

**Oregon State Bar**  
**Meeting of the Board of Governors**  
September 8, 2017  
**Open Session Minutes**

President Michael Levelle called the meeting to order at 12:00 p.m. on September 8, 2017. The meeting adjourned at 3:00 p.m. Members present from the Board of Governors were John Bachofner, Jim Chaney, Chris Costantino, Eric Foster, Ray Heysell, John Mansfield, Eddie Medina, Vanessa Nordyke, Tom Peachey, Kathleen Rastetter, Liani Reeves, Julia Rice, Traci Rossi, Kerry Sharp and Elisabeth Zinser. Not present were Rob Gratchner, Guy Greco and Per Ramfjord. Staff present were Helen Hierschbiel, Amber Hollister, Rod Wegener, Dawn Evans, Susan Grabe, Dani Edwards, Jonathan Puente, Judith Baker, Catherine Petrecca, and Camille Greene. Also present: Kaori Eder, ONLD Chair, Jennifer Nicholls, ONLD Chair-elect; Jeff Crawford, PLF; Teresa Statler, PLF Board of Directors Chair; Christine Meadows, ABA HOD Delegate; Myah Kehoe, Alternative Dispute Resolution Chair; and Steven Rahe, Client Security Fund Committee Chair.

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

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

**2. Strategic Areas of Focus for 2017**

Ms. Nordyke presented the Policy & Governance Committee's recommendation to the Board of Governors that it create a Paraprofessional Licensing Exploration Committee, charged with developing a detailed proposal for licensing paraprofessionals consistent with the recommendations set forth in the Futures Task Force Report and engaging stakeholders in development of the proposal as recommended by the Task Force. Recommended committee members for BOG appointment are listed in **[Exhibit A]**.

Discussion ensued. Ms. Reeves requested clarification on whether the proposed committee would include members from rural areas and whether it would be charged with further exploration or implementation of a paraprofessional licensing program. Ms. Hierschbiel responded that the committee would be charged with fleshing out the details of a proposal for further board consideration, not with implementation. Ms. Rice confirmed that exploration was the intention of the Policy & Governance Committee, not implementation.

**Motion:** The board voted unanimously to approve the committee creation as presented by the P&G committee. The motion passed.

Ms. Nordyke gave an update on the feedback received by HOD delegates after use of InXPO for the first round of HOD regional meetings in July. The technology will not be used at the HOD meeting in November for voting purposes but will be used for others to livestream.

Ms. Nordyke presented an update on the review of the new lawyer programs. The ONLD has been invited to provide feedback on the new lawyer program survey. New lawyer programs will be the subject of further discussion at the BOG retreat.

Mr. Puente presented an update on development of the OSB Diversity Action Plan. The goal is to have a draft plan for the BOG to approve at its November 2017 meeting.

### 3. BOG Committees, Special Committees, Task Forces and Study Groups

#### Board Development Committee

In Mr. Ramfjord's absence, Ms. Costantino asked the board to approve the Board Development Committee's recommendation to appoint Michael Rondeau to the Board of Governors Public Member position beginning January 1, 2018.

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

During the July meeting the BOG approved the appointment of all but one new member of the Council on Court Procedures and asked OTLA to provide one additional recommendation for new member appointment. Ms. Costantino asked the board to approve the Board Development Committee's recommendation to appoint Meredith Holley (125647) for the remaining position.

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

Appointments to the Board of Bar Examiners (BBX) are made by the Supreme Court. Pursuant to Oregon State Bar bylaw 28.2, the BOG has the opportunity to provide feedback on the candidates the BBX plans to recommend for appointment. The BBX met on August 24 and provided the attached memo for the BOG's consideration. Ms. Costantino asked the board to provide feedback. **[Exhibit B]**

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

Ms. Costantino asked the board to approve the committee's recommendations for the Disciplinary Board. **[Exhibit C]**

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

Ms. Costantino asked the board to approve the committee's recommendations for the State Professional Responsibility Board. **[Exhibit C]**

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

Ms. Costantino asked the board to approve the committee's recommendations for the Unlawful Practice of Law Committee. **[Exhibit C]**

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

Ms. Costantino asked the board to approve the committee's recommendations for the Ninth Circuit Judicial Conference Representative: Erin Nicole Biencourt, 131669, Michael Fuller, 093570, Mark Sherman, 095055.

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

Ms. Costantino asked the board to approve the committee's recommendations of Susan Marmaduke for the attorney position on the PLF Board of Directors. For the public member, the PLF board asked Tim Martinez to remain on the board for one more year.

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

#### **Budget & Finance Committee**

Mr. Chaney gave a financial update and presented Mr. Wegener's seven financial scenarios on how to close the budget gap. Mr. Chaney asked the board members to send comments to the committee for consideration at the next committee meeting.

#### **Public Affairs Committee**

In Ms. Rastetter's absence, Mr. Mansfield gave a general update on legislative activity and asked the board to ratify the letter sent to Senators Grassley, Feinstein, Flake, and Franken re: The Proposal to Restructure the United States Court of Appeals for the Ninth Circuit.

**Motion:** The board voted unanimously in favor of ratifying the letter. The motion passed.

Mr. Mansfield asked the board to approve the Futures TF recommendation re: the 2018 Legislative cycle and to explore possible legislation for online document creation.

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

Mr. Mansfield asked the board to approve the Futures TF recommendation re: the 2018 Legislative cycle and to explore possible legislation for changes to the OSB 50-year member fees.

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

#### **4. Professional Liability Fund**

On behalf of Ms. Bernick, Ms. Statler gave a general update and presented the 2016 Final Audited Financial Statements. Claims are low and investments are up, resulting in a net surplus over the PLF's goal. Mike Long has retired after 23 years with the OAAP, and Bruce Schafer's retirement party will be December 12, 2017.

Mr. Crawford asked the board to approve the PLF 2018 budget which includes a 4% salary pool and their continued contribution to the cost of Bar Books.

**Motion:** Ms. Reeves moved, Mr. Mansfield seconded, and the board voted in favor of approving the budget. Mr. Bachofner, Mr. Chaney, and Mr. Peachey abstained. The motion passed.

Ms. Statler asked the board to approve the PLF 2018 assessment without change for the ninth consecutive year. The PLF is considering reducing the assessment in the near future if the current trend continues.

**Motion:** Mr. Sharp moved, Ms. Nordyke seconded, and the board voted in favor of approving the assessment. Mr. Bachofner, Mr. Chaney, and Mr. Peachey abstained. The motion passed.

#### **5. OSB Committees, Sections, Councils and Divisions**

## Oregon New Lawyers Division

Ms. Eder gave an update on the current activities of the ONLD which included their Annual Pro Bono Fair, simulcasts of their CLEs around the state, Veteran's Law CLE, ONLD monthly podcasts, Classroom to Courtroom Project to target future generations, and a Generative Discussion on conducting a CLE on Technology in the Practice. Ms. Hirschbiel suggested they contact the Sole and Small Firm Section which has been holding an annual technology CLE and fair in Bend, OR.

## Legal Ethics Committee

### Proposed Amendment to RPC 5.6 – Collaborative Law Participation

Ms. Hirschbiel presented the Legal Ethics Committee request for the Board of Governors to consider how to respond to the Oregon Law Commission's request for input on a proposal to enact the Uniform Collaborative Law Act into Oregon law. The committee recommends the board choose Option 3: Oppose the prospective disqualification provisions of the Act, but offer to explore amendments to the Rules of Professional Conduct. **[Exhibit D]**

Ms. Maya Kehoe provided additional information about the collaborative law process and the UCLA and expressed hope that the BOG would not oppose collaborative law as a concept but engage members of the collaborative law community in fashioning solutions to the board's concerns about the disqualification provisions.

**Motion:** Ms. Reeves moved, Ms. Rice seconded, and the board voted unanimously to support the committee's suggested Option 3. The motion passed.

### Mediation Rule 8.3 Amendment

Ms. Hirschbiel presented the Legal Ethics Committee recommendation to the Board of Governors to amend the lawyer's duty to report misconduct under Oregon RPC 8.3 to resolve potential inconsistency with duty to maintain confidentiality of mediation communications. **[Exhibit E]**

**Motion:** Mr. Bachofner moved, Ms. Reeves seconded, and the board voted unanimously to approve the recommendation as presented. The motion passed.

### Legal Ethics Opinion

Ms. Hirschbiel presented the Legal Ethics committee's recommendation to the Board of Governors to adopt the proposed formal ethics opinion regarding the disqualification of judges via affidavits of prejudice. **[Exhibit F]** Mr. Bachofner had concerns about use of the term "affidavit of prejudice" given recent changes to the law.

**Motion:** Mr. Chaney moved, Ms. Reeves seconded, to send the opinion back to the committee to ensure that the language used in the opinion reflects the current statutory language. The board voted unanimously to send the opinion back to the committee. The motion passed.

### Client Security Fund Rule Amendments

Mr. Raher presented the Client Security Fund Committee (CSF Committee) recommendation that the Board of Governors adopt the proposed amendments to the Client Security Fund Rules (CSF Rules). **[Exhibit G]**

**Motion:** Mr. Chaney moved, Mr. Bachofner seconded, and the board voted unanimously to approve the recommendation as presented. The motion passed.

#### MCLE Committee Rule Amendment

Ms. Hollister presented the MCLE Committee request that the Board of Governors approve its proposed recommendation to combine the child abuse reporting and elder abuse reporting credit requirements into a single one-hour program. The program would include discussion of the differences between the two types of abuse, an Oregon lawyer's obligations to report the abuse and the exceptions to reporting. **[Exhibit H]**

**Motion:** Mr. Peachey moved, Mr. Bachofner seconded, and the board voted unanimously to approve the recommended amendment as presented. The motion passed.

#### ABA HOD Delegate Report

Ms. Meadows updated the board on the ABA HOD Resolutions, including opposition to the restructuring of the Ninth Circuit. Another resolution she presented would prevent blocking admission to the bar for non-documented aliens. She encouraged the board to consider presenting resolutions to the ABA HOD. The next deadline is this November for the ABA Mid-Year meeting in February 2018. ABA Lobbying Day in April 2018 has been extended to three days, up from two days in previous years.

#### Report of the President

Mr. Levelle reported that attending the meetings of the Advisory Committee on Diversity and Inclusion (ACDI) would be educational for BOG members to become informed about the activities of the OSB Diversity & Inclusion Program.

#### Report of the President-elect

Ms. Nordyke concurred with Mr. Levelle regarding the importance of the ACDI and reported on her experience attending the OLIO Orientation in August. Her theme for 2018 is "The Next Generation."

#### Report of the Executive Director

Ms. Hirschbiel highlighted the following items from her written report: Phase one of the Aptify launch will take place on Tuesday, September 12, and will require all members to change their password; Rod Wegener is retiring effective December 1, 2017; Publication of the OSB handbook "Legal Issues for Older Adults" is final, and DHS is paying for publication of the handbook in four languages; Media attention around the pass score for the bar exam seems to have subsided, but if questions arise, please contact Kateri Walsh; The economic survey results should be completed before the end of the year; House of Delegates members will be offered a discounted price on the CLE on September 29 regarding the proposed changes to the rules of professional conduct that will be on the HOD agenda on November 3; There is a Region 5 vacancy on the BOG to fill the position held by Ms. von Ter Stegge prior to her appointment to the Multnomah County bench. The deadline for applications is September 29.

Director of Regulatory Services. As written.

Director of Diversity & Inclusion. OLIO was attended by 52 law students from the three Oregon law schools last month. They have debriefed with the three law schools to see how they can improve the OLIO program. One main goal is to have Oregon law students stay and practice in Oregon after graduation. They organized the ACDI to be a more effective committee to develop the OSB Diversity & Inclusion program. They are gathering data to develop effective programs for Oregon's diverse attorneys.

MBA Liaison Report.

No MBA meetings were held in summer months.

**6. Consent Agenda**

Mr. Levelle asked if any board members would like to remove any items from the consent agenda for discussion and a separate vote. There was no request to do so.

**Motion:** Mr. Chaney moved, Ms. Costantino seconded, and the board voted unanimously to approve all items on the consent agenda.

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

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

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

Mr. Mansfield asked the board to support the Federal Bar Associations Annual Conference with a donation of \$1500. Mr. Levelle approved. Mr. Heysell supported the idea. Ms. Hirschbiel asked Mr. Mansfield to forward the request to her for approval within her discretion from the existing budget.

Ms. Reeves asked that the BOG Calendar of Events be included on each BOG agenda.

**Oregon State Bar  
Board of Governors Meeting  
September 8, 2017  
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 informed the board of a non-action item.

B. Pending Non-Disciplinary Litigation

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

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 8, 2017  
**From:** Policy & Governance Committee  
**Re:** Paraprofessional Licensing Exploration Committee

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### Action Recommended

Create a Paraprofessional Licensing Exploration Committee, charged with developing a detailed proposal for licensing paraprofessionals consistent with the recommendations set forth in the Futures Task Force and engaging stakeholders in development of the proposal as recommended by the Task Force. Recommend committee members for BOG appointment.

### Background

At its June 2017 meeting, the Board of Governors received the OSB Futures Task Force Report. Among other things, the report recommended that Oregon establish a program for licensure of paraprofessionals who would be authorized to provide limited legal services, without attorney supervision, to self-represented litigants in family law and landlord-tenant proceedings. The reason cited for licensing paraprofessionals would be to help close the access-to-justice gap in two areas of the law where statistics show a continued high need despite decades of efforts to increase legal aid funding and pro bono services.

The Board of Governors accepted the report at its meeting in June 2017. In July 2017, the Board of Governors voted to identify possible stakeholders for a committee and send to the BOG Policy & Governance Committee for further action.

At its discussion at the June 2017 meeting, several BOG members expressed an interest in seeking feedback from members prior to approving implementation of a paraprofessional licensing program. Requests for feedback have begun, both through outreach to local bar associations and through an email from Michael Levelle to all bar members inviting feedback. Much of the feedback has been questions about the details of the proposal. At this point, however, the proposal consists of general parameters, not a detailed plan.

An alternative to establishing an implementation committee—which presupposes the adoption of the Task Force recommendation—would be to establish a program exploration committee. The purpose would be to formulate a detailed proposal for paraprofessional licensure and would engage stakeholders in development of the proposal as recommended by the Task Force. Throughout the process of development, the committee could seek input from members of the bar and of the public.

The Policy & Governance Committee recommends the appointment of the following members to the Committee:

- Kelly Harpster, Futures Task Force Paraprofessional Subcommittee Chair
- Two Oregon Circuit Court judges in family law or landlord/tenant law



- A representative from each of the three Oregon law schools, to be chosen by the law school deans
- Aubrey Baldwin, Portland Community College Paralegal Program Chair
- Angela Lucero, Board of Bar Examiners
- Chris Costantino, Board of Governors
- A representative from Disciplinary Counsel's Office
- A representative from General Counsel's Office
- One lawyer representative in the family law
- One lawyer representative in the landlord tenant arena
- Two public members
- A paralegal

We recommend that Kelly Harpster be appointed as Chair of the Committee.

# OREGON STATE BOARD OF BAR EXAMINERS

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16037 SW Upper Boones Ferry Road, PO Box 231935, Tigard, OR 97281-1935  
(503) 620-0222 or (800) 452-8260 • www.osbar.org

August 25, 2017

Helen M Hirschbiel  
Executive Director  
Oregon State Bar  
PO Box 231935  
Tigard, OR 97281

RE: *Board of Governors' Approval of Board of Bar Examiners Actions*

Dear Ms. Hirschbiel:

As required by OSB Bylaws Section 28.2, the Oregon State Board of Bar Examiners (BBX) hereby solicits input from the Board of Governors (BOG) related to the reappointment of the following persons to continue serving as BBX members:

Lawyer Members:

Misha Isaak  
Kelly Skye  
Cassandra McLeod-Skinner  
Caroline Wong

Public Members:

Randall Green  
Richard Kolbell

Our goal is to have the appointment of these nominees placed on the earliest possible public meeting agenda of the Oregon Supreme Court. Please let me know if you need anything further from the BBX. Thank you in advance for your assistance in this process.

Sincerely,



Jeffrey A. Howes, Chair  
Oregon State Board of Bar Examiners

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** June 23, 2017  
**Memo Date:** June 23, 2017  
**From:** Chris Costantino, Board Development Committee Member  
**Re:** Recommendations for appointments to the Disciplinary Board, State Professional Responsibility Board, and Unlawful Practice of Law Committee

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### Action Recommended

Approve the Board Development Committee's recommendations for new member appointments to the following bar groups. Send these recommendations to the Oregon Supreme Court.

### Background

#### Disciplinary Board

##### **Region 1:**

Jennifer Kimble, chair  
 Paul Heatherman  
 John Laherty  
 Ronald Roome  
 Steven Bjerke, public member

##### **Region 2:**

Jet Harris, chair  
 Chas Horner  
 Teena Killian  
 Debra Velure

##### **Region 3:**

John (Jack) E. Davis, chair  
 Thomas Pyle, public member

##### **Region 4:**

Kathy Proctor, Chair  
 Arnie Polk  
 Bryan Penn, public member

##### **Region 5:**

Ronald Atwood, chair  
 Andrew Schpak  
 Duane Bosworth  
 Richard Josephson  
 Samuel Kauffman  
 Frank Weiss

##### **Region 6:**

James C. Edmonds, chair  
 Paul Mark Gehlar, public member

##### **Region 7:**

Andrew Cole, chair  
 S. Michael Rose

#### State Professional Responsibility Board

Chair: Ankur Doshi  
 Region 1 member: Todd Grover  
 Region 3 member: Joel Benton  
 Public member: Dr. Zena Polly

Given changes to BR 2.3 that are effective January 1, 2018, all of the members of the SPRB whose present terms will not have expired must be appointed by the Supreme Court. The following members are recommended for appointments to expire on the date indicated:

Carolyn Alexander, term expiring 12/31/19  
 Heather Bowman, term expiring 12/31/19  
 Ankur Hasmukh Doshi, term expiring 12/31/18

Randall Green, Ph.D, public member, term expiring 12/31/18  
Christine M. Meadows, term expiring 12/31/20  
Elaine D. Smith-Koop, term expiring 12/31/18  
Amanda Walkup, term expiring 12/31/20

**Unlawful Practice of Law Committee**

Chair: Jay Bodzin  
Chair-Elect: Mary Briede  
Secretary: John Marandas  
Members:  
Travis A Flynn  
Jennifer Schade  
Amanda Benjamin

Effective January 1, 2018, BR 12.1, provides the Supreme Court authority to appoint members to the UPL Committee. The following existing members are recommended for appointments to expire on the dates indicated.

Jay Bodzin, term expiring 12/31/2018  
Mary Ellen Briede, term expiring 12/31/2019  
James M. Brown, term expiring 12/31/2020  
Monica A. Goracke, term expiring 12/31/2018  
Jacob O. Kamins, term expiring 12/31/2018  
Andrea K. Malone, term expiring 12/31/2019  
John J. Marandas, term expiring 12/31/2019  
Alexander S. Ogurek, term expiring 12/31/2019  
Dylan S.R. Potter, term expiring 12/31/2020  
Stephen A. Raher, term expiring 12/31/2020  
Theresa L. Wright, term expiring 12/31/2019  
Morad B. Noury, public member, term expiring 12/31/2019  
Samuel D. Reese, public member, term expiring 12/31/2019

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 8, 2017  
**From:** Legal Ethics Committee  
**Re:** Collaborative Law in Oregon

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### Action Recommended

Consider how to respond to the Oregon Law Commission's request for input on a proposal to enact the Uniform Collaborative Law Act into Oregon law.

### Background Information

The Oregon Law Commission has received a proposal to enact the Uniform Collaborative Law Act (UCLA) into Oregon law. The Commission has requested input from the Bar and has asked for a response by fall 2017. Because enacting the UCLA may implicate ethics rules, the Legal Ethics Committee is providing feedback.

In collaborative law, the parties agree in a "collaborative law participation agreement" not to seek a judicial resolution, but instead to "negotiat[e] a mutually acceptable settlement without court intervention, to engag[e] in open communication and information sharing, and to creat[e] shared solutions that meet the needs of both clients." See ABA Formal Ethics Op No 07-447 (discussing core elements of collaborative practice).

The UCLA was drafted by the Uniform Law Commission, and is designed to implement a uniform system of "collaborative law" through court rule or statute. A UCLA collaborative participation agreement specifically provides for prospective disqualification of collaborative lawyers if their clients decline to continue the collaborative law process. In other words, either party can terminate the collaborative process at any time, but in order to do so both of their lawyers must "withdraw from representing their respective clients" and agree not to "handle any subsequent court proceedings." *Id.* Practically, this prospective disqualification acts as a penalty, because if the collaborative process is unsuccessful the parties must retain (and pay for) new lawyers. Further, the clients may not rely upon any of the information obtained during the collaborative process in subsequent litigation; instead, they must rely on the usual discovery processes.

In the family law context, collaborative law enjoys sufficient popularity among the public and family law practitioners to have come to the Oregon Law Commission's attention. While some version of the UCLA has been adopted in sixteen states, its

acceptance among lawyers is not as widespread. Instead, the UCLA was soundly rejected by the American Bar Association's House of Delegates (by a margin of 2-1), as well as by the Board of Governors of the American Academy of Matrimonial Lawyers. Based on anecdotal information, some Oregon practitioners are presently marketing "collaborative law" services, although it is unclear whether they are practicing in the manner described by the UCLA.

Although little empirical data exists on the benefits of collaborative law, its proponents promise a "more civilized" process for divorce litigation: one that gives the clients more control over the process and the outcome and is generally more satisfactory in terms of preserving cooperative family relationships following the divorce. A useful overview of the legal and practical issues presented by collaborative law is provided by John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 Ohio St L J 1315 (2003).

## Discussion

### 1. Oregon Lawyers May Already Practice Collaboratively.

Any discussion of collaborative law in Oregon must begin with the observation that much of what collaborative lawyers and their family law clients seek to accomplish under the UCLA can already be accomplished under existing Oregon law. For instance,

- Oregon lawyers are explicitly allowed to limit their representation of clients (*e.g.* to only pre-filing non-litigation matters), so long as the limitation is a reasonable one under the circumstances, and the client can rely on the advice provided. *See* RPC 1.2(b).
- Recently, the courts explicitly authorized limited-scope representation in family law cases and provided special procedures for lawyers appearing in a limited capacity. *See* UTCR 8.110.
- In family law disputes, parties often choose to mediate their disputes using third-party mediators. Under existing law, mediation communications are confidential. *See* ORS 36.222. In addition, the parties to a dispute may agree to confidentiality provisions for their negotiations that they find desirable.

### 2. The Court Is in the Best Position to Make Decisions Regarding Lawyer Disqualification.

The Oregon Law Commission has signaled it is considering recommending that the Legislature enact the entire UCLA, including its disqualification provision, by statute. It has long been the position of the bar, however, that regulating lawyer conduct, including lawyer disqualification, is the province of the court. After all, the court is in the best position to regulate legal practice, and control the proceedings before it.

Under the UCLA, clients agree to disqualification of both lawyers and their respective law firms in the event that the collaborative process fails, and the Act itself purports to disqualify the lawyers from further representation:

“SECTION 9. DISQUALIFICATION OF COLLABORATIVE LAWYER AND LAWYERS IN ASSOCIATED LAW FIRM.

- (a) Except as otherwise provided in subsection (c),<sup>1</sup> a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.
- (b) Except as otherwise provided in subsection (c) and Sections 10 and 11, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under subsection (a).

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Enacting this provision of the UCLA by statute would be inconsistent with the current scheme for the regulation of lawyers. The Oregon Rules of Professional Conduct place the power to disqualify lawyers or remove them from cases squarely with the court. For instance, if a lawyer identifies an existing conflict of interest in a pending case, the rules provide the lawyer must seek permission prior to withdrawal if court rules require the lawyer to do so. RPC 1.16(c). If the court decides that withdrawal is not warranted or it serves the interests of justice for the lawyer to remain, the court may order the lawyer to continue the representation. *Id.* Similarly, in instances where a lawyer is an advocate in a trial in which the lawyer is likely to be a witness on behalf of the lawyer’s client, the rules allow the court discretion to determine whether disqualification of the lawyer would “work a substantial hardship on the client.” RPC 3.7(a)(3).

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<sup>1</sup> Section 9(c) of the Uniform Collaborative Law Act contains exceptions for lawyers who are asking for court approval of an agreement resulting from the collaborative law process, or “to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party” if successor counsel is not “immediately available.”

Finally, in instances where lawyers seek to disqualify opposing counsel, the court exercises its inherent authority to determine whether disqualification is appropriate. The court's right to disqualify stems from its duty to "prevent breaches of trust and to control the proceedings before it." *The Ethical Oregon Lawyer* §10.3-5, citing *State ex rel. Bryant v. Ellis*, 301 Or 633, 638–39 (1986).

Ensuring that judges retain the power to make decisions regarding lawyer disqualification is fundamental to ensuring the court's power to regulate the practice of law. Such an approach is also well grounded in practical reality – after all, judges have the ability to examine the facts and law before them, and to rule in a manner that serves justice. Enabling statutory provisions to determine when and whether lawyers are disqualified from practicing law could have unintended consequences. Therefore, if any disqualification provision is enacted, the Committee recommends it be enacted by court rule.

3. Collaborative Law Participation Agreements Authorized by the UCLA May Implicate the Oregon Rules of Professional Conduct and Confuse Lawyers

The UCLA's form of collaborative law may also implicate the Oregon Rules of Professional Conduct, and potentially place lawyers in jeopardy of running afoul of the prohibition on restrictions on the right to practice.

The Oregon Rules of Professional Conduct do not permit lawyers to participate in offering or making an agreement, as a part of the settlement of a dispute that limits the lawyer's right to practice. Instead, Rule 5.6(b) provides:

"A lawyer shall not participate in offering or making:

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(b) an agreement in which a direct or indirect restriction on the lawyer's right to practice is part of the settlement of a client controversy."

See OSB Formal Ethics Op 2005-47 (Neither plaintiff's counsel nor defense counsel may offer or agree to settle litigation on the condition that plaintiff's counsel agree not to sue the defendant again).

The policy rationale for this limitation is both to protect the autonomy of lawyers and to prevent "limits" on "the freedom of clients to choose a lawyer." Comment [1] to ABA Model Rule 5.6. The prohibition is intended prohibit all such restrictions, "except for



restrictions incident to provisions concerning retirement benefits for service with the firm.” *Id.*

There is no Oregon case law or ethics opinion addressing whether a collaborative participation agreement’s prospective disqualification of the collaborative lawyers implicates Rule 5.6(b).<sup>2</sup> Likely, any analysis by an Oregon court regarding Rule 5.6 would turn on whether such an agreement would be deemed an “indirect or direct” limitation on a lawyer’s right to practice that is “part of” the settlement of a client controversy.

Because the purpose of the collaborative participation agreement is to set out a framework for settlement negotiations, it seems plausible that a court could find such an agreement implicates RPC 5.6(b). It appears that collaborative law participation agreements under the UCLA would both limit the lawyer’s right to take the client to trial if that is what the lawyer and the lawyer’s own client decide is the best option, and would limit the lawyer’s ability to represent that client in future court proceedings related to the underlying dispute (e.g. post-judgment matters).

Some state ethics opinions have suggested that collaborative law participation agreements may give rise to a lawyer self-interest conflict, because a lawyer interested in maintaining a collaborative practice may be self-interested in advising the client to agree to a participation agreement. RPC 1.7(a)(2). These authorities typically conclude that, with proper informed consent, it may be possible to waive any self-interest conflicts created by a lawyer’s involvement in negotiating a collaborative law participation agreement, as long as the lawyer reasonably believes he or she can provide competent and diligent representation. *See* RPC 1.7(b).<sup>3</sup>

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<sup>2</sup> The authorities are split on whether collaborative law participation agreements are ethical. Interestingly, the formal ethics opinion of the American Bar Association, widely cited as approving the practice of collaborative law, does not address the potential RPC 5.6 issue. *Ethical Considerations in Collaborative Law Practice*, ABA Standing Comm. on Ethics and Prof’l Responsibility, Formal Op 07-447 (2007). Similarly, many state ethics opinions that address the ethical implications of collaborative law participation agreements do not discuss whether mandatory prospective disqualification implicates Rule 5.6. *See* Maine Ethics Op. 208 (March 6, 2014); Orange County Bar Association Formal Opinion 2011-01; North Dakota Opinion 12-01 (July 31, 2012); New Jersey Ethics Opinion 711 (July 23, 2007).

<sup>3</sup> A number of state ethics opinions discuss collaborative law participation agreements and conclude they give rise to a waivable conflict, under Rule 1.7, without analyzing the Rule 5.6 question. *See* South Carolina Opinion 10-01 (March 31, 2010); Alaska Opinion 2011-3 (May 3, 2011); Washington Opinion 2170 (2007); Kentucky Opinion E-425 (June 2005); Missouri Opinion 124 (August 20, 2008).

Colorado is the only state, to our knowledge, to determine that collaborative law participation agreements with prospective disqualification provisions may run afoul of ethics requirements. See Colorado Opinion 115 (February 24, 2007). The Colorado opinion concludes that a lawyer may not use a collaborative law retainer agreement that requires the lawyer to withdraw if the client or adversary chooses to litigate the matter rather than continue the collaborative process. The opinion explains that such a provision would create an unwaivable conflict between the lawyer and client, because it would allow an opposing party to exercise the disqualification provision over the objections of the client; therefore, it concludes, such an agreement would run afoul of Rule 1.7.

The UCLA attempts to overcome any potential inconsistencies with Rules of Professional Conduct by merely stating that the Act “does not affect ... the professional responsibility obligations and standards applicable to a lawyer or other licensed professional.” UCLA at Section 13. This provision does very little to provide clarity to practicing lawyers. The Committee is concerned that enacting the UCLA in its current form could create needless confusion among Oregon attorneys about the propriety of collaborative law participation agreements that contain prospective disqualification provisions.

4. The BOG Could Oppose Provisions of the Act Related to Prospective Disqualification, and Later Explore Potential Amendments to the Rules of Professional Conduct.

Given this background, the Committee proposes that the Board oppose adoption of the provisions of the UCLA pertaining to prospective disqualification, on the principle that any such provisions should be enacted by court rule. This approach would be consistent with Comments to the UCLA (as Amended in 2010), which provide, “The Drafting Committee recommends that Section 9 [pertaining to disqualification] be enacted by judicial rule rather than legislation.”

With this approach, upon enactment of the UCLA without disqualification provisions, the bar could explore an amendment to the Oregon Rules of Professional Conduct to enable lawyers to participate in offering or making collaborative law agreements that contain a prospective disqualification provision.

This Committee would welcome the opportunity to propose a rule amendment at the Board’s request at a later date, if the UCLA is enacted. Because no version of the UCLA has been adopted, it is difficult to propose language at this time.

### Conclusion

In conclusion, everything about a collaborative participation agreement, except the prospective disqualification provision, can be accomplished under current law.

What is unique and different about the UCLA's version of collaborative law is the disqualification provision itself; the utility of that provision to any particular client is unclear. Allowing the courts to remain engaged in decisions about lawyer disqualification would help protect vulnerable litigants and support the bar's access to justice mission.

### Options

**Option 1: Take no position at this time.** Refer matter to Public Affairs Committee to provide a response to the Oregon Law Commission. This option would provide the PAC with flexibility to respond and take positions during the legislative session, but would not provide a clear path to amending the Oregon Rules of Professional Conduct.

**Option 2: Oppose Act as written and not propose amending the RPCs.** This option would support the status quo, but political realities may result in the Act's passage, as written.

**Option 3: Oppose the prospective disqualification provisions of the Act, but offer to explore amendments to the Rules of Professional Conduct.** This option would recognize Oregon family law lawyers' interest in the practice collaborative law, while working to ensure the court's continued involvement in questions of disqualification of lawyers.

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 8, 2017  
**From:** Legal Ethics Committee  
**Re:** Proposed Amendment to Oregon RPC 8.3  
Mediation Communication Confidentiality

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### Action Recommended

Amend lawyer's duty to report misconduct under Oregon RPC 8.3 to resolve potential inconsistency with duty to maintain confidentiality of mediation communications.

### Background

At the July 21, 2017 Board of Governors' meeting, Rich Spier presented the Fee Mediation Task Force Report and asked the BOG to consider its recommendations. After accepting the report, the BOG directed the Legal Ethics Committee to consider how to best resolve the inconsistency between the duty to report attorney misconduct under Oregon RPC 8.3 and statutory protections for mediation communications.

In its report, the Fee Mediation Task Force recommended:

"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."

Oregon RPC 8.3(a), provides that a lawyer who "know 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" must report the other lawyer to the bar. If, however, the lawyer learns of another lawyer's RPC violation in the course of a mediation—the communications of which are confidential under ORS 36.220—the lawyer may be uncertain whether to report the misconduct. A lawyer under those circumstances may rightfully be wary of making a bar complaint that discloses confidential mediation communications. After all, lawyers can be disciplined for disclosing confidential mediation communications. *See In re Dodge*, 22 DB Rptr 271 (2008) (lawyer disciplined for disclosing confidential mediation communications pursuant to Rule 3.4(c)).

This issue is most likely to arise for lawyers serving as mediators. If a lawyer is serving as a lawyer to a party in mediation then it is very likely that any report that comes up in the context of a mediation will be prohibited by Rule 8.3(c)'s exception for information "otherwise protected by Rule 1.6 or ORS 9.460(3)" and the issue will not arise.

## DISCUSSION

Determining whether it is appropriate to amend the Rules to provide an exception for reports based upon mediation communications requires weighing the interests of the regulatory system in learning information about potential lawyer misconduct against the interests of mediation participants (and the public at large) in maintaining confidentiality.

The Legal Ethics Committee weighed these interests and concluded that lawyers have a legitimate interest in having a clear understanding of when it is appropriate to report in the context of mediations. The potential inconsistency between Oregon RPC 8.3 and ORS 36.222 may create a scenario where lawyers have no clear path forward. The Committee also noted that the Legislature made a policy decision that it is in the best interest of Oregonians to facilitate alternative dispute resolution by allowing for the confidentiality of mediation communications. In light of this legislative decision, the Committee determined an amendment to Oregon RPC 8.3 was in order.

The Committee recommends that the Board adopt the following amendment, which would add a new section (d) to Oregon RPC 8.3, as follows:

### RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) 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.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) 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:

(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.

**(d) This rule does not require disclosure of mediation communications otherwise protected by ORS 36.220.**

## OPTIONS

1. **Adopt Proposed Amendment to Oregon RPC 8.3 and Place Matter on 2017 HOD Agenda.**  
Amend Oregon RPC 8.3 to provide an exception for confidential mediation communications.

This option would resolve the potential inconsistency between a lawyer's duty to report misconduct and obligation not to disclose mediation communications.

2. **Provide Guidance.** Direct Legal Ethics Committee to draft a formal ethics opinion addressing lawyer-mediator's duty to report misconduct. This option would help lawyers better understand their obligations, but would not resolve the underlying inconsistency between the duty to report misconduct and the duty not to disclose mediation communications.
3. **Take No Action.** The Board could decline to recommend a rule change, and maintain the status quo. Ultimately, any inconsistency may be resolved through a disciplinary decision or legislative action. This option would leave members without clear guidance.

DRAFT

*Project 14-08*

**FORMAL OPINION NO. 2017-xxx**

**Candor, Independent Professional Judgment, Communication,  
Disqualification of Judges via Affidavit of Prejudice**

Lawyer practices primarily in ABC County and represents Defendant in a personal injury litigation. Judge X, a Circuit Court judge in ABC County, is assigned to preside over the case. Lawyer has no reason to believe that Judge X has any specific bias against Lawyer or Defendant personally. However, Lawyer believes that Judge X has a reputation for doing just about everything that can be done to support personal injury plaintiffs—e.g., by consistently construing facts and law against personal injury defendants, by frequently granting motions to add punitive damages, by refusing to grant summary judgment to personal injury defendants, etc.

Lawyer is considering whether to file an “affidavit of prejudice” and motion to disqualify Judge X pursuant to ORS 14.260. Lawyer believes that there are potential pros and cons to doing so. Lawyer is also concerned, however, that if Lawyer files an affidavit of prejudice against Judge X in Defendant’s case he will need to start regularly filing affidavits of prejudice against Judge X in all of Lawyer’s personal injury cases. As a result, Lawyer’s reputation could be tarnished. For example, one or more other Circuit Court judges in ABC County may take offense and treat Defendant or Lawyer’s other clients more harshly. In addition, Lawyer’s ability to represent other clients before Judge X in non-personal injury cases, or when the time for filing an affidavit of prejudice has passed, could be adversely affected.

**Questions:**

1. May Lawyer file an affidavit of prejudice against Judge X in Defendant’s case?
2. May Lawyer consider the impact that filing an affidavit of prejudice could have on Lawyer’s other clients or the Lawyer’s reputation generally?
3. Must Lawyer advise Defendant about Judge X’s reputation and the option to potentially disqualify Judge X?

**Conclusions:**

1. See discussion.

2. No, qualified.
3. See discussion.

**Discussion:**

One method for seeking a judge’s disqualification in Oregon is set forth in ORS 14.250 to 14.260, referred to as disqualification by “affidavit of prejudice.”<sup>1</sup> Under ORS 14.260(1), a lawyer or party may (but is not required to) seek disqualification of a judge by filing a motion and supporting affidavit stating that “the party or attorney believes that the party or attorney cannot have a fair and impartial trial or hearing before the judge, and that it is made in good faith and not for the purpose of delay.” An affidavit of prejudice need not state specific grounds for the attorney’s or party’s belief. ORS 14.250(1). In addition, the motion *must* be granted unless the challenged judge contests disqualification. *Id.* If contested, the challenged judge bears the burden of proof to establish that the attorney or party filed the affidavit of prejudice in bad faith. *Id.*<sup>2</sup> The motion and affidavit must be filed within certain statutory time limits, and a party or attorney may not file more than two affidavits of prejudice in any one case. ORS 14.260(4)-(6).<sup>3</sup>

1. *May Lawyer File an Affidavit of Prejudice Against Judge X?*

The first question implicates the ethical restrictions that govern a lawyer’s decision as to whether to file an affidavit of prejudice when there is concern about a judge’s perceived reputation against a certain class of litigants, rather than the specific parties or attorneys in the case.<sup>4</sup> There are several relevant Oregon RPCs.

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<sup>1</sup> Additional grounds for disqualification are set forth in ORS 14.210.

<sup>2</sup> See also *State ex rel. Kafoury v. Jones*, 315 Or 201, 207 (1992).

<sup>3</sup> For a more thorough discussion of affidavits of prejudice, see 1 *Criminal Law* § 12.6-2 (OSB Legal Pub 2013).

<sup>4</sup> We emphasize that this opinion does not address whether a judge’s reputation for bias against a certain class of litigants is or should be a proper basis alone for disqualification under ORS 14.260—that issue is for the Legislature and courts to decide. This Committee is authorized to construe statutes and regulations pertaining directly to lawyers, but not to construe substantive law generally. See OSB Formal Ethics Opinion 2006-176 (rev 2015). This opinion addresses only the circumstances under which an attorney’s filing of an affidavit of prejudice under the provisions of ORS 14.260 is *ethically* permissible under the Oregon Rules of Professional Conduct.



Oregon RPC 3.3(a)(1) provides, in pertinent part:

- (a) A lawyer shall not knowingly:
  - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . .

Oregon RPC 8.2(a) provides:

- (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard to its truth or falsity concerning the qualifications or integrity of a judge . . . .

Oregon RPC 8.4(a) provides, in pertinent part:

- (a) It is professional misconduct for a lawyer to:
  - . . . .
  - (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law; or
  - (4) engage in conduct that is prejudicial to the administration of justice . . . .

Taken together, Oregon RPCs 3.3(a)(1), 8.2(a), and 8.4(a)(3)-(4) prohibit lawyers from making any false statements in an affidavit of prejudice. The critical issue, therefore, is whether Lawyer can truthfully state in an affidavit under ORS 14.260 that: (1) Lawyer believes Defendant or Lawyer cannot receive a fair and impartial trial or hearing before Judge X; *and* (2) Lawyer is filing the disqualification motion in “good faith and not for the purpose of delay.” These are subjective inquiries. Lawyer must consider each question independently in light of the specific facts, procedural posture, and applicable law of his or her case. Only if Lawyer can truthfully answer yes to both questions may Lawyer ethically file a motion to disqualify Judge X under ORS 14.260.

As to the first question, Lawyer must consider whether his or her concern about Judge X is significant enough that Lawyer honestly believes that Defendant cannot receive a fair and impartial trial or hearing before Judge X. However, even if Lawyer concludes (after conducting this analysis) that he or she honestly believes that Defendant or Lawyer cannot receive a fair and impartial trial or hearing before Judge X, that does not end the inquiry. Lawyer must then consider the second question—can Lawyer truthfully state that the motion would be brought in “good faith and not for the purpose of delay”?

In considering the second question, Lawyer must draw a careful distinction between seeking to disqualify Judge X to ensure a fair and impartial proceeding for Defendant versus doing so to obtain a tactical advantage in the litigation. The former situation would constitute good faith; the latter would not. For example, it would not be “good faith” for Lawyer to file an affidavit of prejudice against Judge X if Lawyer’s primary reason was to delay resolution of the case, or to maximize the chances that a more favorable judge will be assigned to Defendant’s case, or as an attempt to get Defendant’s case transferred to a more favorable venue.<sup>5</sup> Using affidavits of prejudice as a form of judge or forum shopping, or for other strategic advantage, is a form of bad faith and, thus, Lawyer would violate Oregon RPCs 3.3, 8.2, and 8.4 by filing an affidavit of prejudice primarily for those reasons.

2. *May Lawyer Consider the Impact Filing an Affidavit of Prejudice Might Have on Lawyer’s Other Clients or Lawyer’s Own Reputation?*

Filing an affidavit of prejudice can have significant consequences for a lawyer. Lawyers may be concerned about the effect that filing an affidavit of prejudice could have on their own reputation or practice, or on their other clients in the future. This is particularly true for lawyers who practice in smaller counties where the local Bar and pool of available judges are relatively small, and for lawyers who typically represent only one class of litigants (such as in criminal and personal injury contexts).

Oregon RPC 2.1 provides, in pertinent part, that “in representing a client, a lawyer shall exercise independent professional judgment.” In addition, Oregon RPC 1.7(a) provides, in pertinent part:

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

The duties to exercise “[l]oyalty and independent judgment are essential elements in the lawyer’s relationship to a client.” ABA Model Rules, Rule 1.7, cmt. [1]. Generally speaking, Oregon RPC 2.1 and 1.7 require a lawyer to make

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<sup>5</sup> These examples are not intended to be exhaustive.

decisions with only his or her client's interests in mind, not the lawyer's personal interests or the interests of other clients or third parties.<sup>6</sup>

In the context of a disqualification motion, this means that Lawyer must evaluate whether to file an affidavit of prejudice on a case-by-case basis, without regard to lawyer's personal interests or the interests of others. Lawyer may consider only the impact that seeking disqualification of Judge X could have on Defendant's case. Lawyer may not consider the effect, if any, that seeking Judge X's disqualification could have on Lawyer's own practice, or on Lawyer's other current or future clients or cases.

Moreover, if there is a significant risk that Lawyer's analysis of the disqualification issue in Defendant's case will be materially limited by his or her concerns about Lawyer's personal interests, or the interests of other clients or third parties, then under Oregon RPC 1.7(a)(2) Lawyer must withdraw from the representation unless Lawyer's continued representation complies with the requirements of Oregon RPC 1.7(b).

This is not to say that Lawyer may never consider the potential impact a disqualification motion would have on Lawyer's own credibility, reputation, or relationship with Judge X or other judges in ABC County. Lawyer may ethically consider such factors to the extent Lawyer believes they could impact Lawyer's representation of *Defendant*. For example, it would be permissible for Lawyer to consider whether filing an affidavit of prejudice against Judge X could negatively affect how other judges in ABC County (who might preside over Defendant's case if Judge X is disqualified) might treat Lawyer or Defendant in Defendant's specific proceeding.

3. *Whether Lawyer Has a Duty to Advise Client about the Option to file an Affidavit of Prejudice*

Question No. 3 asks whether Lawyer has an affirmative duty to advise Defendant about Judge X's reputation and the potential option to file a motion to disqualify Judge X.

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<sup>6</sup> For a broader discussion on the duties to exercise loyalty and independent judgment, see the Annotation to ABA Model Rule 2.1.

Oregon RPC 1.4 provides:

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit client to make informed decisions regarding the representation.

In addition, Oregon RPC 1.2(a) provides, in pertinent part:

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

In this hypothetical, the first question is whether there is even a decision for Lawyer to potentially discuss with Defendant. In other words, Lawyer must first determine initially whether he or she can even file a motion to disqualify Judge X. If Lawyer has concluded that he or she cannot legally *and* ethically file a motion to disqualify Judge X (see *supra* discussion Part 1), then there is nothing to discuss with Defendant, and Lawyer would have no duty under Oregon RPCs 1.2 or 1.4 to advise Defendant of any potential option to file an affidavit of prejudice against Judge X.<sup>7</sup>

If, however, Lawyer has concluded that he or she could legally and ethically file an affidavit of prejudice against Judge X, Lawyer has a duty under Oregon RPC 1.2 and 1.4 to reasonably consult with Defendant about that decision. At a minimum, Lawyer should inform Defendant about the basis of his or her concerns about Judge X, the available options and procedure under ORS 14.260, and the potential advantages and disadvantages to filing a motion to disqualify.

In doing so, Lawyer must disclose sufficient information for Defendant to intelligently participate in a discussion about whether to file an affidavit of prejudice. As the *Restatement (Third) of the Law Governing Lawyers* states:

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<sup>7</sup> Of course, should Defendant ask Lawyer to explain why a motion to disqualify cannot be filed, Lawyer would need to provide a reasonable response to the client inquiry under Oregon RPC 1.2(a).

The lawyer's duty to consult goes beyond dispatching information to the client. The lawyer must, when appropriate, inquire about the client's knowledge, goals, and concerns about the matter, and must be open to discussion of the appropriate course of action. . . .

The level of consultation is measured by a standard of reasonableness and depends on such factors as the importance of the decision, the extent to which disclosure or consultation has already occurred, the client's sophistication level and interest, and the time and money that reporting or consulting will consume.<sup>8</sup>

The timing of that discussion will depend on the specific circumstances of the representation and how the issue regarding potential disqualification arises. The identity of a judge is an important issue in any case, and, if feasible, lawyers should consult with their clients before making a decision about whether to file an affidavit of prejudice. In some situations, however, a lawyer may be required to decide about filing an affidavit of prejudice without any reasonable opportunity to consult with the client beforehand—such as when the lawyer faces an impending deadline or when substantive law requires the lawyer to either file an affidavit of prejudice immediately or risk waiver. If reasonably necessary under the circumstances, a lawyer may decide whether to file an affidavit of prejudice without first consulting with his or her client; however, even then, the lawyer must reasonably inform the client about the lawyer's decision within a reasonable time thereafter.

Finally, there may be circumstances where the lawyer and client, even after consultation, disagree about whether to file a disqualification motion. Such a decision goes to the “means,” not the “objectives,” of the representation. Moreover, filing a motion to disqualify is not one of the enumerated decisions listed in Oregon RPC 2.1(a) that is expressly reserved to the client (e.g., whether to accept a settlement). Accordingly, the lawyer is ethically permitted to make the final decision as to whether to seek disqualification, even over his or her client's objection, provided the lawyer has adequately consulted with the client, as discussed above.<sup>9</sup>

In the criminal context, we note that the lawyer may need to consider other factors besides ethical considerations in resolving such a disagreement. Criminal defendants possess constitutional rights that are not implicated in civil cases. “[T]he decision-making authority of a criminal defendant is therefore broader than that of a client in a civil matter.”<sup>10</sup> Criminal defense lawyers should consider, among other

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<sup>8</sup> *Restatement (Third) of the Law Governing Lawyers* § 20 cmt. b (2000).

<sup>9</sup> Of course, the client retains the ultimate right to resolve any disagreement by discharging the lawyer. See Oregon RPC 1.16(a)(3); ABA Model Rules, Rule 1.2, cmt. [2].

<sup>10</sup> Annotation to ABA Model Rule 1.4 at 36-37 (citing various authorities).

things, whether) the decision to file an affidavit of prejudice in his or her client's specific case implicates a the client's fundamental rights under the Sixth Amendment. That issue is beyond the scope of what this Committee can opine on.

## Client Security Fund Rules

(As approved by the Board of Governors through ~~April 25, 2014~~, \_\_\_\_, 2017)

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## Section 1. Definitions.

For the purpose of these ~~Rules of Procedure, rules,~~ the following definitions ~~shall~~ apply:

1.1 "Administrator" means the ~~OSB Executive Director~~ Oregon State Bar executive director or other person designated by the ~~Executive Director~~ executive director to oversee the operations of the Client Security Fund.

1.2 "Bar" means the Oregon State Bar.

~~1.3 "Committee" means the Client Security Fund Committee.~~

~~1.4 "Fund" means the Client Security Fund.~~

~~1.5 "Lawyer" means one who, at the time of the act or acts complained of, was an active member of the Oregon State Bar and maintained an office for the practice of law in Oregon.~~

1.3 "Claimant" means one who files a claim with the Fund.

~~1.6-1.4~~ "Client" means the individual, partnership, corporation, or other entity who, at the time of the act or acts complained of, had an established attorney-client relationship with the lawyer.

1.5 "Committee" means the Client Security Fund Committee.

1.6 "Dishonest conduct" has the meaning prescribed in Rule 2.1.2.

1.7 "Fund" means the Client Security Fund.

~~1.7 "Claimant" means one who files a claim with the Fund.~~

1.8 ~~"Dishonest conduct"~~ "Lawyer" means the person named in a statement of claim as the attorney whose dishonest conduct caused the loss, and who, at the time of the act or acts

complained of, was an active member of the Oregon State Bar.

1.9 "Statement of claim" means the form designated by the administrator pursuant to CSF Rule 3.1.

## Section 2. Reimbursable Losses.

2.1 A loss of money or other property of a lawyer's client is eligible for reimbursement if:

~~2.1~~ 2.1.1 The claim is made by the injured client or the client's conservator, personal representative, guardian ad litem, trustee, or attorney in fact.

~~2.2~~ 2.1.2 The loss was caused by the lawyer's dishonest conduct. ~~2.2.1 In a loss resulting from~~ For purposes of this rule, dishonest conduct includes: (i) a lawyer's ~~refusal~~ willful act against a client's interest by defalcation, embezzlement, or failure to refund an unearned legal fee, "dishonest conduct" shall include (i) other wrongful taking; (ii) a lawyer's misrepresentation or false promise to provide legal services to a client in exchange for the advance payment of a legal fee or (ii) fee; or, (iii) a lawyer's wrongful failure to maintain the advance payment in a lawyer trust account until earned. ~~2.2.2~~ A lawyer's failure to perform or complete a legal engagement ~~shall~~ does not constitute, in itself, evidence of misrepresentation, false ~~promise~~ promise, or dishonest conduct.

~~2.2.3 Reimbursement of a legal fee will be allowed only if (i) the lawyer provided no legal services to the client in the engagement; or (ii) the legal services that the lawyer actually provided were, in the Committee's judgment, minimal or insignificant; or (iii) the claim is supported by a determination of a court, a fee arbitration panel, or an accounting acceptable to the Committee that establishes that the client is owed a refund of a legal fee. No award reimbursing a legal fee shall exceed the actual fee that the client paid the attorney.~~

~~2.2.4 In the event that a client is provided equivalent legal services by another lawyer without cost to the client, the legal fee paid to the predecessor lawyer will not be eligible for reimbursement, except in extraordinary circumstances.~~

~~2.3~~ 2.1.3 The loss ~~was~~ is not covered by any similar fund in another state or jurisdiction, or by a bond, surety agreement or insurance contract, including losses to which any bonding agent, surety or insurer is subrogated.

~~2.4~~ 2.1.4 The loss ~~was~~ is not ~~to~~ incurred by a financial institution covered by a "banker's blanket bond" or similar insurance or surety contract.

~~2.5~~ 2.1.5 The loss arose from, and was because of: ~~2.5.1~~ (i) an established lawyer-client relationship; ~~or 2.5.2 or, (ii)~~ the failure to account for money or property entrusted to the lawyer in connection with the lawyer's practice of law or while acting as a fiduciary in a matter related to the lawyer's practice of law.

~~2.6~~ 2.1.6 As a result of the dishonest conduct, either: ~~(i) the~~ (i) the lawyer was found guilty of a crime; (ii) a civil judgment was entered against the lawyer, ~~or which remains unsatisfied;~~ (iii) the claimant holds an allowed claim against the lawyer's probate or bankruptcy estate, ~~and that judgment which~~ remains unsatisfied; or (iv) in the case of a claimed loss of



\$5,000 or less, the lawyer was disbarred, suspended, or reprimanded in disciplinary proceedings, or the lawyer resigned from the Bar.

**2.7-2.1.7** A good faith effort has been made by the claimant to collect the amount claimed, to no avail.

**2.8-2.1.8** The **statement of** claim was filed with the Bar within two years after the latest of the following: ~~(a)~~ **(i)** the date of the lawyer's conviction; or ~~(b)~~ **(ii)** in the case of a claim of loss of ~~\$5,000.00~~ **\$5,000** or less, the date of the lawyer's disbarment, suspension, reprimand or resignation from the Bar; or ~~(c)~~ **(iii)** the date a judgment is obtained against the lawyer, or ~~(d)~~ **(iv)** the date the claimant knew or should have known, in the exercise of reasonable diligence, of the loss. In no event ~~shall any claim against may~~ the ~~Fund be considered~~ **Committee approve a claim** for reimbursement if ~~it~~ **the statement of claim** is submitted more than six ~~(6)~~ years after the date of the loss.

**2.9-2.1.9** **The loss arose from the lawyer's practice of law in Oregon. In determining whether the loss arose from the lawyer's practice of law in Oregon, the Committee may consider all relevant factors including the parties' domiciles, the location of the lawyer's office, the location where the attorney-client relationship was formed, and the location where legal services were rendered.**

**2.2** **Reimbursement of a legal fee will be allowed only if: (i) the lawyer provided no legal services to the client in the engagement; or (ii) the legal services that the lawyer actually provided were, in the Committee's judgment, minimal or insignificant; or (iii) the claim is supported by a determination of a court, a fee arbitration panel, or an accounting or other evidence acceptable to the Committee that establishes that the client is owed a refund of a legal fee. No award reimbursing a legal fee may exceed the actual fee that the client paid the lawyer.**

**2.3** **In the event that a client is provided equivalent legal services by another lawyer attorney without cost to the client, the legal fee paid to the predecessor lawyer will not be eligible for reimbursement, except in extraordinary circumstances.**

**2.4** A claim approved by the Committee ~~shall~~ **may** not include attorney's fees, interest on a judgment, prejudgment interest, any reimbursement of expenses of a claimant in attempting to make a ~~recovery~~ **recovery**, or prevailing party costs authorized by statute, except that a claim may include the claimant's actual expense incurred for court costs, as awarded by the court.

**2.10-2.5** Members of the Bar are encouraged to assist claimants without charge in preparing and presenting a claim to the Fund. Nevertheless, a member of the Bar may contract with a claimant for a reasonable attorney fee, which contract must be disclosed to the Committee at the time the claim is filed or as soon thereafter as an attorney has been retained. The Committee may disapprove an attorney fee that it finds to be unreasonable. No attorney shall charge a fee in excess of the amount the Committee has determined to be reasonable, and the attorney fee shall be paid from, and not in addition to the award. In determining a reasonable fee, the Committee may refer to factors set out in ORS 20.075.

**2.11-2.6** In cases of extreme hardship or special and unusual circumstances, the Committee

may approve or recommend for payment a claim that would otherwise be denied due to noncompliance with one or more of the provisions in Section 2 of these rules.

### Section 3. Statement of Claim for Reimbursement.

3.1 All claims for reimbursement must be submitted ~~on the form prepared in a format designated~~ by the ~~Bar~~ administrator.

3.2 The statement of claim ~~form shall require, as minimum must include, at a minimum, the following~~ information:

3.2.1 The name and address of the lawyer alleged to have engaged in ~~"dishonest conduct."~~ dishonest conduct;

3.2.2 The amount of the alleged loss;

3.2.3 The date or period of time during which the alleged loss occurred;

3.2.4 A general statement of facts relative to the claim, including a statement regarding efforts to collect any judgment against the lawyer;

3.2.5 The name and address of the claimant and a verification of the claim by the claimant under oath; and

3.2.6 The name of the attorney, if any, who is assisting the claimant in presenting the claim to the ~~Client Security Fund~~ Committee.

3.3 The ~~Statement statement~~ of ~~Claim shall claim must~~ contain substantially the following statement: ~~ALL~~ "ALL DECISIONS REGARDING PAYMENTS FROM THE CLIENT SECURITY FUND ARE DISCRETIONARY. Neither the Oregon State Bar nor the Client Security Fund are responsible for the acts of individual ~~lawyers.~~ lawyers."

### Section 4. Processing ~~Statements of Claim.~~ Claims.

4.1 All statements of claim ~~shall must~~ be submitted to Client Security Fund, Oregon State Bar, 16037 SW Upper Boones Ferry Rd., P. O. Box 1689, Tigard, Oregon 97281-1935.

4.2 The ~~Administrator administrator~~ shall ~~cause assign~~ each statement of claim to ~~be sent to~~ a member of the Committee for investigation and ~~report. Such member shall be reimbursed by report, and~~ the ~~State~~ Bar ~~shall reimburse such member~~ for reasonable out of pocket expenses incurred ~~by said attorney~~ in making such investigation. ~~A~~ The administrator shall send a copy of the statement of claim ~~shall be sent by regular mail~~ to the lawyer who is the subject of the claim at the lawyer's last known address. Before ~~transmitting assigning~~ a statement of claim for investigation, the ~~Administrator administrator~~ may request of the claimant further information with respect to the claim.

4.3. A Committee member to whom a statement of claim is referred for investigation shall conduct such investigation as seems necessary and desirable to determine whether the claim is for a ~~"reimbursable loss"~~ reimbursable loss and is otherwise in compliance with these rules in order to guide the Committee in determining the extent, if any, to which the claimant ~~shall~~ may receive an award from the Fund.

~~4.4 Reports with respect to claims shall be submitted by the~~ The Committee member to whom ~~the a~~ claim is assigned for investigation shall submit an investigative report to the ~~Administrator administrator~~ within a reasonable time after the referral assignment of the claim to that member. ~~Reports submitted The member~~ shall contain include in such report a discussion of the criteria for payment set by these rules and ~~shall include the a~~ recommendation ~~of the member for the regarding~~ payment ~~of any amount~~ on such claim from the Fund.

~~4.5 The Committee shall meet from time to time upon the call of the chairperson. At the request of at least two members of the Committee and with reasonable notice, the chairperson shall promptly call a meeting of the Committee.~~

~~4.6 4.5~~ At any meeting of the Committee, claims may be considered for which an investigation has been completed. ~~In determining each claim, the Committee shall be considered the representative of the Board of Governors and, as such, shall be vested with the authority conferred by ORS 9.655.~~

~~4.7 Records of the Client Security Fund are public records within the meaning of the Public Records Law and meetings of the Committee are public meetings within the meaning of the Public Meetings Law. The claimant, the claimant's attorney, the lawyer or the lawyer's attorney may attend meetings and, at the discretion of the chair, present their respective positions on a claim.~~

~~4.8 4.6~~ No award ~~shall may~~ be made to any claimant if the statement of claim has not been submitted and reviewed pursuant to these ~~rules. No award shall be made to any claimant unless rules, and~~ approved ~~by a majority of at a quorum duly noticed meeting~~ of the Committee.

~~4.7~~ No award from the Fund on any one claim shall may exceed \$50,000.

~~4.8~~ The Committee shall determine the amount of loss, if any, for which any claimant ~~shall may~~ receive an award from the Fund. The Committee may give final approval to an award of less than \$5,000 and shall submit regular reports to the Board of Governors reflecting all awards finally approved by the Committee since the Board's last ~~Board~~ meeting.

~~4.10 4.9~~ The Committee's denial of a claim ~~shall be is~~ final unless a claimant's written request for review by the Board of Governors is received by the ~~Executive Director of the Bar administrator~~ within 20 days of the Committee's decision. The 20 days ~~shall run runs~~ from the date the Committee's decision is sent to the claimant by mail, exclusive of the date of mailing.

~~4.11. Claims for which 4.10~~ If the Committee ~~finds an award determines that a claim~~ should be ~~for approved in an amount of~~ \$5,000 or ~~more shall be submitted more, the Committee must submit its recommendation~~ to the Board ~~for approval, and decisions of the Committee which are reviewed by Governors for approval.~~ When reviewing such claims, the Board of Governors shall ~~be considered under conduct its review pursuant to~~ the criteria stated in provisions of these rules. The Board ~~shall of Governors may~~ approve or deny each claim presented to it for review, or it may refer a claim back to the Committee for further

investigation prior to making a decision.

**4.12.4.11** Awards from the Fund are discretionary. The Committee or Board of Governors may deny claims in whole or part for any reason.

**4.12** The Board of Governors may determine the order and payment of awards; may defer or pro-rate awards based on ~~CSF~~ funds available in any calendar year; and may allow a further award in any subsequent year to a claimant who received only partial payment of an award. In exercising its discretion, the Board of Governors shall ~~be guided by~~ consider the following objectives:

4.12.1 Timely and complete payment of approved awards;

4.12.2 Maintaining the integrity and stability of the Fund; and

4.12.3 Avoiding frequent or significant fluctuations in the member assessment.

4.13 A finding of ~~"dishonest conduct"~~ dishonest conduct by the Committee ~~or the Board shall be is~~ for the sole purpose of resolving a claim and ~~shall is~~ not ~~be construed~~ to be construed as a finding of misconduct for purposes of ~~discipline or otherwise, any other proceeding.~~

4.14 The Committee may ~~recommend to the Board of Governors that provide~~ information obtained by the Committee about a lawyer's conduct ~~be provided~~ to any agency or entity that the Committee determines may be helpful in resolving the claimant's concerns the appropriate District Attorney or to the Oregon Department of Justice when, in the Committee's opinion, a single serious act or a series of acts by the lawyer might constitute a violation of criminal law or of a civil fraud or consumer protection statute.

## Section 5. Subrogation for Reimbursements Made.

**5.1.1-5.1** As a condition of receiving an award, a claimant shall ~~be required to~~ provide the Bar with a pro tanto transfer assignment of the claimant's rights against the lawyer, the lawyer's legal representative, estate ~~or and~~ assigns, and of the claimant's rights against ~~the any~~ person or entity who may be liable for the claimant's loss. **5.1.2** Upon receipt of such assignment, the following rules govern the relationship between the Bar and the claimant:

**5.1.1** Upon commencement of an action by the Bar as subrogee or assignee of a claim, ~~it the administrator~~ shall advise the claimant, who may then join in such action to recover the claimant's unreimbursed losses.

**5.1.3-5.1.2** In the event that the claimant commences an action to recover unreimbursed losses against the lawyer or another person or entity who may be liable for the claimant's loss, the claimant shall ~~be required to~~ notify the Bar of such action in writing, within 14 days of the commencement of such action.

**5.1.4-5.1.3** The claimant shall ~~be required to agree to~~ cooperate in all efforts that the Bar undertakes to achieve restitution for the Fund.

**5.2-A-5.1.4** The claimant shall not release the lawyer from liability or otherwise impair the Bar's assignment of judgment or subrogated interest without the prior approval of the Board of Governors.

~~5.3-5.2~~ The ~~Administrator-administrator~~ shall be responsible for collection of Fund receivables and shall have sole discretion to determine when such efforts would be futile. The ~~Administrator-administrator~~ may undertake collection efforts directly or may assign subrogated claims to a collection agency or outside counsel. The ~~Administrator-administrator~~ may authorize the expenditure of money from the ~~Client Security~~-Fund for reasonable costs and expenses of collection.

## Section 6. General Provisions.

~~6.1~~ The members and officers of the Committee will be appointed and discharged pursuant to applicable provisions of the Bar Bylaws.

~~6.2~~ The Committee may only act pursuant to the quorum provisions contained in section 14.9 of the Bar Bylaws.

~~4.5-6.3~~ The Committee shall meet from time to time upon the call of the chairperson. At the request of at least two members of the Committee and with reasonable notice, the chairperson shall promptly call a meeting of the Committee.

~~6.4~~ These Rules may be changed at any time by a majority vote of ~~a quorum-the entire membership~~ of the ~~Committee-Committee~~, subject to approval by the Board of Governors of the ~~Oregon State~~-Bar. ~~A quorum is a majority of the entire Committee membership.~~

~~6.2~~ No award from the Fund on any one claim shall exceed \$50,000.

~~6.5~~ ~~In determining each~~ When investigating, reviewing, or acting on a claim, the Committee shall be considered and its members are deemed to be the representative of the Board of Governors and, as such, shall be vested with the authority conferred by ORS 9.655.

~~4.7-6.6~~ Records of the ~~Client Security~~-Fund are public records within the meaning of the ~~Public Records Law-Oregon's public records law~~ and meetings of the Committee are public meetings within the meaning of ~~the Public Meetings Law-Oregon's public meetings law~~. The claimant, the claimant's attorney, the lawyer or the lawyer's attorney may attend meetings and, at the discretion of the chair, present their respective positions on a claim.

~~6.3-6.7~~ A member of the Committee who has or has had ~~a lawyer-client-an attorney-client~~ relationship or financial relationship with a claimant or lawyer who is the subject of a claim ~~shall may~~ not participate in the investigation or review of ~~a-any~~ claim involving the claimant or lawyer. A member who is subject to this provision shall disclose the nature of the relationship before the Committee begins consideration of such claim, and the member may not participate in the Committee's discussion of the claim without leave of the chair.

~~6.8~~ These Rules ~~shall~~ apply to all claims pending at the time of their enactment.

~~6.5-6.9~~ The ~~Administrator-administrator~~ shall prepare an annual report to the ~~membership-Bar membership~~, and may from time to time issue press releases or other public statements about the Fund and awards that have been made. The annual report and any press releases and other public statements shall include the name of the lawyer, the amount of the award, the general nature of the claim, the lawyer's status with the ~~bar-Bar~~, and whether any criminal action has been instituted against the lawyer for the conduct giving rise to the loss. If the claimant has

previously initiated criminal or civil action against the lawyer, the press release or public statement may also include the claimant's name. The annual report, press release or other public statement may also include general information about the Fund, what claims are eligible for reimbursement, how the Fund is financed, and who to contact for information.

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 8, 2017  
**Memo Date:** June 22, 2017  
**From:** MCLE Committee  
**Re:** Child Abuse Reporting and Elder Abuse Reporting credit requirements

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### Action Recommended

Approve the Committee's recommendation to combine the child abuse reporting and elder abuse reporting credit requirements into a single one-hour program. The program would include discussion of the differences between the two types of abuse, an Oregon lawyer's obligations to report the abuse and the exceptions to reporting.

### Background

During the 1999 Legislative Session, the legislature passed HB 2998, which required active Oregon lawyers to complete one of hour training every three years on their duty to report child abuse. The law became effective July 1, 2000. Beginning with the reporting period ending 12/31/2000, all active members were required to complete 1.0 child abuse reporting credit in each reporting period.

During the 2013 Legislative Session, House Bill 2205 was passed. Among other changes, Section 5 of HB 2205 amended ORS 124.050 to add lawyers to the list of mandatory reporters for elder abuse. Section 7 of HB 2205 amended the mandatory child abuse reporting training requirement set forth in ORS 9.114 to remove the details of the training requirement from the statute but required the Oregon State Bar to "...adopt rules to establish minimum training requirements for all active members of the bar relating to the duties of attorneys under ORS 124.060 and 419B.010." The amendments to HB 2205 became effective January 1, 2015.

The rules establishing minimum training requirements must be approved by the Supreme Court. In April 2014, the Court approved the following amendments to the MCLE Rules. These amendments became effective January 1, 2015.

**Rule 3.2 (b) Ethics.** At least six of the required hours shall be in subjects relating to ethics in programs accredited pursuant to Rule 5.5(a), including one hour on the subject of a lawyer's statutory duty to report child abuse ~~(see ORS 9.114)~~ or one hour on the subject of a lawyer's statutory duty to report elder abuse (see ORS 9.114). MCLE Regulation 3.300(d) specifies the reporting periods in which the child abuse or elder abuse reporting credit is required.

**Rule 3.2(c) Access to Justice.** In alternate reporting periods, at least three of the required hours must be in programs accredited for access to justice pursuant to Rule 5.5(b). ~~For purposes of this rule, the first reporting period that may be~~

~~skipped will be the one ending on December 31, 2009.~~<sup>1</sup>

### **3.3 Reinstatements, Resumption of Practice After Retirement and New Admittees.**

(a) An active member whose reporting period is established in Rule 3.7(c)(2) or (d)(2) shall complete 15 credit hours of accredited CLE activity in the first reporting period after reinstatement or resumption of the practice of law in accordance with Rule 3.4. Two of the 15 credit hours shall be devoted to ethics ~~(including one in child abuse reporting)~~.

(b) New admittees shall complete 15 credit hours of accredited CLE activity in the first reporting period after admission as an active member, including two credit hours in ethics ~~(including one in child abuse reporting)~~, and ten credit hours in practical skills. ~~New admittees admitted prior to December 31, 2008 must also complete one access to justice credit in their first reporting period.~~ New admittees admitted on or after January 1, 2009<sup>2</sup> must also complete a three credit hour OSB-approved introductory course in access to justice. The MCLE Administrator may waive the practical skills requirement for a new admittee who has practiced law in another jurisdiction for three consecutive years immediately prior to the member's admission in Oregon, in which event the new admittee must complete ten hours in other areas. After a new admittee's first reporting period, the requirements in Rule 3.2(a) shall apply.

### **3.5 Out-of-State Compliance.**

(a) Reciprocity Jurisdictions. An active member whose principal office for the practice of law is not in the State of Oregon ~~but~~ and who is an active member in a jurisdiction with which Oregon has established MCLE reciprocity may comply with these rules by filing a compliance report as required by MCLE Rule 7.1 accompanied by evidence that the member is in compliance with the requirements of the other jurisdiction and has completed the child abuse or elder abuse reporting credit required in ORS 9.114. ). MCLE Regulation 3.300(d) specifies the reporting periods in which the child abuse or elder abuse reporting credit is required.

### **5.5 Ethics and Access to Justice.**

(a) In order to be accredited as an activity in legal ethics under Rule 3.2(b), an activity shall be devoted to the study of judicial or legal ethics or professionalism, and shall include discussion of applicable judicial conduct codes, disciplinary rules, or statements of professionalism. Of the six hours of ethics credit required by Rule 3.2(b), one hour must be on the subject of a lawyer's statutory duty to report child abuse or elder abuse (see ORS 9.114). The child abuse reporting training requirement can be completed only by one hour of training by participation in or screening of an

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<sup>1</sup> Reference to past date was deleted for housekeeping purposes.

<sup>2</sup> References to past dates were deleted for housekeeping purposes.



accredited program. MCLE Regulation 3.300(d) specifies the reporting periods in which the child abuse or elder abuse reporting credit is required.

After the above-referenced rule amendments were approved by the Court, the following regulations were also amended.

### Regulation Amendments

**3.260 Reciprocity.** An active member who is also an active member whose principal office for the practice of law is in a jurisdiction with which Oregon has established MCLE reciprocity (currently Idaho, Utah or Washington) may comply with Rule 3.5(a) by attaching to the compliance report required by MCLE Rule 7.1 a copy of the member's certificate of compliance with the MCLE requirements from that jurisdiction of the state in which the member's principal office is located, together with evidence that the member has completed the child abuse or elder abuse reporting training required in ORS 9.114. No other information about program attendance is required. MCLE Regulation 3.300(d) specifies the reporting periods in which the child abuse or elder abuse reporting credit is required.

**3.300(d)** Members in a three-year reporting period are required to have 3.0 access to justice credits and 1.0 child abuse reporting credit in reporting periods ending 12/31/2012 through 12/31/2014, 12/31/2018 through 12/31/2020 and in alternate three-year periods thereafter. ~~Access to Justice credits earned in a non-required reporting period will be credited as general credits.~~ Members in a three-year reporting period ending 12/31/2015 through 12/31/2017, 12/31/2021 through 12/31/2023 and in alternate three-year periods thereafter are required to have 1.0 elder abuse reporting credit. Access to Justice, child abuse reporting and elder abuse reporting credits earned in a non-required reporting period will be credited as general credits.

After this year's reporting period ends on 12/31/2017, all active members in a three-year reporting period (2015, 2016 and 2017) will have completed one elder abuse reporting credit.

Based on comments MCLE staff have received, members find this alternating requirement very confusing. Also, requiring separate stand-alone programs for each abuse reporting requirement is confusing and encourages people to think that the reporting obligations are more different than alike, which is not the case.

Therefore, the Committee recommends amending the rules and regulations to combine these reporting requirements into a single one-hour program. The program would meet the requirement set forth in ORS 9.114 and include discussion of the differences between child abuse and elder abuse, an Oregon lawyer's obligations to report the abuse and the exceptions to reporting.

If the BOG agrees that these credit requirements should be combined into a single requirement, the rule and regulation amendments, which could be effective on January 1, 2018, are set forth below.

## Proposed Rule Amendments

### 3.2 Active Members.

(a) Minimum Hours. Except as provided in Rules 3.3 and 3.4, all active members shall complete a minimum of 45 credit hours of accredited CLE activity every three years as provided in these Rules.

(b) Ethics. At least five of the required hours shall be in subjects relating to ethics in programs accredited pursuant to Rule 5.13(a).

(c) ~~Child Abuse or Elder Abuse Reporting.~~ Abuse Reporting. One hour must be on the subject of an lawyer's statutory duty to report child abuse ~~or one hour on the subject of a lawyer's statutory duty to report and~~ elder abuse (see ORS 9.114). ~~MCLE Regulation 3.300(d) specifies the reporting periods in which the child abuse or elder abuse reporting credit is required.~~

(d) Access to Justice. In alternate reporting periods, at least three of the required hours must be in programs accredited for access to justice pursuant to Rule 5.13(c).

### 3.4 Out-of-State Compliance.

(a) Reciprocity Jurisdictions. An active member whose principal office for the practice of law is not in the State of Oregon and who is an active member in a jurisdiction with which Oregon has established MCLE reciprocity may comply with these rules by filing a compliance report as required by MCLE Rule 7.1 accompanied by evidence that the member is in compliance with the requirements of the other jurisdiction and has completed ~~the child abuse or elder abuse~~ a child and elder abuse reporting credit required in ORS 9.114. ~~MCLE Regulation 3.300(d) specifies the reporting periods in which the child abuse or elder abuse reporting credit is required.~~

(b) Other Jurisdictions. An active member whose principal office for the practice of law is not in the State of Oregon and is not in a jurisdiction with which Oregon has established MCLE reciprocity must file a compliance report as required by MCLE Rule 7.1 showing that the member has completed at least 45 hours of accredited CLE activities as required by Rule 3.2.

### 5.13 Ethics, Child and Elder Abuse Reporting and Access to Justice.

(a) In order to be accredited as an activity in legal ethics under Rule 3.2(b), an activity shall be devoted to the study of judicial or legal ethics or professionalism, and shall include discussion of applicable judicial conduct codes, rules of professional conduct, or statements of professionalism.

(b) ~~Child abuse or elder abuse~~ Child and elder abuse reporting programs must be devoted to the lawyer's statutory duty to report child abuse ~~or~~ and elder abuse (see ORS 9.114). ~~MCLE Regulation 3.300(d) specifies the reporting periods in which the child abuse or elder abuse reporting credit is required.~~

(c) In order to be accredited as an activity pertaining to access to justice for purposes of Rule 3.2(d), an activity shall be directly related to the practice of law and designed to educate attorneys to identify and eliminate from the legal profession and from the practice of law barriers to access to justice arising from biases against persons because of race, gender, economic status, creed, color, religion, national origin, disability, age or sexual orientation.

(d) Portions of activities may be accredited for purposes of satisfying the ethics and access to justice requirements of Rule 3.2, if the applicable content of the activity is clearly defined.

### Proposed Regulation Amendments

**3.200 Reciprocity.** An active member who is also an active member in a jurisdiction with which Oregon has established MCLE reciprocity (currently Idaho, Utah or Washington) may comply with Rule 3.4(a) by attaching to the compliance report required by MCLE Rule 7.1 a copy of the member's certificate of compliance with the MCLE requirements from that jurisdiction, together with evidence that the member has completed a child and elder abuse ~~the child abuse or elder abuse~~ reporting training required in ORS 9.114. No other information about program attendance is required. ~~MCLE Regulation 3.300(d) specified the reporting periods in which the child abuse or elder abuse reporting credit is required.~~

#### **3.300 Application of Credits.**

(a) Legal ethics and access to justice credits in excess of the minimum required can be applied to the general or practical skills requirement.

(b) Practical skills credits can be applied to the general requirement.

(c) ~~For members in a three-year reporting period, one child abuse or elder abuse reporting credit earned in a non-required reporting period may be applied to the ethics credit requirement. Additional child abuse and elder abuse reporting credits will be applied to the general or practical skills requirement. For members in a shorter reporting period, child abuse and elder~~ Excess ~~child and elder~~ abuse reporting credits will be applied as general or practical skills credit. Access to Justice credits earned in a non-required reporting period will be credited as general credits.

(d) Members in a three-year reporting period are required to have 3.0 access to justice credits ~~and 1.0 child abuse reporting credit in reporting periods ending 12/31/2012 through 12/31/2014, in reporting periods ending 12/31/2018 through 12/31/2020 and in alternate three-year periods thereafter. Members in a three-year reporting period ending 12/31/2015 through 12/31/2017, 12/31/2021 through 12/31/2023 and in alternate three-year periods thereafter are required to have 1.0 elder abuse reporting credit.~~

**5.600 Child and Elder Abuse Reporting.** In order to be accredited as ~~a child abuse reporting or elder abuse~~ a child and elder abuse reporting activity, the one-hour session must include discussion of an Oregon attorney's requirements to report child abuse ~~or~~ and elder abuse and the exceptions to those requirements.

**6.100 Carry Over Credit.** No more than six ethics credits can be carried over for application to the subsequent reporting period requirement. Ethics credits in excess of the carry over limit may be carried over as general credits. ~~Child abuse and elder abuse~~ Abuse education credits earned in excess of the reporting period requirement may be carried over as general credits, but a new ~~child abuse or elder~~ abuse reporting education credit must be earned in each reporting period in which the credit is required. Access to justice credits may be carried over as general credits, but new credits must be earned in the reporting period in which they are required. Carry over credits from a reporting period in which the credits were completed by the member may not be carried forward more than one reporting period.