.
- (6) Public information. An applicant and, as an ongoing obligation, an approved domestic relations custody and parenting mediator must comply with requirements to provide and maintain information in Section 1.5.
- (7) Supervision. A qualified domestic relations custody and parenting mediation supervisor is an individual who has:
- (a) Met the qualifications of a domestic relations custody and parenting mediator as defined in Section 2.2,
 - (b) Completed at least 35 cases including a total of at least 350 hours of domestic relations custody and parenting mediation beyond the experience required of a domestic relations custody and parenting mediator in this section, and
 - (c) An understanding of court-connected domestic relations programs.

SECTION 2.3 QUALIFICATION AS AN APPROVED DOMESTIC RELATIONS FINANCIAL MEDIATOR, ONGOING OBLIGATIONS

To become an approved domestic relations financial mediator, an individual must establish, to the satisfaction of the determining authority, that the individual meets or exceeds all the following qualifications and will continue to meet all ongoing requirements as described.

- (1) **Education.** An applicant must meet the education requirements under Section 2.2 applicable to an applicant to be approved as a domestic relations custody and parenting mediator.
- (2) **Training.** An applicant must have completed training in each of the following areas:
 - (a) The basic mediation curriculum in Section 3.2;
 - (b) The domestic relations custody and parenting mediation curriculum in Section 3.3;
 - (c) Domestic relations financial mediation training in Section 3.4; and
 - (d) Court-system training in Section 3.5, or substantially similar training.
- (3) **Experience.** An applicant must have completed one of the following types of experience:
 - (a) Participation in at least 20 cases including a total of at least 100 hours of domestic relations mediation supervised by or comediated with a person qualified as a domestic relations financial mediation supervisor under this section. At least ten cases and 50 hours of the supervised cases in this paragraph must be in domestic relations financial mediation. At least three of the domestic relations financial mediation cases must have direct observation by the qualified supervisor; or
 - (b) At least two years full-time equivalent experience in any of the following: mediation, direct therapy or counseling experience with an emphasis on short-term problem solving, or as a practicing attorney handling a domestic relations or juvenile caseload. Applicants must have:
 - (i) Participated as a mediator or comediator in a total of at least ten cases including a total of at least 50 hours of domestic relations financial mediation, and
 - (ii) An understanding of court-connected domestic relations programs.
- (4) **Continuing education.** As an ongoing obligation, an approved domestic relations financial mediator must complete 24 hours of continuing education every two calendar years, beginning January 1 of the year after the mediator's approval by the determining authority, as described in Section 3.6.
- (5) **Conduct.** An applicant and, as an ongoing obligation, an approved domestic relations financial mediator must subscribe to the mediator ethics in Section 1.4.

- (6) Public information. An applicant and, as an ongoing obligation, an approved domestic relations financial mediator must comply with requirements to provide and maintain current information in Section 1.5.
- (7) Insurance. As an ongoing obligation, an approved domestic relations financial mediator shall have in effect at all times the greater of:
 - (a) \$100,000 in malpractice insurance or self-insurance with comparable coverage; or
 - (b) Such greater amount of coverage as the determining authority requires.
- (8) Supervision. A qualified domestic relations financial mediation supervisor is an individual who has:
 - (a) Met the qualifications of a domestic relations financial mediator as defined in this section,
 - (b) Completed at least 35 domestic relations cases including a total of at least 350 hours of domestic relations financial mediation beyond the experience required in this section, and
 - (c) Malpractice insurance coverage for the supervisory role in force.

3: COMPONENTS OF QUALIFICATIONS FOR COURT-CONNECTED MEDIATORS

SECTION 3.1 INDEPENDENT QUALIFICATION REVIEW

- (1) In programs where domestic relations financial mediators are independent contractors, the determining authority must appoint a panel consisting of at least:
 - (a) A representative of the determining authority;
 - (b) A domestic relations financial mediator; and
 - (c) An attorney who practices domestic relations law locally.
- (2) The panel shall interview each applicant to be an approved domestic relations financial mediator solely to determine whether the applicant meets the requirements for being approved or whether it is appropriate to substitute or waive some minimum qualifications. The review panel shall report its recommendation to the determining authority in writing.
- (3) Nothing in this section affects the authority under Section 1.3 to make sole and final determinations about whether an applicant has fulfilled the requirements to be approved or whether an application for substitution should be granted.

SECTION 3.2 BASIC MEDIATION CURRICULUM

The basic mediation curriculum is a single curriculum that is designed to integrate the elements in this section consistent with any guidelines promulgated by the State Court Administrator. The basic mediation curriculum shall:

- (1) Be at least 30 hours, or substantially similar training or education.
- (2) Include training techniques that closely simulate the interactions that occur in a mediation and that provide effective feedback to trainees, including, but not be limited to, at least six hours participation by each trainee in role plays with trainer feedback to the trainee and trainee self-assessment.
- (3) Include instruction to help the trainee:
 - (a) Gain an understanding of conflict resolution and mediation theory,
 - (b) Effectively prepare for mediation,
 - (c) Create a safe and comfortable environment for the mediation,
 - (d) Facilitate effective communication between the parties and between the mediator and the parties,
 - (e) Use techniques that help the parties solve problems and seek agreement,
 - (f) Conduct the mediation in a fair and impartial manner,
 - (g) Understand mediator confidentiality and ethical standards for mediator conduct adopted by Oregon and national organizations, and
 - (h) Conclude a mediation and memorialize understandings and agreements.
- (4) Be conducted by a lead trainer who has:
 - (a) The qualifications of a general civil mediator as defined in Section 2.1, except the requirement in Section 2.1(1)(a) to have completed the basic mediation curriculum;
 - (b) Mediated at least 35 cases to conclusion or completed at least 350 hours of mediation experience beyond the experience required of a general civil mediator in Section 2.1; and either
 - (c) Served as a trainer or an assistant trainer for the basic mediation curriculum outlined in this section at least three times; or

- (d) Have experience in adult education and mediation as follows:
 - (i) Served as a teacher for at least 1000 hours of accredited education or training for adults, and
 - (ii) Completed the basic mediation curriculum outlined under this section.

SECTION 3.3 DOMESTIC RELATIONS CUSTODY AND PARENTING MEDIATION CURRICULUM

The domestic relations custody and parenting mediation curriculum shall:

- (1) Include at least 40 hours in a domestic relations custody and parenting mediation curriculum consistent with any guidelines promulgated by the State Court Administrator.
- (2) Include multiple learning methods and training techniques that closely simulate the interactions that occur in a mediation and that provide effective feedback to trainees.
- (3) Provide instruction with the goal of creating competency sufficient for initial practice as a family mediator and must include the following topics:
 - (a) General Family Mediation Knowledge and Skills;
 - (b) Knowledge and Skill with Families and Children;
 - (c) Adaptations and Modifications for Special Case Concerns; and
 - (d) Specific Family, Divorce, and Parenting Information.
- (4) Be conducted by a lead trainer who has all of the following:
 - (a) The qualifications of a domestic relations custody and parenting mediator as defined in Section 2.2,
 - (b) Completed at least 35 cases including a total of at least 350 hours of domestic relations custody and parenting mediation beyond the experience required of a domestic relations custody and parenting mediator in Section 2.2,
 - (c) Served as a mediation trainer or an assistant mediation trainer for the domestic relations custody and parenting mediation curriculum outlined in this section at least three times, and
 - (d) An understanding of court-connected domestic relations programs.

SECTION 3.4 DOMESTIC RELATIONS FINANCIAL MEDIATION TRAINING

- (1) Domestic relations financial mediation training shall include at least 40 hours of training or education that covers the topics relevant to the financial issues the mediator will be mediating, including:
 - (a) Legal and financial issues in separation, divorce, and family reorganization in Oregon, including property division, asset valuation, public benefits law, domestic relations income tax law, child and spousal support, and joint and several liability for family debt;
 - (b) Basics of corporate and partnership law, retirement interests, personal bankruptcy, ethics (including unauthorized practice of law), drafting, and legal process (including disclosure problems); and
 - (c) The needs of self-represented parties, the desirability of review by independent counsel, recognizing the finality of a judgment, and methods to carry out the parties' agreement.
- (2) Of the training required in subsection (1) of this section:
 - (a) Twenty-four of the hours must be in an integrated training (a training designed as a single cohesive curriculum that may be delivered over time).
 - (b) Six hours must be in three role plays in financial mediation with trainer feedback to the trainee.
 - (c) Fifteen hours must be in training accredited by the Oregon State Bar.

SECTION 3.5 COURT-SYSTEM TRAINING

When court-system training under this section is required, the training shall include, but not be limited to:

- (1) At least six hours including, but not limited to, the following subject areas:
 - (a) Instruction on the court system including, but not limited to:
 - (i) Basic legal vocabulary;
 - (ii) How to read a court file;
 - (iii) Confidentiality and disclosure;
 - (iv) Availability of jury trials;
 - (v) Burdens of proof;
 - (vii) Basic trial procedure;

- (viii) The effect of a mediated agreement on the case including, but not limited to, finality, appeal rights, remedies, and enforceability;
 - (ix) Agreement writing;
 - (x) Working with interpreters; and
 - (xi) Obligations under the Americans with Disabilities Act.
 - (b) Information on the range of available administrative and other dispute resolution processes.
 - (c) Information on the process that will be used to resolve the dispute if no agreement is reached, such as judicial or administrative adjudication or arbitration, including entitlement to jury trial and appeal, where applicable.
 - (d) How the legal information described in this subsection is appropriately used by a mediator in mediation, including avoidance of the unauthorized practice of law.
- (2) For mediators working in contexts other than small claims court, at least two additional hours including, but not limited to, all of the following:
- (a) Working with represented and unrepresented parties, including:
 - (i) The role of litigants' lawyers in the mediation process;
 - (ii) Attorney-client relationships, including privileges;
 - (iii) Working with lawyers, including understanding of Oregon State Bar disciplinary rules; and
 - (iii) Attorney fee issues.
 - (b) Understanding motions, discovery, and other court rules and procedures;
 - (c) Basic rules of evidence; and
 - (d) Basic rules of contract and tort law.

SECTION 3.6 CONTINUING EDUCATION REQUIREMENTS

- (1) Of the continuing education hours required of approved mediators every two calendar years:
 - (a) If the mediator is an approved general civil mediator:
 - (i) One hour must relate to confidentiality,
 - (ii) One hour must relate to mediator ethics, and

- (iii) Six hours can be satisfied by the mediator taking the continuing education classes required by his or her licensure unless such licensure is not reasonably related to the practice of mediation.
- (b) If the mediator is an approved domestic relations custody and parenting or domestic relations financial mediator:
 - (i) Two hours must relate to confidentiality;
 - (ii) Two hours must relate to mediator ethics;
 - (iii) Twelve hours must be on the subject of either custody and parenting issues or financial issues, respectively;
 - (iv) Twelve hours can be satisfied by the mediator taking the continuing education classes required by his or her licensure unless such licensure is not reasonably related to the practice of mediation; and
 - (v) The hours required in subparagraphs (i) and (ii) can be met in the hours required in subparagraph (iii) if confidentiality or mediator ethics is covered in the context of domestic relations.
- (2) Continuing education topics may include, but are not limited to, the following examples:
 - (a) Those topics outlined in Sections 3.2, 3.3, and 3.4;
 - (b) Practical skills-based training in mediation or facilitation;
 - (c) Court processes;
 - (d) Confidentiality laws and rules;
 - (e) Changes in the subject matter areas of law in which the mediator practices;
 - (f) Mediation ethics;
 - (g) Domestic violence;
 - (h) Sexual assault;
 - (i) Child abuse and elder abuse;
 - (j) Gender, ethnic, and cultural diversity;
 - (k) Psychology and psychopathology;
 - (l) Organizational development;
 - (m) Communication;
 - (n) Crisis intervention;

- (o) Program administration and service delivery;
 - (p) Practices and procedures of state and local social service agencies; and
 - (q) Safety issues for mediators.
- (3) Continuing education shall be conducted by an individual or group qualified by practical or academic experience. For purposes of this section, an hour is defined as 60 minutes of instructional time or activity and may be completed in a variety of formats, including but not limited to:
- (a) Attendance at a live lecture or seminar;
 - (b) Attendance at an audio or video playback of a lecture or seminar with a group where the group discusses the materials presented;
 - (c) Listening or viewing audio, video, or internet presentations;
 - (d) Receiving supervision as part of a training mentorship;
 - (e) Formally debriefing mediation cases with mediator supervisors and colleagues following the mediation;
 - (f) Lecturing or teaching in qualified continuing education courses; and
 - (g) Reading, authoring, or editing written materials submitted for publication that have significant intellectual or practical content directly related to the practice of mediation.
- (4) Continuing education classes should enhance the participant's competence as a mediator and provide opportunities for mediators to expand upon existing skills and explore new areas of practice or interest. To the extent that the mediator's prior training and experience do not include the topics listed above, the mediator should emphasize those listed areas relevant to the mediator's practice.
- (5) Where applicable, continuing education topics should be coordinated with, reported to, and approved by the determining authority of each court at which the mediator is an approved mediator and reported at least every two calendar years via the electronic Court-Connected Mediator Continuing Education Credit Form available on the Oregon Judicial Department's web page or other reporting form authorized by the appropriate determining authority.

Appendix A
Court-Connected Mediator Information for Public Dissemination

Name of Mediator:	
Business or Program Name (if applicable):	
Business or Program Contact Information below (as applicable)	
Mailing Address:	
Telephone Number:	Fax Number:
E-Mail Address:	

Description of mediation training: _____

Description of other relevant education: _____

If you are a domestic relations mediator, description of formal education: _____

Description of mediation experience, including type and approximate number of cases mediated: _____

Relevant organizations with which the mediator is affiliated: _____

Description of other relevant experience: _____

Description of fees (if applicable): _____

Description of relevant codes of ethics to which the mediator subscribes: _____

I hereby certify that the above is true and accurate.

 (Name)

 (Date)

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: July 21, 2017
Memo Date: July 21, 2017
From: BOG Awards Committee
Re: Award recommendations for 2017

Action Recommended

Approve the following slate of nominees:

President's Membership Service Award

Erin N. Dawson
M. Christopher Hall
Bruce L. Schafer

President's Public Service Award

Sheryl Balthrop
David C. Glenn
Theresa Hollis

President's Diversity & Inclusion Award

Rima I. Ghandour
Ivan R. Gutierrez
Diane S. Sykes

President's Public Leadership Award

Steven Bjerke

President's Sustainability Award

William Sherlock & Christopher G. Winter

Wallace P. Carson, Jr., Award for Judicial Excellence

Hon. Sid Brockley
Hon. Diarmuid F. O'Scannlain

OSB Award of Merit

Donald B. Bowerman

President's Special Award of Appreciation

Hon. Christopher L. Garrett
John E. Grant

Background

The ad hoc Awards Committee met by conference call on July 12 and in person on August 21 to review nomination materials and develop the recommendations detailed above. Members of the committee are: Michael Levelle (Chair), Vanessa Nordyke, John Bachofner, Tom Peachey and Chris Costantino. Note that nominees for the President's Special Award of Appreciation are selected by the OSB President rather than the awards committee, and ratified by the full board.

The annual Awards Luncheon will take place on Wednesday, November 8, at the Sentinel Hotel in Portland.

OSB Futures Task Force Recommendations and Possible Next Steps

I. Changes to Rules of Professional Conduct					
Task Force Recommendation	Rec. No.	Full Report Reference	Possible Next Step	Timeline	Board Decision
A. Adopt Recommendation to Amend Oregon RPC 7.3, which has already been adopted by the Board in substance, with (very slightly) modified wording	2.1	Pages 36-38	Place on HOD Agenda	9.22.2017	
B. Adopt Recommendation to Amend Oregon RPC 5.4 to permit fee-sharing with lawyer referral services, with adequate disclosure to consumers	2.2	Pages 38-40	Place on HOD Agenda	9.22.2017	
C. Direct the Legal Ethics Committee to consider whether to amend Oregon RPCs to allow fee-sharing or law firm partnership with paraprofessionals and other professionals	2.3	Pages 40-43	Send to LEC		

Questions for discussion:

- Are there questions regarding any of the proposals?
- Do we need more information?
- What are the risks of action/no action?
- Is feedback needed before adopting the recommendation? If so, from whom and by when?
- What is the timeline for making a decision?
- What is the timeline for implementation?
- Other?

II. Regulation/Development of Alternative Legal Service Delivery Models

Task Force Recommendation	Rec. No.	Full Report Reference	Possible Next Step	Timeline	Board Decision
A. Convene a paraprofessional licensing implementation committee to prepare a detailed proposal for Board and Supreme Court.	1.1 to 1.11	Pages 3-26			
B. Direct Public Affairs Committee to craft legislative approach related to online document review and consumer protections generally consistent with the approach outlined by Report	2.4	Pages 43-45	Send to PAC		
C. Direct Public Affairs Committee to craft legislative approach related to Self-Help Centers and Court facilitation that is generally consistent with the approach outlined by Report	3.2	Pages 48-51	Send to PAC		

Questions for discussion:

- Are there questions regarding any of the proposals?
- Do we need more information?
- What are the risks of action/no action?
- Is feedback needed before adopting the recommendation? If so, from whom and by when?
- What is the timeline for making a decision?
- What is the timeline for implementation?
- Other?

III. Support Court and Legal Aid Efforts to Increase Access and Explore Innovation

Task Force Recommendation	Rec. No.	Full Report Reference	Possible Next Step	Timeline	Board Decision
A. Establish an Ad Hoc committee of stakeholder representatives from OJD/LASO/OSB tasked with streamlining self-navigation resources	3.1	Pages 47-48	Send to ED/CEO		
B. Direct Staff to Explore Ways to Support Stakeholder Efforts to Improve Family Law and Small Claims Court Processes	3.3-3.4	Pages 51-54	Send to ED/CEO		
C. Develop Blueprint for Nonfamily Law Facilitation Office	5.2	Page 65	Send to ED/CEO		
D. Promote use of technology to increase A2J in Lower Income & Rural Communities	7.2	Page 70	Send to ED/CEO		
E. Take steps to make legal services more accessible in Rural Areas	7.3	Page 71	Send to ED/CEO		

ED/CEO Action Items

- Talk with Court and Legal Aid
- Participate in Oregon Supreme Court Civil Access Initiative Task Force
- Continue to advocate for legal aid funding
- Review legal services standards and guidelines

IV. Enhancement of Existing Bar Programs and Resources

Task Force Recommendation	Rec. No.	Full Report Reference	Possible Next Step	Timeline	Board Decision
A. Ask PSAC to explore ways to increase availability to unbundled services offered through LRS	3.5	Pages 54-55	Send to ED/CEO		
B. Continue to Improve & Enhance Resources for Self-Navigators	3.6	Pages 56-57	Send to ED/CEO		
C. Work to improve the public perception of lawyers	7.4	Page 72	Send to ED/CEO		
D. Expand the Lawyer Referral Service and Modest Means Program					
1. Set Goal to increase LRS Inquiries by 11% by Next 4 Years	5.1	Page 64	Send to ED/CEO		
E. Enhance Practice Management Resources					
1. Develop Comprehensive Training Curriculum re Modern Law-Practice Management Methods	6.1	Page 65-68	Send to PLF		
2. Promote unbundled legal services	7.1	Page 69	Send to PLF		

ED/CEO Action Items

- Talk with PLF CEO
- Review and modify Program Measures as appropriate
- Participate in SFLAC pro se assistance subcommittee
- Update Fee Agreement Compendium to include broader sampling of alternative fee agreements

V. BOG Policy Development

Task Force Recommendation	Rec. No.	Full Report Reference	Possible Next Step	Timeline	Board Decision
A. Embrace Data-Driven Decision-Making	4	Page 61	Send to PGC		
1. Adopt Data-Driven Decision Making Policy	4.1	Page 61	Send to PGC		
2. Adopt formal Set of Key Performance Indicators to Monitor State of Values	4.2	Page 62	Send to PGC		
3. Adopt Open-Data Policy	4.3	Page 62	Send to PGC		
4. Dedicate OSB Resources to Data collection, design and dissemination	4.4	Page 63	Send to ED/CEO		

VI. Development of New Bar Programs

Task Force Recommendation	Rec. No.	Full Report Reference	Possible Next Step	Timeline	Board Decision
A. Create Incubator/Accelerator Program	8	Page 86-93			
1. Dedicate staff as project manager					
2. Form a Program Development Committee to help design and implement the program					

Questions for discussion:

- Are there questions regarding the proposal?
- Do we need more information?
- What are the risks of action/no action?
- Is feedback needed before adopting the recommendation? If so, from whom and by when?
- What is the timeline for making a decision?
- What is the timeline for implementation?
- Are there alternatives to this recommendation?
- Other?

Possible next steps for ED/CEO:

- Reach out to law schools and law firms to determine interest in participation
- Include questions regarding incubator/accelerator in new lawyer survey
- Send to PGC as part of New Lawyer Programs Review
- Other?

OREGON STATE BAR

Public Affairs Committee

Meeting Date: July 21, 2017
Memo Date: July 19, 2017
From: Kathleen Rastetter
Re: Document Access Fees for eCourt (OJCIN)

Action Recommended

Review proposed document access fee increases in CJO 17-037 and request the following:

- 1) Additional time to review and comment on the proposed order;
- 2) Delay implementation of proposed order (scheduled for September 1, 2017) ;
- 3) Consider whether the bar should do its own survey; and,
- 4) Consider whether the bar should propose an alternative approach.

Background

The Oregon Judicial Department opened a public comment period on revised fees for Oregon Judicial Case Information Network (OJCIN), or document access, on June 29th. Comments on the proposed fee schedule are due no later than 5 pm on July 31, 2017. <http://www.courts.oregon.gov/services/online/pages/ojcin.aspx> View a copy of the Chief Justice orders establishing the notice and comment provisions, and establishing the proposed fees ([CJO 17-036](#) and [CJO 17-037](#)).

Since then, some practitioners have become aware of the proposed CJ order and have raised concerns, including M. Patton Echols from Gresham who conducted his own survey of three bar groups. While limited in reach, the feedback and comments are enlightening. (see attached exhibit). Other bar groups from Estate Planning, to Sole Small Firm Practitioners, Real Estate and Land Use and Bar Press Broadcasters Council have raised concerns as well. It is likely that most people missed the notice since it came out just before the 4th of July holiday.

By way of background, in 2016, the Oregon Judicial Department (OJD) completed the implementation of Oregon eCourt. The eCourt system is funded through three funding sources: civil filing fees, criminal fines and assessments, and user fees. At the beginning of the 2017 Legislative Session, OJD identified an \$8.3 million shortfall in funding for the Oregon eCourt program and identified four possible funding sources.

In the 2017 session two bills passed to address some of the eCourt filing fees to help fund the eCourt system and technology fund. [HB 2795](#) increases civil court filing fees by five

percent as of October 1, 2017. This will raise an additional \$2.9 million for OJD to fund Oregon eCourt. [HB 2797](#) increases presumptive fines for violations by \$5 beginning on January 1, 2018 and will raise an additional \$3.1 million to fund Oregon eCourt. In addition, eCourt user fees will be increased to raise \$1.5 million as well.

The fourth proposed funding source is an assessment on governmental entities. Currently, 60% of the total users are public subscribers such as law enforcement entities, the Oregon Department of Justice, public defense providers, district attorneys and legal aid. These entities do not pay to access the Oregon eCourt system. While the proposal was discussed this session, it was not implemented.

August 7, 2017

The Honorable Thomas A. Balmer
Chief Justice, Oregon Supreme Court
Supreme Court Building
1163 State Street
Salem OR 97301

Dear Chief Justice Balmer:

Thank for the opportunity – and extension of time – to provide comment on the proposed fee structure for use of the Oregon Judicial Case Information Network (OJCIN). The Oregon State Bar Board of Governors has a few comments regarding the proposed changes found in CJO 17-036 and -037 and would like to suggest a possible path forward.

The board is both impressed by and grateful for the Oregon Judicial Department's work on its eCourt program. Not only has eCourt proven to be one of the most successful I.T. projects in Oregon, it is also a giant leap forward in improving access to justice in Oregon, an important goal that we share with the Court. Over the years, the Oregon State Bar and the Oregon Judicial Branch have worked together to minimize the access to justice gap. The enactment of new fees for access to documents through the Oregon Judicial Case Information Network (OJCIN) provides the bar and the courts with another opportunity to focus on this important principle and further strengthen the public's faith, trust, and confidence in Oregon's impartial judicial system.

We know that I.T. resources are expensive to acquire, operate, and maintain. Further, we recognize the need for revenue given the current state of Oregon's state budget. Our hope is that the strides forward that the Court and the bar have made to increase access to justice will not be lost by establishing document access fees that have the unintended consequence of denying access for low- and middle-income Oregonians to Oregon's court system.

The Oregon State Bar has consistently relied on principles, first identified by the *Joint Interim Committee on State Justice System Revenues* in 2010 and later adopted by the Oregon Legislature, by which court fees should be viewed. These principles, set forth below, are as applicable to the proposed document access fees as they are to filing fee issues in general.

- Access to justice. Fees should be set at a level that ensures everyone has access to the court system.
- Constitutional and statutory mandates require the courts to resolve all disputes brought to them, some within certain time constraints.

- Revenue generation is an appropriate factor to consider in setting fees, but revenue generated from such fees alone will never fund the court system adequately.
- Balance. A healthy fee structure balances generation of revenue and access to justice.
- Fee structure should be transparent, simple and understandable:
 - Fees should not impede reasonable access to justice.
 - Fees should be uniform across the state.
 - Fees should be cost-effective and transaction costs minimized.
- Fee waivers and deferrals should be granted in appropriate cases.
- Revenue neutrality. Court fees should not become more of a revenue source for courts than at the current time.

Available data suggests that the cost of legal representation is no longer just prohibitive for Oregon's lowest income residents – the cost is now becoming prohibitive for many middle-income Oregonians as well. Oftentimes solo and small firm practitioners are the lawyers representing Oregonians running small businesses, living in rural areas, and navigating personal or family cases through the court system. If document access fees are increased for solo and small firm practitioners, while fees for larger firms and governmental entities and local governments remain steady, the shift may have the unintended consequence of decreasing the lawyers available to serve the needs of low and moderate income Oregonians. Not only will this change further burden those low- and middle-income Oregonians seeking access to the court system, it may drive small and solo practitioners to no longer subscribe to document access and return to relying on court clerks for court information, creating a greater financial burden on the court system as well.

Further, a funding structure based on continuous fee increases will not be sustainable. The bar suggests that the Oregon Judicial Department reconsider the proposed fee structure and, with the input of stakeholders, design a tiered fee structure based on system usage. By developing a usage fee system, the financial burden will be shared by all who benefit from the system. The creation of a fee system that brings about greater access to justice, which is measurable and equitable, will increase the public's faith, trust, and confidence in the judicial branch and the Oregon eCourt system.

2017 – 2019 Biennium

1. Establish temporary fees rather than permanent fees with an end date of July 1, 2019. This will ensure sufficient funding for Oregon eCourt during the 2017 – 2019 biennium as well as allow for the analysis of and development of a tiered usage document access proposal.
2. Rebalance the temporary fees found in CJO 17-036 and -037 to ensure that the fee increase does not fall disproportionately on small and solo practitioners.
3. Create a joint Oregon State Bar/Oregon Judicial Department Work Group to review possible fee structures that are based on usage rather than firm size and report back during the 2019 legislative session with a plan to implement usage-based document access fees. Possible areas to explore include:

- a. charge by document size,
- b. charge by CPU usage,
- c. charge by number of pages accessed, and
- d. charge by number of cases accessed.

2019 and into the future

1. Institute the work group's fee structure proposal directed to the State Court Technology Fund on July 1, 2019, in conjunction with a biennial assessment. Include in the proposal the sunset for the user-based fee structure and the implementation date for instituting a usage-based fee structure.
2. Request that the legislature institute a biennial assessment on state entities with funding directed to the State Court Technology Fund. This assessment addresses the lack of financial support from the 60% of Oregon eCourt users who do not currently pay to use the Oregon eCourt system. The assessment would have a similar structure as the law library assessment and go into effect on July 1, 2019.
3. Request that the legislature institute a separate assessment on cities and counties which is attached to each convicted offense and directed to the State Court Technology Fund beginning July 1, 2019. This assessment is necessary because cities and counties are not subject to the biennial budgetary assessment.

We understand that the proposed adoption of document access fees is the third leg of the eCourt funding strategy. And again we appreciate the leadership and staff of the Oregon Judicial Department for shepherding the implementation of the Oregon eCourt project through the courts, the legislature, and the legal community. As we take this final step to a fiscally sound and technologically stable Oregon eCourt system, the bar looks forward to supporting the mission of the Oregon Judicial Department as it continues to focus on maintaining the public's faith, trust, and confidence in a judicial system for all Oregonians.

Respectfully yours,

MICHAEL D. LEVELLE

Michael D. Levelle
OSB President

Kathleen J. Rastetter

Kathleen J. Rastetter
OSB Public Affairs Chair

July 24, 2017

Dear Chief Justice Balmer:

Thank you for the opportunity to comment on the proposed fee structure for use of the Oregon Judicial Case Information Network. While the Oregon State Bar at this time takes no position on the substance of the proposal, we respectfully ask that you consider an extension of the comment period.

The Oregon State Bar commends the Oregon Judicial Department's work on its eCourt program, which has proven to be one of the most successful I.T. projects in the state. We further recognize the need for increased revenue, given the current state of the budget.

Our concerns at this stage are two-fold:

1. Both the number and tone of comments received thus far by the OJD and by the bar through a variety of communication vehicles indicate that the impact on practitioners, and ultimately the public, could be considerable. Categories of concern are broad but compelling, including: a potential doubling or tripling of OJCIN costs for some practitioners, with sole and small firms being disproportionately impacted; a subscription fee that is out of proportion to fees charged in other states; and a concern that some practitioners will cancel subscriptions, which would provide a hardship on their practices and clients.
2. The state bar generally considers any fees that are required in order to engage with Oregon courts as at least a potential barrier to the public's ability to access the justice system. Any fees to pursue a case or defend a claim are paid by regular Oregonians and businesses. If fees get too high, citizens' access to the court system can be hindered. This certainly does not negate the need for fees, particularly in an era when the courts continue to be underfunded and legal services programs for the poor are in crisis. The bar would like to assure ample time for consideration and comment on this access to justice issue before significant fee structure changes go into effect.

With those issues in mind, and given the timing of the comment period during the quiet vacation month of July, we would like to ensure that all stakeholders are made aware of the proposal and have ample opportunity to analyze and comment on its impact.

We respectfully request that you extend the comment period to assure that you can take a full measure of its impact prior to finalizing any fee increases. Thank you for your consideration.

Respectfully,

MICHAEL D. LEVELLE

Michael Levelle, President
Oregon State Bar