President Vanessa Nordyke called the meeting to order at 12:40 p.m. on April 20, 2018. The meeting adjourned at 4:25 p.m. Members present from the Board of Governors were Colin Andries, John Bachofner, Whitney Boise, Chris Costantino, Eric Foster, John Grant, Rob Gratchner, Guy Greco, Eddie Medina, Tom Peachey, Per Ramfjord, Liani Reeves, Julia Rice, Traci Rossi, Kerry Sharp, and David Wade. Not present were Michael Levelle, Kathleen Rastetter, and Michael Rondeau. Staff present were Helen Hierschbiel, Amber Hollister, Dawn Evans, Susan Grabe, Dani Edwards, Jonathan Puente, Gonzalo Gonzales and Catherine Petrecca. Also present: Nicole Commissiong, University of Oregon Assistant Dean for Student Affairs; Dean Curtis Bridgeman, Willamette University School of Law; Dean Jennifer Johnson, Lewis & Clark Law School; Jennifer Nicholls, ONLD Chair; Carol Bernick, PLF CEO, Barbara Fishleder, PLF Director of Personal and Practice Management/OAAP Executive Director, Cindy Hill, PLF Executive Assistant, Betty Lou Morrow, PLF CFO, Madeleine Campbell, PLF Director of Claims, and PLF Board members, Teresa Statler, Tim Martinez, Dennis Black (Chair), Holly Mitchell, Molly Jo Mullen, and Rob Raschio, and Susan Marmaduke.

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

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

2. **Law School Deans**

   Law school representatives Assistant Dean Nicole Commissiong (University of Oregon), Dean Curtis Bridgeman (Willamette University School of Law), and Dean Jennifer Johnson (Lewis & Clark Law School) provided brief overviews of their roles and institutions.

   The law school representatives provided feedback and insights on the concept of a “writing for the bar exam” program and the potential of licensing paraprofessionals.

   At the request of PLF CEO Carol Bernick, each representative spoke about the support and resources law schools provide to students experiencing mental health and substance abuse issues.

   President Nordyke thanked the law school representatives for their attendance and input.

3. **2018 Strategic Areas of Focus**

   A. **New Lawyer Program Review**

   Ms. Costantino updated the board on the review of new lawyer programs, which was the subject of a joint meeting between the Policy & Governance and Budget & Finance Committees.

   B. **Futures Task Force Progress Report.**

   Ms. Hierschbiel presented the Futures Task Force progress report. The Referral Fee Committee and Alternative Pathways Task Force have been convened and have meetings scheduled. Staff also provided support to a team in the first round of the Global Legal Hackathon.
Ms. Hierschbiel introduced Director of IT Gonzalo Gonzalez and noted that the bar has made significant progress implementing its new association management software. In particular, the bar has launched modules related to legal publications, continuing legal education and case management.

C. Diversity Action Plan Update

Mr. Puente updated the board on the work of the Diversity Action Plan.

The Diversity & Inclusion department is working with mid-size and large law firms to talk about challenges of associate retention. The department’s goal is to develop a toolkit on lawyer retention for legal employers.

The department brought a task force of bar leaders to Arizona, to learn about the Arizona State Bar’s Bar Leadership Institute.

This year OLIO is celebrating its 20th year.

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

A. Public Affairs Committee

Mr. Bachofner updated the board on the legislative session and the law improvement package. The Public Affairs Committee will host a legislative forum on May 2, 2018 to consider legislative proposals for the 2019 Legislative Session. Currently, there are eleven proposals on the agenda, including three proposals from the Board.

Ms. Bachofner presented the Standards of Practice – Attorneys Representing Child Welfare Agency for the board’s approval and adoption. [Exhibit A]. A task force that stemmed from the passage of SB 222, chaired by ODOJ attorney Joanna Southey, drafted the standards.

Motion: The board voted unanimously in favor of the Public Affairs Committee motion to accept the standards. The motion passed.

Mr. Bachofner next presented a committee motion on the ABA’s House of Delegates resolution to Eliminate Non-Unanimous Guilty Verdicts in Felony Cases. Non-unanimous juries are only permitted in felony criminal matters in Oregon and Louisiana. The Louisiana Bar has voted to support the resolution, and the ABA has sought the Oregon State Bar’s input.

Mr. Bachofner noted the board’s options are to:

1. Endorse or co-sponsor the American Bar Association House of Delegates resolution to eliminate the use of non-unanimous juries;
2. Craft a separate statement on the use of non-unanimous verdicts, addressing additional concerns; or
3. Delay final decision until precise language of any proposed change to Oregon law is available for review.

The Public Affairs Committee voted in favor of the Oregon State Bar’s co-sponsorship of the resolution.

Several issues were discussed by board members including the concern that if the board took a position on this ABA resolution, it could create complications for any later engagement on the issue;
the fact that this issue relates fundamentally to the bar’s mission to improve administration of the justice system; the belief that there may be divisions within the membership regarding the right outcome; the concern that allowing non-unanimous juries may disproportionately impact jurors from non-dominant cultures; and the relationship between this issue and implicit bias within Oregon’s justice system.

The board discussed the likelihood that non-unanimous juries will be an issue raised during the 2019 Oregon legislative session. Taking a position on this resolution will not commit the bar to any particular position on future legislative proposals.

**Motion:** The board voted unanimously in favor of the Public Affairs Committee motion to co-sponsor the ABA Resolution.

**B. Budget & Finance Committee**

Mr. Wade presented the Investment Committee Report. The investment committee has moved some portion of our investments accounts into cash to protect against market volatility. The committee has also rebalanced our portfolio between the two investment advisors. The investment committee plans to draft a proposal to reduce reserve requirements. Mr. Wade plans to present a proposed amendment to Section 7.4 of the bar’s investment policy to the Budget & Finance Committee for consideration.

**C. Board Development Committee**

Mr. Greco presented the appointments to various bar groups. [Exhibit B]

The committee voted to recommend the Board appoint Tamala Argue (Bar No. 113179) to the State Lawyers Assistance Committee for a term through December 31, 2021.

The committee voted to recommend Martin Fisher (Bar No. 962840) for appointment to the Unlawful Practice of Law Committee through December 31, 2020. If approved by the BOG, the Supreme Court will consider Mr. Fisher for appointment.

**Motion:** The board voted unanimously in favor of the committee motion to accept the appointment and recommendation to the Supreme Court. The motion passed.

Mr. Greco presented there was a 20% turnout in the House of Delegates races, although we will need to reissue ballots for Regions 5 and 7 due to technical issues. The deadline for seeking election for the Board of Governors is May 8, 2018.

**D. Policy and Governance Committee**

Ms. Costantino presented the committee motion to amend the Fee Dispute Resolution Rules. [Exhibit C]

**Motion:** The board voted unanimously in favor of adopting the Policy & Governance Committee’s recommended rule amendments. The motion passed.

**5. Professional Liability Fund**
Ms. Bernick updated the board on PLF operations. Madeline Campbell is the new director of claims at the PLF. She is bringing a new level of claims data analysis, and loss prevention analysis, to the role.

Investment performance is essentially flat over the year to date. The PLF has budgeted for a 4.5% return, so the PLF is watching its investments closely.

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

   **A. Oregon New Lawyers Division**

   Ms. Nicholls presented this morning at a joint meeting of the Policy & Governance and Budget & Finance Committees. The ONLD held its past meeting in March in Eugene, where it helped to recruit mock trial judges for a University of Oregon School of Law event. In March, Jon Puente led a discussion with the Executive Committee about the implementation of the Diversity Action Plan.

   Ms. Nicholls referenced her report in the Committee materials. The ONLD is proposing certain bylaw revisions and other changes for the Board’s consideration.

7. **Request for Establishment of a Commission**

   Ms. Hierschbiel presented the request of Ms. Tuthill-Kveton for an independent audit of the disciplinary system. Ms. Hierschbiel met with Ms. Tuthill-Kveton to share information about the recent Disciplinary System Review Committee process and the enactment of amended Rules of Procedure earlier this year. After the meeting, Ms. Tuthill-Kveton agreed that the bar should focus its efforts on possible process improvements, in lieu of engaging in another systemic review. Staff will follow up with her, but Ms. Tuthill-Kveton has withdrawn her request for an independent audit at this time. [Exhibit D]

8. **Statement Against White Nationalism and Normalization of Violence**


   Ms. Hierschbiel explained the Bar’s Statement was reviewed and adopted at its February 2018 meeting. It was electronically circulated to the membership in the March BOG Update following the meeting.

   The board was not asked to review or endorse the Specialty Bar Statement, which was produced by separate and independent organizations. The specialty bars are voluntary nonprofit organizations separate from the Oregon State Bar.

   She outlined feedback received from bar members regarding the publication of both statements in The Bulletin. Ms. Hierschbiel noted that the two statements were published on adjacent pages of the April 2018 edition of The Bulletin. Members noted the design elements of the border around two statements and the absence of a date on the Specialty Bar Statement. Based on these design elements, some individuals expressed concern about the possibility the Board had adopted the Specialty Bar Statement. Ms. Hierschbiel outlined that the manner of
layout of the two Statements in The Bulletin publication was a staff error. She acknowledged that the publication of the two Statements in a dual-page layout was ill-advised and confusing to the membership.

In her memorandum to the board, Ms. Hierschbiel included all of the responses to the publication of the two Statements. She noted the bar has received comments from Diane Gruber, Shawn Lindsay, Daniel Crowe, and others. [Exhibit E]. She reported that yesterday the bar received a letter from the Multnomah County Republican Party. The letter was provided as a handout to the Board [Exhibit F].

Under OSB Bylaw Section 12.6, bar members may object to the use of their bar fees for purposes that are not germane to the bar’s statutory purpose. Section 12.6 provides, “If the Board agrees with the member’s objection, it will immediately refund the portion of the member’s dues that are attributable to the activity, with interest paid on that sum of money from the date that the member’s fees were received to the date of the Bar’s refund.” Ms. Hierschbiel explained that today, the Board of Governors needs to make two decisions: first, does the Board wish to issue any kind of a refund for publication of either statement pursuant to Section 12.6; second, does the Board wish to issue any additional statement or withdraw its statement in response to the comments we have received.

Ms. Nordyke invited comment from Mr. Crowe.

Mr. Crowe stated that he is a member of the bar, the immediate past-chair of the Military & Veterans Law Section, and the chair of Oregon Veterans Legal Services. Mr. Crowe stated that the section was concerned regarding prior staff input on the section’s ability to comment on emerging military and veteran’s issues, under the auspices of the Bar. Mr. Crowe noted that Ms. Hierschbiel and Ms. Hollister attended the section’s April executive committee meeting to hear the section’s concerns and answer questions. He explained the section is interested in gaining a better understanding of its role and ability to take positions on military and veterans’ issues. Mr. Crowe then presented his and Lawrence K. Peterson’s written response to the Board [Exhibit G], and outlined their concerns about the publication of the Specialty Bar Statement in The Bulletin.

Ms. Nordyke thanked Mr. Crowe for his feedback.

**Executive Session** (pursuant to ORS 192.660(1)(h)) - General Counsel Report

The Board went into closed session.

The Board went into open session.

**Motion:** Motion to refund the portion of Mr. Lindsay’s member fees that are attributable to the publication of the Specialty Bar Statement on page 43 of the April 2018 Bar Bulletin, due to the confusion created by the placement of the Specialty Bar Statement next to the OSB Statement.

Mr. Wade moved and Mr. Greco seconded the motion. Mr. Boise, Mr. Peachy, Mr. Grant, Mr. Bachofner, Mr. Greco, Ms. Rice, Ms. Reeves, Mr. Wade, Mr. Medina, Ms. Costantino and Mr. Sharp voted in favor of the motion. Mr. Andries opposed the motion.

The motion passed.
The Board next addressed how to communicate with the Bar membership about the confusion created by the layout and publication of the OSB Statement and Specialty Bar Statement in The Bulletin.

**Motion:** Motion that the Board issue a clarification in The Bulletin about the placement of the publication of the Specialty Bar’s Statement. The clarification will include a statement affirming the original OSB Statement and explaining that the specialty bars are independent of the OSB.

Mr. Greco moved and Mr. Bachofner seconded the motion, and the board voted unanimously to adopt the motion.

Ms. Hierschbiel noted that staff is reexamining the editorial function of The Bulletin, and considering whether there are systemic changes that should be addressed.

9. **Consent Agenda**

Ms. Nordyke asked if any board members would like to remove any items from the consent agenda for discussion and a separate vote. No one asked to do so.

**Motion:** Ms. Costantino moved, and Ms. Rice seconded, and the board voted unanimously to approve the consent agenda and past meeting minutes.

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

   - Report of the President
     As written.

   - Report of the Executive Director
     As written.

   - Director of Diversity & Inclusion
     As written.

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

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

      The board went into closed session.
      The board reconvened in open session.

   **Motion:** Ms. Reeves moved and Mr. Peachy seconded to deny reinstatement of Mr. Gray. The motion passed unanimously.

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

    Ms. Nordyke thanked members for their participation.

    The meeting adjourned.
Standards of Practice for Attorneys Representing the Child Welfare Agency

April 20, 2018
Foreword

The original version of the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases (hereafter, the performance standards) was approved by the Board of Governors on September 25, 1996. Significant changes to the original performance standards were adopted in 2006, and an additional set of standards pertaining to representation in post-conviction standards were adopted in 2009.

As noted in the earlier revision, in order for the performance standards to continue to serve as valuable tools for practitioners and the public, they must be current and accurate in their reference to federal and state laws and they must incorporate evolving best practices.

The Foreword to the original performance standards noted that “[t]he object of these guidelines is to alert the attorney to possible courses of action that may be necessary, advisable, or appropriate, and thereby to assist the attorney in deciding upon the particular actions that must be taken in a case to ensure that the client receives the best representation possible.” This continues to be the case, as does the following, which was noted in both the Foreword in the 2006 revision and the Foreword to the 2009 post-conviction standards:

“These guidelines, as such, are not rules or requirements of practice and are not intended, nor should they be used, to establish a legal standard of care. Some of the guidelines incorporate existing standards, such as the Oregon Rules of Professional Conduct, however which are mandatory. Questions as to whether a particular decision or course of action meets a legal standard of care must be answered in light of all the circumstances presented.”

We hope that this addition to the Performance Standards, like the originals, will serve as a valuable tool both to the new, and to the experienced lawyer who may look to them in each new case as a reminder of the components of competent, diligent, high quality legal representation.

Vanessa Nordyke
Oregon State Bar President
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Summary and Background

In September of 1996, the Oregon State Bar Board of Governors first approved the *Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases*. These standards have been updated and expanded several times in the intervening years. Previous standards applicable in juvenile dependency cases, however, have always focused on the roles of attorneys for parents and children respectively.

These new standards came about as a result of Senate Bill 222, passed during the 2015 Oregon Legislative Session, which created a task force charged with recommending models of legal representation in juvenile dependency proceedings. The Oregon Task Force on Dependency Representation, staffed by the Governor’s office, convened in 2015 and 2016 and issued its final report in July 2016. That report made a number of recommendations for improving services in
juvenile dependency proceedings—including the creation of these new performance standards for agency attorneys.

In the fall of 2016, the Oregon State Bar Board of Governors directed the creation of this workgroup. The workgroup was chaired by Joanne Southey (Oregon Department of Justice), and workgroup members included Amy Benedum (Oregon Judicial Department Juvenile Court Improvement Program), Linn Davis (Oregon State Bar), Shannon Dennison (Oregon Department of Justice), Lori Fellows (Multnomah County District Attorney’s Office), Olivia Godinez (Oregon Department of Justice), Amy Miller (Office of Public Defense Services), Rahela Rehman (Oregon Department of Justice), and Matt Shields (Oregon State Bar). Adrian Smith (Former Governor’s Task Force Administrator) also contributed.

The following pages set forth these new performance standards applicable to attorneys who represent the Oregon Department of Human Services (DHS) Child Welfare Program in juvenile dependency proceedings. These standards should be read alongside general standards for attorneys, and may be further informed by reference to the standards applicable to attorneys for parents and children that are presented on the Oregon State Bar website.
Role of the Agency Attorney

The role of the agency attorney is multifaceted. The attorney ensures that the child welfare agency has quality, uniform, continuous, and comprehensive legal representation in the juvenile system statewide. In addition, the attorney has an equal obligation to ensure due process, promote fairness, and advocate for consistent application of the law. Agency representation is essential to a well-functioning child welfare system.

Juvenile dependency proceedings are a complex interplay between social work and law. It is essential that the agency attorney have a thorough understanding of the agency’s social-work practices, procedures, policies, and obligations to effectively advocate on the agency’s behalf to promote safe and positive outcomes for children and families. The attorney must have direct and privileged communication with agency employees in order to take legal action supported by sound casework practice, which is based on the agency’s assessment of and work with the child and family. Legal advocacy partnered with the agency’s expertise enhances the agency’s credibility in court and improves outcomes for all. In addition, unified and statewide agency representation allows for consistent interpretation and application of laws and coherent decision making.

The child welfare agency’s legal representation is provided by the Oregon Department of Justice (DOJ) statewide. Assistant Attorney Generals (AAGs) provide legal advice and litigation support to the agency on specific issues and individual cases. AAGs also play a significant role outside of the courtroom providing guidance and advice on legal issues with statewide implications. The AAG represents the agency as a legal entity and does not represent individual caseworkers. That being said, the AAG works closely with agency caseworkers to prepare cases for court, advise caseworkers of the agency’s legal obligations, and assists with specialized training. Agency representation is a safeguard against caseworkers engaging in the unauthorized practice of law.
Standard 1 – General Obligations of the Agency Attorney

A. Acquire a working knowledge of all relevant federal and state laws, regulations, policies, and rules

Action: At a minimum, the agency attorney should be familiar with the following:

Oregon State Laws—
1. ORS chapter 109 – Parent and Child Rights and Relationships (includes Uniform Child Custody Jurisdiction and Enforcement Act)
2. ORS chapter 125 – Protective Proceedings, Guardianships
3. ORS chapter 409 – Department of Human Services
4. ORS chapter 418 – Child Welfare Services
5. ORS chapter 419A – Juvenile Code: General Provisions and Definitions
6. ORS chapter 419B – Juvenile Code: Dependency
7. ORS chapter 419C – Juvenile Code: Delinquency
8. OAR chapter 413 – Administrative Rules, DHS Child Welfare Programs
10. The Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), ORS 109.701–109.834
12. DHS Oregon Safety Model
13. State laws and rules of civil procedure including Uniform Trial Court Rules and Supplemental Trial Court Rules
14. Oregon Constitution
15. State laws and rules of criminal procedure
16. State laws and rules of administrative procedure
17. State laws concerning public benefits, education, and disabilities
18. State laws regarding domestic violence

Federal laws—
22. Social Security Act (SSA), Title IV-E eligibility provisions (42 USC §§ 670–673); and Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed Reg 4020 (2000)
29. Public Health Service Act (42 U.S.C. § 290dd-2) and 42 C.F.R. part 2 (pertaining to confidentiality of individual information)
30. Immigration laws relating to child welfare and child custody

International Laws—
35. Vienna Convention on Consular Relations, art 36, April 24, 1963, 21 U.S.T. 77 (regarding foreign nationals in the United States and the rights of consular officials to assist them, implemented at ORS 419B.851(3) and 8 C.F.R. § 236.1)

Action: The attorney should establish some familiarity with the following subjects and participate in training as needed:

1. Stages of child development
2. Attachment and sibling relationships
3. Cultural child rearing practices
4. Substance abuse and available treatment options
5. Domestic violence and available resources
6. Diagnosis and treatment of mental health and abuse (sexual, physical, and emotional)
7. Educational, mental health, and other resources for children
8. Placement matching options and considerations (including placement of siblings, visitation, language, and culture)
9. Use of psychotropic medication for children
10. Agency funding resources (adoption assistance, guardianship assistance, Social Security benefits, and state assistance for families in need).

11. Transition plans and independent-living programs for teens

Commentary: The attorney represents the agency in juvenile dependency and termination-of-parental-rights proceedings, and advises the agency on the legality of actions and policies. To best perform these functions, the attorney should read and become familiar with all relevant laws.

Action: The attorney must understand and comply with state and federal privacy and confidentiality laws. The attorney should also assist the agency to access confidential information from external sources as needed on a case-by-case-basis, such as obtaining a court order to access mental health or drug and alcohol information.

Commentary: Given the sensitive nature of child welfare cases and the impact on the lives of children and families, the attorney should be vigilant about protecting the confidentiality of child welfare information and assist the agency to do the same. The identity of the child, parents, and child-abuse reporters, as well as treatment records and HIV status of any of the parties, for example, must all be kept confidential. Some information may also need to be kept confidential between parties (e.g., domestic-violence records and protected health information). The attorney should work with the agency to ensure that disclosure of confidential information is pursuant to applicable laws or with appropriate authorization. For example, a party may sign a release authorizing disclosure of drug and alcohol treatment records or protected health information.

Commentary: Confidential information regarding the juvenile dependency case may only be disclosed as provided by statute, a court order, or by a signed release of information. For example, an agency attorney in a dependency case may not share information with a prosecutor in a related criminal case or an attorney in a related domestic-relations case absent statutory authority or a court order.

B. Promote timely hearings and reduce case continuances

Action: The agency attorney must be prepared to move forward in a timely manner. The agency attorney should carefully consider all circumstances when requesting or responding to a motion for a continuance. The agency attorney should be fully prepared for all hearings.

Commentary: The agency has a duty to ensure that statutory timelines are met and that children do not remain in foster care longer than necessary. The agency attorney must assist the agency to meet this duty. Requesting or agreeing to case continuances should be unusual rather than routine practice.

C. Protect and promote the agency’s credibility
Action: The attorney should counsel the agency regarding its legal position and must file only meritorious cases, motions, and appeals. The attorney should be professional, knowledgeable, and promote candor when presenting cases to the court. In representing the agency, the attorney should be respectful and courteous to agency representatives and promote a positive image of the agency with parties, community partners, and the court.

Commentary: At times, the agency may take a legal position in a case or implement a policy that is not popular. It is important that the attorney adequately explain the agency’s decision-making process and, if applicable, protect any confidential case-related information. The attorney should counsel the agency to consistently apply its policy and avoid taking positions that undermine the agency’s credibility. The attorney’s role includes supporting the agency in the courtroom and in other forums.

D. Communicate on a regular basis with the agency and case-related professionals.

Action: The attorney should regularly communicate with the agency to discuss case developments. The attorney should communicate regularly with juvenile dependency attorneys and the court.

Commentary: The attorney must have timely, relevant information to effectively represent the agency, which requires open and ongoing communication with caseworkers. When appropriate, the attorney should share information with other professionals, which may include prosecutors, law enforcement, and attorneys. For example, the attorney should communicate with a prosecutor regarding related criminal matters, to ensure that probation orders and disposition orders do not conflict and, where appropriate, are mutually reinforcing (e.g., a visitation order in an abuse and neglect case should not contradict a no-contact order from a criminal court).

Action: The attorney should make efforts to build relationships with other professionals in the juvenile dependency system.

Commentary: Maintaining positive relationships with other professionals benefits the agency as a whole as well as on individual cases. Such professionals may include judges, attorneys, court staff, court-appointed special advocates (CASAs), tribal representatives, service providers, and law enforcement agencies. Recognizing that system partners are an integral part of the juvenile dependency system will likely assist in achieving better outcomes for children and families.
**Standard 2 – Counseling, Training, and Advice**

**A. Counsel the agency in all legal matters related to individual cases as well as general policy and practice issues.**

**Action:** The attorney should be available for in-person meetings, telephone calls, electronic communication, and should routinely staff and monitor legal cases. The attorney should provide clear, concise, timely advice that is readily accessible to the agency. The attorney should advise agency administration on policy concerns and developments that may affect the agency.

**Commentary:** The attorney’s role extends beyond the courtroom. The agency’s actions, practices, and decisions may have statewide implications beyond individual cases. The attorney should consider the potential impact and advise accordingly. The attorney should work with the agency to develop a plan for consistent, regular staffings at significant points throughout the case (e.g., prior to filing a petition or before a permanency hearing). The attorney’s role is not to act as the caseworker’s supervisor, but rather to provide legal guidance and expertise so the agency can make informed decisions. When appropriate, the attorney should confirm significant oral advice by following with written advice.

**B. Assist with agency training.**

**Action:** The attorney should be familiar with formalized agency trainings, both initial and ongoing, provided to caseworkers.

**Commentary:** The child welfare agency provides mandatory standardized trainings for all new caseworkers. Caseworkers are trained on a wide array of topics including the agency’s role in juvenile dependency proceedings, child development, and safety and permanency planning. The attorney may need to draw on a caseworker’s training in court in order to qualify a caseworker as an expert when testifying in juvenile dependency proceedings.

**Action:** The attorney should assist the agency in identifying and implementing specific trainings as needed.

**Commentary:** In the course of their work with caseworkers in local branches, the attorney may identify the need for additional caseworker training specific to juvenile court proceedings. Prior to providing any training, the attorney should consult with his or her managing attorney to ensure that training content is consistent statewide.
Standard 3 – Court Preparation

A. Consult with the agency regarding legal sufficiency of removal or other actions taken prior to court involvement.

Action: The attorney should be readily available to provide legal advice and counsel on actions and decisions that the agency must make prior to filing a petition.

Commentary: Prior to filing a petition, the agency may need advice regarding removal of a child or safety planning with a family. These decisions are often time-sensitive, which may require the attorney to be available outside of regular working hours. The agency may need consultation on a number of issues, such as safety planning with the family, removal, emergency medical decisions, working with law enforcement, missing children, child fatalities, and suitability of a voluntary agreement as opposed to initiating court action.

B. Prepare and file dependency petitions.

Action: Prior to filing a petition, the attorney should review all available supporting documentation. The attorney should work with the agency to draft, review, and file the petition with the court.

Commentary: The petition is a significant legal document. All subsequent legal actions in the dependency case stem from the allegations contained in the petition. The attorney should confirm that each allegation has a factual basis and is legally sufficient to establish juvenile court jurisdiction. The petition notifies the parents and other parties as to the agency’s concerns and the legal basis for court intervention.

Commentary: In some instances, the agency may provide draft language for the petition. However, it is essential that the attorney review the petition and supporting documentation prior to filing. The attorney should not rely solely on caseworker reports. Documentation related to the case may include affidavits, police reports, medical and service provider records, reports from other agencies, and witness interviews.

C. Ensure compliance with all notice and service requirements.

Action: The attorney must be knowledgeable of statutory notice and service provisions and should ensure compliance with these requirements.

Commentary: The appropriate method of service depends on the specific facts of each case. Timely resolution of the case may be significantly impacted by defects in service. Parties have a right to notice of court hearings and all pleadings filed with the court. Other entities or individuals may also be entitled to notice of court hearings, including foster parents, grandparents, consulates, tribes, and Indian custodians.
Commentary: Notice and service requirements will differ in cases in which The Hague Convention or the Indian Child Welfare Act apply.

D. Assist the agency in obtaining relevant case-related material and review documents and information gathered by the agency or filed in the case.

Action: The attorney should counsel the agency to ensure the agency obtains all records that are necessary to prove the petition, or may be needed for later hearings. For example, the agency file may include mental health and substance abuse treatment records, histories for the children and parents, abuse and neglect reports with supporting materials about the investigation, education records, medical records, birth certificates for the children, death certificates, affidavits of efforts to locate parents, and paternity records.

Action: The attorney should counsel the agency regarding its discovery obligations to timely provide records to all parties.

Commentary: The attorney should review all records to assist the agency in evaluating the most appropriate case plan. Some of these records may not be in the agency’s file. Obtaining these records may require assistance from the attorney, which may involve subpoenaing records or requesting court orders.

E. File timely, accurate, and thorough pleadings.

Action: The attorney is responsible for filing thorough, accurate, timely pleadings on the agency’s behalf. The attorney should review all pleadings filed for completeness and accuracy.

Commentary: Abuse and neglect proceedings are typically initiated by the agency. Agency pleadings frame the case and, therefore, must be comprehensive and contain all necessary information. After reviewing the file, the attorney should exercise professional judgment in identifying information that should be provided to the court. In order for the court to make informed decisions, the attorney must ensure appropriate information known to the agency is provided to the court.

F. Subpoena and interview witnesses called on behalf of the agency.

Action: The attorney should work with the agency to develop a witness list in advance of a hearing. The attorney is responsible for determining which witnesses should testify. Prior to testimony the attorney should interview witnesses who may be called on behalf of the agency. The attorney should issue subpoenas and ensure proper service.

Commentary: Advance preparation is the key to successfully resolving a case, whether by negotiation or trial. The attorney should meet with the agency well in advance of the hearing to identify, subpoena, and interview relevant and necessary witnesses. The attorney should consider
working with other parties who share the agency’s position when creating a witness list, issuing subpoenas, and interviewing witnesses.

**Commentary:** The attorney must be aware potential witnesses have busy schedules and need appropriate notice of the date and time of the hearing. The attorney should be considerate of time constraints for witnesses, in particular teachers, healthcare providers, and law enforcement officers and agents. When possible, the attorney should work with others to minimize a witness’s time in court or request an alternate manner of appearance.

**Commentary:** Witnesses may be apprehensive about testifying in court. Preparation well in advance of the appearance may assist the witness in feeling more comfortable with the process and the type of questions that may be asked. This preparation also informs the attorney before trial what information the witness has and what may be elicited as testimony. The attorney should inform the witness of the obligation to provide accurate and truthful testimony.

**Action:** The attorney should consult with the agency and the child’s attorney to determine whether the child should testify at a hearing. If the decision is made that the child should testify, and when the positions of the agency and the child are aligned, the agency attorney and the child’s attorney should decide together who will present the child’s testimony.

**Commentary:** In considering whether the child should testify, the attorney should balance the evidentiary needs of the case with the impact that testifying will have on the child. The attorney should give careful consideration to the child’s development, emotional needs, and ability to handle both direct and cross-examination. The attorney should also investigate alternatives to in-court testimony to minimize trauma, such as video appearances or an in-chambers conference.

**G. Subpoena and prepare agency staff to testify.**

**Action:** The attorney should identify and determine which agency witnesses will testify at the hearing and issue subpoenas accordingly. The attorney should sufficiently prepare agency staff witnesses to testify.

**Commentary:** It is imperative that the attorney adequately prepare agency staff to testify in court, which should include an explanation of the court process and legal issues, the importance of demeanor and professionalism, and questions they are likely to be asked. The attorney should advise the agency representative of the obligation to adequately prepare for court and provide accurate testimony. It may be necessary to request the agency representative to gather additional information and meet with the attorney again before trial.

**Action:** The attorney should counsel the agency on its obligations when agency staff are served with subpoenas by other parties. The attorney should prepare the agency witness to testify.

**Commentary:** Agency staff may be apprehensive about being called to testify by opposing counsel. Attorneys should thoroughly prepare agency witnesses so they are more comfortable with the process and the type of questions they may be asked.
H. Actively participate in all settlement negotiations, pretrial conferences, and hearings to achieve speedy resolution of the case when appropriate.

Action: The attorney should participate in all settlement negotiations and hearings to promptly resolve the case, keeping in mind the effect of continuances and delays on the child. The attorney must support the agency’s position during negotiations, and communicate all settlement offers to the agency, as it is the agency’s ultimate decision whether to settle.

Commentary: During pretrial negotiations, a great deal of information is shared about the family and the allegations in the petition. Therefore, it is important that the attorney be actively involved in this stage. The attorney should be prepared to negotiate and resolve cases during the pretrial process. However, the attorney should understand that certain allegations should not be compromised as they may impact child safety, case planning, and permanency planning. If an appropriate settlement is not reached, the attorney must be prepared to proceed to trial and not compromise merely to avoid litigation.

Commentary: Generally, when agreements have been thoroughly discussed and negotiated, all parties feel they had a say in the decision and are, therefore, more willing to adhere to a plan. The attorney should work with the other parties to ensure that the court is immediately notified of the settlement so it may adjust its calendar accordingly. When appropriate, the attorney should ensure the settlement is included in the court record.

I. Assist the agency in meeting legal obligations to adhere to state and federal case timelines.

Action: The attorney must be aware of federal and state case timelines indicating when certain actions must occur, and must advise the agency accordingly.

Commentary: The agency attorney shares a responsibility with the agency for keeping deadlines in mind and moving a case forward. For example, the Adoption and Safe Families Act (ASFA) requires the court to hold a permanency hearing 12 months after jurisdiction or 14 months after the removal of a child. The ASFA timelines also require the filing of a termination-of-parental-rights petition when the child has been in care for 15 of the most recent 22 months, unless certain exceptions apply.

J. Assist the agency with permanency planning for the child.

Action: The attorney should assist the agency in determining and implementing the agency’s permanent plan for the child.

Action: The attorney may need to draft and file motions or petitions for guardianship, petitions to terminate parental rights, or motions to implement other permanent plans. The attorney should review all relevant documentation and confer with the agency prior to filing pleadings.
Commentary: Permanency planning is specific to the facts of each case and may include reunification, another planned permanent living arrangement, placement with a fit and willing relative, guardianship, and adoption. The attorney should investigate other legal actions that could impact the ability to achieve permanency.

Commentary: To effectively assist the agency in implementing a permanent plan, it is essential for the attorney to review the initial jurisdictional petition, any subsequent petitions, jurisdictional and dispositional orders, and all other court orders and judgments in the case. It is equally important that the attorney review all relevant supporting documentation related to the case such as evaluations, case notes, provider updates, treatment records, police reports, court reports, information provided by other parties, and exhibits that may have been entered into the legal record.
Standard 4 – Juvenile Court Proceedings

A. Attend and prepare for juvenile court proceedings.

**Action:** The attorney must prepare for and attend all court proceedings in the case.

**Action:** The attorney should have adequate time and resources to competently represent the agency, maintain a reasonable workload, and have access to sufficient support services.

**Commentary:** To advocate on behalf of the agency, the attorney must be prepared for all court appearances. This is not limited to contested trials, but includes all court proceedings (shelter, jurisdiction, disposition, visitation, placement, dismissals, reviews, permanency hearings, etc.). Preparation for hearings will depend on the nature of the hearing, the standard of proof, and the supporting evidence and documentation. For example, a hearing on a parent’s motion to expand visitation may include review of visitation notes, evaluations of the parents and child, and other service provider notes, whereas a jurisdiction hearing may involve records review, extensive witness preparation, and ongoing negotiation with the parties.

**Commentary:** In addition to the above, the attorney must adhere to the Oregon Rules of Professional Conduct, which require the attorney to provide competent representation including skilled advocacy, thorough preparation, and relevant legal knowledge necessary for representation of the agency.

B. Make all appropriate motions and evidentiary objections.

**Action:** The attorney should make appropriate motions and evidentiary objections to advance the agency’s position during the hearing. If necessary, the attorney should file briefs, legal memoranda, or pleadings to support the agency’s position. The agency attorney should preserve legal issues for possible appeal.

**Commentary:** It is essential that attorneys are familiar with and understand the Oregon Evidence Code and all relevant court rules and procedures. The attorney should zealously advocate on behalf of the agency in court by making appropriate motions, objections, and legal arguments. The attorney should also ensure the court has all necessary and relevant information to make statutorily required judicial determinations.

C. Present case-in-chief, call and cross-examine witnesses, prepare and offer exhibits

**Action:** The attorney must be able to effectively prepare and present witnesses to support the agency’s position. The attorney must also be skilled at cross-examining opposing parties’ witnesses in an effective, respectful manner. The attorney should be familiar with the Oregon Evidence Code and be prepared to offer exhibits.
Commentary: As the agency is the moving party in most hearings, the burden is on the attorney to present a solid case with well-prepared witnesses and documentary evidence. The attorney should create a thorough record to assist the court in making required factual findings and legal conclusions. The attorney should possess the skills to elicit helpful information from both agency and opposing-party witnesses.

D. Request the opportunity to make opening and closing arguments when appropriate.

Action: When permitted by the court, the attorney should make opening statements and closing arguments to frame the issues and the evidence in the case.

Commentary: As the agency is typically the moving party, the court often relies on the attorney to summarize the issues and evidence in any given hearing. Despite the brevity and informality of some dependency hearings, an effective opening statement and closing argument can help clarify and promote the agency’s position.

Commentary: In significant, complex, or extended contested hearings (jurisdictional, guardianship, and termination-of-parental-rights trials), well-prepared opening statements and closing arguments are essential to assist the court understand the agency’s legal position, theory of the case, and evidence presented.

E. Prepare judgments and orders.

Action: The attorney may need to prepare the order on behalf of the agency. When doing so, the attorney must ensure that the order reflects the necessary or required findings of fact and conclusions of law consistent with the record.

Commentary: Upon receipt, the attorney must review every judgment and order to ensure it accurately reflects the court’s findings and orders.
Standard 5 - Post Hearings

A. Review court orders and judgments to ensure accuracy and clarity.
   Action: The attorney should ensure the accuracy of all orders and judgments and review the same with the agency. When necessary, the attorney should take the necessary steps to correct any errors in orders and judgments.

   Commentary: The attorney should promptly review the court’s orders and judgments with the agency. If the agency is dissatisfied with the outcome, the attorney should counsel on possible legal options (e.g., request a rehearing, file a motion to set aside, or file a motion to stay the order). The trial attorney may need to consult with the appellate attorney to determine the best legal course.

   Commentary: The attorney must be familiar with the requisite findings of fact and conclusions of law the court must make in each type of hearing. For example, the findings a court must make at a shelter hearing differ from those at a permanency hearing.

   Commentary: Inaccurate orders may have significant ramifications for the agency. For example, failure to secure a finding of reasonable efforts could affect federal funding for the agency. Additionally, the failure to make a required finding can raise issues on appeal, potentially delaying permanency for the child.

B. Take reasonable steps to ensure the agency complies with court orders.

   Action: The attorney should counsel the agency regarding the court’s orders and expectations of the agency.

   Commentary: The attorney should help the agency understand the court’s orders and judgments, provide advice on how to comply, and explain the ramifications of failing to comply.

   Commentary: There may be times when the court orders the attorney to take an action on behalf of the agency that the agency opposes, such as filing a termination-of-parental-rights petition. The attorney must counsel the agency to comply with such orders, or seek alternative relief on behalf of the agency.
Standard 6 – Appellate issues for trial attorneys

A. Advise the agency regarding the possibility of appeal.

**Action:** The trial attorney should consider and discuss with the agency the possibility of an appeal when a court’s ruling is contrary to the agency’s position or interests. The decision to appeal should be jointly made by the attorney and agency and must have an appropriate legal basis.

**Commentary:** When discussing the possibility of an appeal, the attorney should consider the legal basis for the appeal, the effects of an appeal on the agency, DHS’ statewide policy, and the child’s best interests. For example, if the agency believes the court made a legal error, an appeal may be warranted. Conversely, an appeal might unnecessarily delay permanency for the child or result in other negative consequences.

B. Consult with appellate attorney regarding appeal.

**Action:** The trial attorney should consult with the appellate attorney to identify appropriate appellate issues within required timelines.

**Commentary:** The trial attorney has critical insight into witness demeanor, the court’s receptiveness to testimony and evidence, and other events that may have taken place off the record that go beyond what is contained in the trial transcript and provide important context for the appellate attorney. The trial attorney should inform the appellate attorney of the current case status and any developments that may impact the appeal.

C. Ensure any necessary posthearing motions are timely filed.

**Action:** After consultation with the appellate attorney, the trial attorney may need to file a motion to stay with the trial court.

**Commentary:** Once a decision to appeal is made, the trial attorney may need to seek a stay of the trial court order if the agency wishes to be relieved temporarily from taking an action or is concerned about the negative impact of an adverse decision.

D. Advise the agency during the pendency of the appeal.

**Action:** The trial attorney should consult with the appellate attorney while the appeal is pending.

**Commentary:** Even with a stay, the dependency case continues to be heard by the juvenile court. The trial attorney needs to be aware of any ongoing issues in the underlying case that may impact the appeal and communicate those issues to the appellate attorney. For example, a dismissal of wardship by the juvenile court may moot a pending appeal.
Commentary: There may be a delay between the issuance of the appellate opinion and the entry of the appellate judgment. It is important that the trial and appellate attorneys for the agency remain in good communication during this process.

E. Communicate the result of the appeal and its implications to the agency.

Action: The attorney should coordinate with the appellate attorney to explain the result of the appeal and its implications to the agency. Should the result of the appeal require the agency to take action, the attorney should coordinate with the appellate attorney before advising the agency.
Standard 7 – Issues for appellate attorneys

A. Consult with the trial attorney and the agency regarding the potential for an appeal.

Action: The appellate attorney should consider and discuss with the agency and the trial attorney the potential for an appeal when a court’s ruling is contrary to the agency’s position or interests. The decision to appeal should be jointly made by the attorneys and agency and must have an appropriate legal basis.

B. If a decision is made to appeal, timely file the necessary appellate pleadings and attend all scheduled proceedings.

Action: The appellate attorney must review and be familiar with the Oregon Rules of Appellate Procedure. The appellate attorney must timely file pleadings that may include a motion to stay at the appellate level. The appellate brief should be clear, concise, and comprehensive.

Action: The attorney should zealously advocate on behalf of the agency in court. The attorney must be prepared and organized for all proceedings.

Commentary: Agency appeals may delay the juvenile court case. The attorney should consider the importance of the appellate issues and the impact on the child. The attorney should strive to expedite the appellate process to move the plan for the child forward.

C. Communicate the result of the appeal and its implications to the agency.

Action: The appellate attorney should coordinate with the trial attorney to communicate the result of the appeal and its implications to the agency. Should the result of the appeal require the agency to take action, the appellate attorney should coordinate with the trial attorney before advising the agency.
# AGENDA

**BOG Board Development Committee**

**Meeting Date:** April 20, 2018  
**Location:** OSB Center, Tigard  
**Chair:** Guy Greco  
**Vice-Chair:** John Bachofner  
**Members:** Colin Andries, Rob Gratchner, Liani Reeves, Michael Rondeau, Tom Peachey

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<td><strong>1. Committee Minutes</strong></td>
<td>Review and approve minutes from the February 22 committee meeting.</td>
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<td><strong>2. State Lawyers Assistance Committee Appointment</strong></td>
<td>Due to a resignation, one new member is needed on the committee. Tamala Argue (113179) is recommended based on her willingness to handle cases in the Rouge River Valley and the central and south coast area.</td>
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<td><strong>3. Unlawful Practice of Law Committee Appointments</strong></td>
<td>The Supreme Court needs to make one new member appointment to the UPL Committee and relies on a recommendation from the BOG. Based on OSB bylaw 20.2, the number of committee members in private practice cannot exceed ¼ of the overall membership. This position must be filled by a member not in private practice and Martin Fisher (962840) is recommended based on his geographic location.</td>
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<td><strong>4. 2018 Committee Work Plan</strong></td>
<td>The committee will review the draft work plan for 2018 and discuss activities for the remainder of the year.</td>
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<td><strong>5. HOD Election Review</strong></td>
<td>The HOD election ended April 16. The committee will discuss the election recruitment process, outcomes, and identify any areas for improvement in 2019. Results of the election will be posted online on April 17.</td>
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<td><strong>6. BOG Election Recruitment Update</strong></td>
<td>Discuss ongoing recruitment strategies. Staff will provide an update on the number of candidates who have filed to date. The candidate deadline for the open seats in regions 4, 5, 6, and 7 is May 8. Additional information about the election is available online.</td>
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| **7. Volunteer Recruitment** | Discuss outreach and recruitment process for lawyer and public member volunteers.  
Lawyer application:  
Sept. 7 deadline, [http://www.osbar.org/volunteer/volunteeropportunities.html](http://www.osbar.org/volunteer/volunteeropportunities.html)  
Public member application:  
July 13 deadline, [http://www.osbar.org/volunteer/publicmember.html](http://www.osbar.org/volunteer/publicmember.html) |

**Exhibit**
OREGON STATE BAR
BOG Policy & Governance Committee Agenda

Meeting Date: February 22, 2018
From: Mark Johnson Roberts, Deputy General Counsel
Re: Proposed Amendments to the Fee Dispute Resolution Rules

Action Recommended

Recommend that the Board of Governors adopt the attached amendments the OSB Fee Dispute Resolution Rules to implement the recommendations of the 2017 Fee Mediation Task Force.

Background

Last year, the BOG appointed a task force to review the Fee Dispute Resolution Program and, in particular, the program’s treatment of mediation confidentiality issues. The BOG approved the committee’s report (also attached) in July. This agenda item requests approval of the resulting changes to the program rules.

In January 2018, the Supreme Court approved an amendment to Oregon RPC 8.3 stating that the rule does not require disclosure of mediation communications protected by statute.

The accompanying changes to the program rules are needed to align the program rules with the amended Oregon RPC 8.3 and the task force’s recommendations.

Proposed Amendments

1. Rule 1.1 is amended to remove the prior language providing for a limited waiver of mediation confidentiality in the context of a mandatory RPC 8.3 ethics report to the Client Assistance Office.

2. A new Rule 7.6 is added to clarify that the mediation program is not intended, and may not be used, to mediate a malpractice case or an ethics complaint. The amended rule expressly states that the mediation may resolve disputes over the distribution of client property, including client files.

3. Rules 10.4 and 10.5 are amended to remove references to mediation, and Rule 10.8 is repealed.
# Fee Dispute Resolution Rules

Rules of the Oregon State Bar on Mediation and Arbitration of Fee Disputes  
*Effective September 2015*

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Section 1 Purpose

1.1 The purpose of these Rules is to provide a voluntary method to resolve fee disputes between active members of the Oregon State Bar maintaining offices in Oregon and their clients; between those members and other active members of the Oregon State Bar; and between active members of a state bar other than Oregon and their clients who either are residents of the state of Oregon or have their principal place of business in Oregon. Parties who agree to participate in this program expressly waive the requirements of ORS 36.600 to 36.740 to the extent permitted by ORS 36.610 except as specifically provided herein.

Section 2 Mediation and Arbitration Panels; Advisory Committee

2.1 The Fee Dispute Resolution Administrator ("Administrator") shall appoint attorney members to mediation panels in each board of governors region, from which mediators will be selected. The normal term of appointment shall be three years, and a mediation panelist may be reappointed to a further term. All mediation panelists shall be active or active pro bono members in good standing of the Oregon State Bar with a principal business office in the board of governors region of appointment.

2.2 The Administrator shall appoint attorney and public members to arbitration panels in each board of governors region, from which arbitrators will be selected. The normal term of appointment shall be three years, and an arbitration panelist may be reappointed to a further term. All attorney panelists shall be active or active pro bono members in good standing of the Oregon State Bar with a principal business office in the board of governors region of appointment. All public panelists shall reside or maintain a principal business office in the board of governors region of appointment and shall be neither active nor inactive members of any bar.

2.3 General Counsel shall appoint an advisory committee consisting of at least one attorney panel member from each of the board of governors regions. The advisory committee shall assist General Counsel and the Administrator with training and recruitment of arbitration and mediation panel members, provide guidance as needed in the interpretation and implementation of the fee dispute rules, and make recommendations to the board of governors for changes in the rules or program.

Section 3 Training

3.1 The Oregon State Bar will offer training opportunities to panelists regarding mediation and arbitration techniques and the application of RPC 1.5 in fee disputes.

3.2 The Administrator may request information about panelists’ prior training and experience and may appoint panelists based on their related training and experience.

Section 4 Initiation of Proceedings

4.1 A mediation proceeding shall be initiated by the filing of a written petition and mediation agreement. The mediation agreement must be signed by one of the parties to the dispute and filed with General Counsel’s Office within 6 years of the completion of the legal services involved in the dispute.
4.2 An arbitration proceeding shall be initiated by the filing of a written petition and arbitration agreement. The petition must be signed by one of the parties to the dispute and filed with General Counsel’s Office within 6 years of the completion of the legal services involved in the dispute.

4.3 Upon receipt of a petition and agreement(s) signed by the petitioning party, the Administrator shall forward a copy of the petition and the agreement(s) to the respondent named in the petition by regular first-class mail, e-mail, or facsimile or by such other method as may reasonably provide the respondent with actual notice of the initiation of proceedings. Any supporting documents submitted with the petition shall also be provided to the respondent. If the respondent desires to submit the dispute to mediation or arbitration the respondent shall sign the agreement(s) and return the agreement(s) to the Administrator within twenty-one (21) days of receipt. A twenty-one (21) day extension of time to sign and return the petition may be granted by the Administrator. Failure to sign and return the agreement within the specified time shall be deemed a rejection of the request to mediate or arbitrate.

4.4 A lawyer who is retained by a client who was referred by the OSB Modest Means Program or OSB Lawyer Referral Program may not decline to arbitrate if such client files a petition for fee arbitration.

4.5 If the respondent agrees to mediate or arbitrate, the Administrator shall notify the petitioner who shall, within twenty-one (21) days of the mailing of the notice, pay a filing fee of $75 for claims of less than $7500 and $100 for claims of $7500 or more. The filing fee may be waived at the discretion of the Administrator based on the submission of a statement of the petitioner’s assets and liabilities reflecting inability to pay. The filing fee shall not be refunded, except on a showing satisfactory to General Counsel of extraordinary circumstances or hardship.

4.6 If the request to mediate or arbitrate is rejected, the Administrator shall notify the petitioner of the rejection and of any stated reasons for the rejection.

4.7 The petition, mediation agreement, arbitration agreement and statement of assets and liabilities shall be in the form prescribed by General Counsel, provided however, that mediation and arbitration agreements may be modified with the consent of both parties and the approval of General Counsel.

4.8 After the parties have signed a mediation or arbitration agreement, if one party requests that a mediation or arbitration proceeding not continue, the Administrator shall dismiss the proceeding. A dismissed proceeding will be reopened only upon agreement of the parties or receipt of a copy of an order compelling arbitration pursuant to ORS 36.625.

Section 5 Amounts in Dispute

5.1 Any amount of fees or costs in controversy may be mediated or arbitrated. The Administrator may decline to mediate or arbitrate cases in which the amount in dispute is less than $250.00.

5.2 The sole issue to be determined in all fee dispute proceedings under these rules shall be whether the fees or costs charged for the services rendered were reasonable in light of the factors set forth in RPC 1.5.
Section 6 Selection of Mediators and Arbitrators

6.1 Each party to a mediation shall receive with the petition and mediation agreement a list of the members of the mediation panel from the board of governors region in which a lawyer to the dispute maintains his or her law office.

6.2 Each party to an arbitration shall receive with the petition and arbitration agreement a list of the members of the arbitration panel in the board of governors region in which a lawyer to the dispute maintains his or her law office.

6.3 Each party may challenge without cause, and thereby disqualify as mediators or arbitrators, not more than two panelists. Each party may also challenge any panelist for cause. Any challenge for cause must be made by written notice to the Administrator, shall include an explanation of why the party believes the party cannot have a fair and impartial hearing before the panelist, and shall be submitted with the required fee. Challenges for cause shall be determined by General Counsel, based on the reasons offered by the challenging party. Upon receipt of the agreement signed by both parties, the Administrator shall select the appropriate number of panelists from the list of unchallenged panelists to hear a particular dispute.

6.4 All mediations shall be mediated by one lawyer panelist selected the board of governors region in which a lawyer to the dispute maintains his or her law office. The Administrator shall give the parties notice of the mediator’s appointment.

6.5 Disputed amounts of less than $10,000 shall be arbitrated by one lawyer panelist. Disputed amounts of $10,000 or more shall be arbitrated by three panelists, including two lawyer arbitrators and one public arbitrator. If three (3) arbitrators are appointed, the Administrator shall appoint one lawyer arbitrator to serve as chairperson. The Administrator shall appoint panelists from the board of governors region in which a lawyer to the dispute maintains his or her law office. The Administrator shall give notice of appointment to the parties of the appointment. Regardless of the amount in controversy, the parties may agree that one lawyer arbitrator hear and decide the dispute. If three arbitrators cannot be appointed in a fee dispute from the arbitration panel of the board of governors region in which a dispute involving $10,000 or more is pending, the dispute shall be arbitrated by a single arbitrator. If, however, any party files a written objection with the Administrator within ten (10) days after receiving notice that a single arbitrator will be appointed under this subsection, two (2) additional arbitrators shall be appointed.

6.6 Any change or addition in appointment of mediators or arbitrators shall be made by the Administrator. When necessary, the Administrator may appoint mediators or arbitrators from a region other than the board of governors region in which a lawyer to the dispute maintains his or her law office.

6.7 Before accepting appointment, a mediator or arbitrator shall disclose to the parties and, if applicable, to the other arbitrators, any known facts that a reasonable person would consider likely to affect the impartiality of the mediator or arbitrator in the proceeding. Mediators and arbitrators have a continuing duty to disclose any such facts learned after appointment. After disclosure of facts required by this rule, the mediator or arbitrator may be appointed or continue to serve only if all parties to the proceeding consent; in the absence of consent by all parties, the Administrator
will appoint a replacement mediator or arbitrator and, if appropriate, extend the time for the hearing.  

6.8 In the absence of consent by all parties, no person appointed as a mediator may thereafter serve as an arbitrator for the same fee dispute.

Section 7 Mediation

7.1 The mediator shall arrange a mutually agreeable date, time and place for the mediation. The mediator shall provide notice of the mediation date, time and place to the parties and to the Administrator not less than 14 days before the mediation, unless the notice requirement is waived by the parties.

7.2 The mediation shall be held within ninety (90) days of appointment of the mediator by the Administrator. Upon request of a party, or upon his or her own determination, the mediator may adjourn, continue or postpone the mediation as the mediator determines necessary.

7.3 Any communications made during the course of mediation are confidential to the extent provided by law. ORS 36.220. Mediations are not public meetings; the mediator has the sole discretion to allow persons who are not parties to the mediation to attend the proceedings.

7.4 If the parties reach a settlement in mediation, the mediator may draft a settlement agreement consistent with RPC 2.4 to memorialize the parties’ agreement.

7.5 At the conclusion of the mediation, the mediator shall notify the Administrator if the fee dispute was resolved. The mediator shall not provide a copy of the settlement agreement to the bar.

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

Section 8 Arbitration Hearing

8.1 The chairperson or sole arbitrator shall determine a convenient time and place for the arbitration hearing to be held. The chairperson or sole arbitrator shall provide written notice of the hearing date, time and place to the parties and to the Administrator not less than 14 days before the hearing. Notice may be provided by regular first class mail, e-mail, or facsimile or by such other method as may reasonably provide the parties with actual notice of the hearing. Appearance at the hearing waives the right to notice.

8.2 The arbitration hearing shall be held within ninety (90) days after appointment of the arbitrator(s) by Administrator, subject to the authority granted in subsection 8.3.

8.3 The arbitrator or chairperson may adjourn the hearing as necessary. Upon request of a party to the arbitration for good cause, or upon his or her own determination, the presiding arbitrator may postpone the hearing from time to time.
8.4 Arbitrators shall have those powers conferred on them by ORS 36.675. The chairperson or the sole arbitrator shall preside at the hearing. The chairperson or the sole arbitrator may receive any evidence relevant to a determination under Rule 5.2, including evidence of the value of the lawyer’s services rendered to the client. He or she shall be the judge of the relevance and materiality of the evidence offered and shall rule on questions of procedure. He or she shall exercise all powers relating to the conduct of the hearing, and conformity to legal rules of evidence shall not be necessary. Arbitrators shall resolve all disputes using their professional judgment concerning the reasonableness of the charges made by the lawyer involved.

8.5 The parties to the arbitration are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing. Any party to an arbitration may be represented at his or her own expense by a lawyer at the hearing or at any stage of the arbitration.

8.6 On request of any party to the arbitration or any arbitrator, the testimony of witnesses shall be given under oath. When so requested, the chairperson or sole arbitrator may administer oaths to witnesses testifying at the hearing.

8.7 Upon request of one party, and with consent of both parties, the panel or sole arbitrator may decide the dispute upon written statements of position and supporting documents submitted by each party, without personal attendance at the arbitration hearing. The chairperson or sole arbitrator may also allow a party to appear by telephone if, in the sole discretion of the chairperson or sole arbitrator, such appearance will not impair the ability of the arbitrator(s) to determine the matter. The party desiring to appear by telephone shall bear the expense thereof.

8.8 If any party to an arbitration who has been notified of the date, time and place of the hearing but fails to appear, the chairperson or sole arbitrator may either postpone the hearing or proceed with the hearing and determine the controversy upon the evidence produced, notwithstanding such failure to appear.

8.9 Any party may have the hearing reported at his or her own expense. In such event, any other party to the arbitration shall be entitled to a copy of the reporter’s transcript of the testimony, at his or her own expense, and by arrangements made directly with the reporter. As used in this subsection, “reporter” may include an electronic reporting mechanism.

8.10 If during the pendency of an arbitration hearing or decision the client files a malpractice suit against the lawyer, the arbitration proceedings shall be either stayed or dismissed, at the agreement of the parties. Unless both parties agree to stay the proceedings within 14 days of the arbitrator’s receipt of a notice of the malpractice suit, the arbitration shall be dismissed.

Section 9 Arbitration Award

9.1 An arbitration award shall be rendered within thirty (30) days after the close of the hearing unless General Counsel, for good cause shown, grants an extension of time.

9.2 The arbitration award shall be made by a majority where heard by three members, or by the sole arbitrator. The award shall be in writing and signed by the members concurring therein or by the sole arbitrator. The award shall state the basis for the panel’s jurisdiction, the nature of the dispute, the amount of the award, if any, the terms of payment, if applicable, and an opinion
regarding the reasons for the award. Awards shall be substantially in the form shown in Appendix A. An award that requires the payment of money shall be accompanied by a separate statement that contains the information required by ORS 18.042 for judgments that include money awards.

9.3 Arbitrator(s) may award interest on the amount awarded as provided in a written agreement between the parties or as provided by law, but shall not award attorney fees or costs incurred in the fee dispute proceeding. An attorney shall not be awarded more than the amount for services billed but unpaid. A client shall not be awarded more than the amount already paid, and may also be relieved from payment of services billed and remaining unpaid.

9.4 The original award shall be forwarded to the Administrator, who shall mail certified copies of the award to each party to the arbitration. The Administrator shall retain the original award, together with the original fee dispute agreement. Additional certified copies of the agreement and award will be provided on request. The OSB file will be retained for six years after the award is rendered; thereafter it may be destroyed without notice to the parties.

9.5 If a majority of the arbitrators cannot agree on an award, they shall so advise the Administrator within 30 days after the hearing. The Administrator shall resubmit the matter, de novo, to a new panel within thirty days.

9.6 The arbitration award shall be binding on both parties, subject to the remedies provided for by ORS 36.615, 36.705 and 36.710. The award may be confirmed and a judgment entered thereon as provided in ORS 36.615, 36.700 and ORS 36.715.

9.7 Upon request of a party and with the approval of General Counsel for good cause, or on General Counsel's own determination, the arbitrator(s) may be directed to modify or correct the award for any of the following reasons:

a. there is an evident mathematical miscalculation or error in the description of persons, things or property in the award;

b. the award is in improper form not affecting the merits of the decision;

c. the arbitration panel or sole arbitrator has not made a final and definite award upon a matter submitted; or

d. to clarify the award.

Section 10 Confidentiality

10.1 The resolution of a fee dispute through the Oregon State Bar Fee Dispute Resolution Program is a private, contract dispute resolution mechanism, and not the transaction of public business.

10.2 Except as provided in paragraph 10.4 below, or as required by law or court order, all electronic and written records and other materials submitted by the parties to General Counsel’s Office, or to the mediators or arbitrators, and any award rendered by the arbitrator(s), shall not be subject to public disclosure, unless all parties to an arbitration agree otherwise. The Oregon State Bar considers all electronic and written records and other materials submitted by the parties to
General Counsel's Office, or to the mediators or arbitrators, to be submitted on the condition that they are kept confidential.

10.3 Mediations and arbitration hearings are closed to the public, unless all parties agree otherwise. Witnesses who will offer testimony on behalf of a party may attend an arbitration hearing, subject to the chairperson's or sole arbitrator's discretion, for good cause shown, to exclude witnesses.

10.4 Notwithstanding paragraphs 10.1, 10.2, and 10.3, lawyer mediators and arbitrators shall inform the Client Assistance Office when they know, based on information obtained during the course of an arbitration proceeding, that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

10.5 Notwithstanding paragraphs 10.1, 10.2, and 10.3, and 10.4, all electronic and written records and other materials submitted to General Counsel's Office or to the mediators or arbitrators during the course of the proceeding, and any award rendered by the arbitrator(s), shall be made available to the Client Assistance Office and/or Disciplinary Counsel for the purpose of reviewing any alleged ethical violation in accordance with BR 2.5 and BR 2.6.

10.6 Notwithstanding paragraphs 10.1, 10.2, 10.3 and 10.4, General Counsel's Office may disclose to the Client Assistance Office or to Disciplinary Counsel, upon the Client Assistance Office's or Disciplinary Counsel's request, whether a dispute resolution proceeding involving a particular lawyer is pending, the current status of the proceeding, and, at the conclusion of an arbitration proceeding, in whose favor the arbitration award was rendered.

10.7 Notwithstanding paragraphs 10.1, 10.2 and 10.3, if any lawyer whose employment was secured through the Oregon State Bar Modest Means Program or Lawyer Referral Program refuses to participate in fee arbitration, the Administrator shall notify the administrator of such program(s).

10.8 Mediators and parties who agree to participate in this program expressly waive the confidentiality provisions of ORS 36.222 to the extent necessary to allow disclosures pursuant to Rule 7.5, 10.4, 10.5 and 10.6.

Section 11 Immunity and Competency to Testify

11.1 Pursuant to ORS 36.660, arbitrators shall be immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity. All other provisions of ORS 36.660 shall apply to arbitrators participating in the Oregon State Bar dispute resolution program.
Appendix A

Oregon State Bar
Fee Arbitration

Petitioner
v.
Respondent

Jurisdiction

Nature of Dispute

Amount of Award

Opinion

Award Summary

The arbitrator(s) find that the total amount of fees and costs that should have been charged in this matter is: $ 

Of which the Client is found to have paid: $ 

For a net amount due of: $ 

Accordingly, the following award is made: $ 

Client shall pay Attorney the sum of: $ 

(or)

Attorney shall refund to Client the sum of: $ 

(or)

Nothing further shall be paid by either attorney or client.

/Signature(s) of Arbitrator(s)
OREGON STATE BAR
Board of Governors Agenda

Meeting Date: July 21, 2017
From: Richard G. Spier, Chair, BOG Fee Mediation Task Force
Re: Report of the Fee Mediation Task Force

Action Recommended

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

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

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

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

2 ORS 36.220 provides:

(1) Except as provided in ORS 36.220 to 36.238:
   (a) Mediation communications are confidential and may not be disclosed to any other person.
   (b) The parties to a mediation may agree in writing that all or part of the mediation communications are not confidential.
(2) Except as provided in ORS 36.220 to 36.238:
   (a) The terms of any mediation agreement are not confidential.
   (b) The parties to a mediation may agree that all or part of the terms of a mediation agreement are confidential.
(3) Statements, memoranda, work products, documents and other materials, otherwise subject to discovery, that were not prepared specifically for use in a mediation, are not confidential.
(4) Any document that, before its use in a mediation, was a public record as defined in ORS 192.410 remains subject to disclosure to the extent provided by ORS 192.410 to 192.505.
(5) Any mediation communication relating to child abuse that is made to a person who is required to report child abuse under the provisions of ORS 419B.010 is not confidential to the extent that the person is required to report the communication under the provisions of ORS 419B.010. Any mediation communication relating to elder abuse that is
2. Once the changes outlined in recommendation 1 are adopted, any references to the reporting requirement in RPC 8.3 should be removed from Oregon Fee Dispute Resolution Rule (Rule) 10.4 and from all other program rules (e.g. Rule 7.5, 10.5, 10.6 and 10.8) and materials addressing program-conducted mediation (program mediation).

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

4. Mediators participating in the program should complete at least a 32-hour integrated mediation course and complete three mediations before being enrolled in the program. Mediators should also agree to be bound by the ethical requirements in section 1.4 of the Chief Justice's order on qualification of mediators for court-connected mediation programs.\(^3\)

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

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\(^3\) https://www.ojd.state.or.us/web/OJDPublications.nsf/Files/05cER001sh.pdf/$File/05cER001sh.pdf.
6. The BOG should further consider whether mediators in the OSB’s program should be required to carry professional liability insurance for mediator malpractice through the PLF (part-time lawyer mediator) or other carrier (full-time lawyer mediator).

**Background Information**

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

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

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

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

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

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

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

This rule, on its face, does not mention mediation, though it refers to “mediators.” To fully implement the
“waiver” language is of additional concern because mediation is based upon the principles of full disclosure, informed consent, and self-determination. These principles are undermined when parties must agree to the “waiver” or not have access to the OSB mediation program.

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

Discussion

Members of the Task Force

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

Meetings of the Task Force

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

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

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

Recommendations of the Task Force

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

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

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

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

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

- The parties in the mediation have a well-established reasonable expectation of confidentiality in mediation.

- The statute-versus-rule conflict presents a potential hazard for all lawyer mediators, who could be vulnerable to accusation of violating the RPCs (e.g., RPC 3.4(c)) and Rule 10.4 while complying with the requirements of ORS 36.220.

- The success of mediation, in large part, depends on the parties' justified expectation of confidentiality, consistent with the policies set out in ORS

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9 RPC 8.3(c) already contains exceptions for SLAC, the PLF, and the PLF loss prevention programs including OAAP. The Task Force believes that the need for confidentiality in any program mediation is similarly weighty in light of the importance confidentiality plays in mediation and in light of the legislative policy statement supporting mediation in other contexts. See ORS 36.100 ("When two or more persons cannot settle a dispute directly between themselves, it is preferable that the disputants be encouraged and assisted to resolve their dispute with the assistance of a trusted and competent third party mediator, whenever possible, rather than the dispute remaining unresolved or resulting in litigation.")
36.220.

- Volunteer mediators should not be compelled to testify and participate in hearings when all other mediators in the State of Oregon are not required to do so.

- Asking the volunteer mediators in the program to have to get involved after the mediation session is an unfair burden.

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

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

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

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

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

\(^{11}\) See Oregon Judicial Dep't Court-Connected Mediator Qualifications Rules § 1.4 (ethical requirements), available at www.ojd.state.or.us/web/OJDPublications.nsf/Files/05cERO01sh.pdf/$File/05cERO01sh.pdf; Oregon Mediation Ass’n, Core Standards of Mediation Practice 2 (rev April 23, 2005), available at www.omediate.org/docs/2005CoreStandardsFinalF.pdf.
to determine the appropriate fee, taking into consideration the quality of the services rendered, while avoiding any mediated resolution of malpractice or ethics issues that are too complex to address in this context.

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

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

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

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

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

13 The Task Force discussed, but is not addressing, the applicability of this language to arbitration because it concluded that the issue went beyond the Task Force's charge. To ensure full implementation of the Task Force's recommendations, the Task Force hopes that the BOG considers whether similar language (with the addition of "findings") should be contained in the fee-arbitration program.
be qualified like mediators in court-connected mediation programs. The Chief Justice has
issued an order for this purpose.

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

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

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

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

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

14 The Task Force believes the BOG’s consideration of this broader issue should follow only after input is
obtained from all appropriate stakeholders including, but not limited to, the OSB ADR Section Executive
Committee or its designee(s).
through the PLF (part-time lawyer mediator) or other carrier (full-time lawyer mediator).

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

The Oregon State Bar Professional Liability Fund provides coverage through its approved coverage plan for those attorneys who conduct mediations as an adjunct to the private practice of law, but it does not cover full-time lawyer mediators. The Task Force discussed that mediators in the OSB's program might want liability insurance coverage, notwithstanding their limited liability under ORS 36.210. This issue is again beyond the scope of the Task Force's charge, but the Task Force suggests that the BOG may wish to consider giving it further study.
April 4, 2018

Vanessa Nordyke  
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Helen Hierschbiel  
Chief Executive Officer of the Oregon State Bar  
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RE: Audit of the Disciplinary System

Dear Ms. Nordyke and Ms. Hierschbiel:

I am writing because I have concerns regarding the disciplinary system. My letter today is strictly solution based. My concerns stem from the disciplinary investigation of Donald Scott Upham. The attached letter from Scott Kveton outlines some of the failures of that investigation.

I am not only concerned that the system failed to prevent Mr. Upham from practicing law, but that other members of the bar are disproportionately reprimanded, creating a crisis of due process. I do not believe there was a breakdown at every level of the Upham investigation, for example it appears that the Client Assistant Office managed the file appropriately, but ultimately there was a breakdown.

I recommend an audit of the system by an independent commission comprised of volunteers appointed by the Board of Governors. The mission of the commission would be to review the handling of numerous matters (including Mr. Upham’s) and recommend solutions to ensure due process, oversight and transparency. Recommendations by the commission can be put to a vote at the House of Delegates annual meeting.
I suggest including volunteers from diverse practice areas. Because the commission would consist of volunteers, this would come at no cost to the Oregon State Bar. I know many attorneys that feel passionate about volunteering for such a commission to improve the system. As a member of the House of Delegates and someone familiar with the issues, I would gladly volunteer my time.

Recommendations of the commission will depend on the issues identified. However, for example, potential recommendations/objectives that could be entertained by the commission are as follows:

- Implementation of timelines and practice management tools within the bar, similar to what is provided to practicing attorneys by the Professional Liability Fund.
- Better data collection on discipline recommendations, available to the public to ensure proportional treatment.
- Define good cause and the ability to grant extensions.
- Explore rules on retaliation.
- Allow the complainant and the attorney a short opportunity to provide feedback on the opinion from the disciplinary counsel before it is submitted to the State Professional Responsibility Board (“SPRB”). This suggestion promotes accountability of the analysis provided to the SPRB.
- Oversight on the disciplinary counsel’s work product.
- The weight given to the identity of the complainant.
- Improve transparency.
- Create a system to prioritize complaints.

The only way to prevent further breakdowns in the system or significant disparity is to identify the issues and offer a solution.

The Board of Governors meets on April 20, 2018. I request this issue be placed on the agenda and that the selection process for volunteers can proceed after a commission has been approved.

I would be happy to answer any questions that the Board of Governors may have regarding the need for a commission or how the commission would be implemented. However, I would ask that this issue be placed on the agenda for April 20, 2018. I hope to have your support on this important issue.

Very truly yours,

Sarah Tuthill-Kveton

STK
cc: Chris Costantino, Chair of the Policy and Governance Committee and President Elect
April 4, 2018

Helen Hierschbiel  
Chief Executive Officer of the Oregon State Bar  
16037 SW Upper Boones Ferry Road  
Tigard, Oregon 97224  
hhierschbiel@osbar.org

Re: Donald S. Upham, Bar No. 722705

Dear Ms. Hierschbiel:

I am writing to provide feedback on the outcome of the five formal bar complaints I filed. This feedback is needed because the disciplinary system was created to prevent attorneys like Donald Scott Upham (“Upham”) from practicing law, and the system failed. It is the largest open secret that Upham should not be practicing law. Members of the community and the bar were stunned when the complaints I filed were dismissed. Unfortunately, the opinion issued from the Assistant Disciplinary Counsel simply ignored my complaints entirely or the analysis was ill-reasoned, at best.

I have no information as to whether the leadership of the Oregon State Bar has been alerted to all the issues with the Upham opinion. Therefore, the purpose of my feedback is to shed light on how this conclusion was reached, to inform the leadership at the bar, its members and the public. Moving forward, knowledge of this matter cannot be denied.

The recent publicity surrounding Upham’s representation of criminal defendant Dylan Sullivan highlights why it is so important to have an effective and consistent disciplinary system. I warned the bar in September of 2017, including the leadership at the bar, that Upham’s actions could impact Mr. Sullivan. Because of the issues in the Sullivan case, this was the appropriate time to write to the bar.

As you know, I filed no less than five formal bar complaints against Upham with 44 supporting exhibits and over 1000 pages of materials. My complaints were likely the most comprehensive bar complaints ever filed. I supported each allegation with a citation to a motion, a deposition transcript or email, so the bar did not simply need to take my word for it, but could review the objective evidence. Upham provided no formal response. The evidence I presented was uncontroverted.

So, why is Upham still practicing law?

Here are a few examples of where the bar had significant errors in logic. There are too many to address, in what has become an already long letter, so I will give a few examples.
1. The bar ignored the competency issue in its entirety.

Upham’s ability to competently practice law has always been the largest issue. Significant complaints against Upham were levied under RPC 1.1. That rule requires competency of an attorney. Under the umbrella of competency, Upham violated other rules, for example taking positions without a basis in law or fact, failing to commence lawsuits within the statute of limitations, committing crimes, and exposing his clients to far greater repercussions based on his actions. Ultimately, these issues all circle back to Upham’s lack of competency. Given the emphasis of competency in all the complaints, I was shocked to learn that the bar entirely failed to address the repeated violations of Rule 1.1. Rule 1.1 was absent from the section, “Rules Implicated”.

In all but one of my formal complaints filed, Upham was alleged to have violated Rule 1.1. In my first complaint, the rule was mentioned regarding 12 actions by Upham. In complaint number two, Rule 1.1 was mentioned regarding Upham’s behavior on three separate occasions. In complaint number four, Rule 1.1 was not directly cited, but was mentioned, for example: “[t]his is a waste at the hands of her incompetent counsel.” In complaint number five, Rule 1.1 was mentioned regarding four separate actions by Upham. Therefore, in just the formal complaints, the rule reference regarding no less than 20 separate actions by Upham. The OSB ignored all of it.

Upham’s competency was not just put at issue in the formal complaints, but in correspondence I sent to the bar, too numerous to count. For example, in a letter to the bar on July 15, 2016, I wrote:

Several of the allegations in my complaint relate to Upham’s incompetence. Upham’s response to the bar, where his arguments are largely in marker, could not better demonstrate that Upham does not have the capacity to practice law.

Upham’s response to the bar, which was a bunch of irrelevant documents, and incomplete sentences written in Sharpie (literally marker) seemingly should have raised red flags, but these complaints regarding competency were ignored.

I was not the first to bring up competency concerns, nor will I be the last so long as Upham continues to practice. In Roger Hanlon’s complaint from October of 2013, competency and the ability to apply the law, were Mr. Hanlon’s largest complaints. In Upham’s recent representation of Mr. Sullivan, the biggest concern with that representation was competency, resulting in a plethora of arguments without a basis in fact or law. I shared these concerns with the bar six months prior to Upham’s courtroom behavior on March 21, 2018. The distress Upham put his own client through and distress/costs forced on Deschutes County based on his incompetent representation could have and should have been avoided. See below.
Of the complaints levied against Mr. Upham, his inability to competently practice law is at the top of the list. It was the clear cause of his other violations. The OSB ignored the allegations of incompetence.

2. The bar ignored the repeated contact with a represented party.

Rule 4.2 prevents an attorney from contacting a represented party. If a person is represented, they can only be contacted through their attorney. I had been represented by a team of attorneys since January of 2014. In fact, on July 13, 2015, my attorney sent Upham the following correspondence:

But let me be clear—crystal clear—about one thing. **Do not ever directly or indirectly contact my client again for any purpose.** On July 1, 2015, you attempted to
Despite the “crystal clear” instructions that demonstrate this had been a problem for Upham in the past, Upham directly contacted me on July 31, 2016, resulting in bar complaint number three. In the disciplinary counsel’s opinion, the bar implausibly argued that Upham must not have known that I was represented, therefore, they did not find Upham in violation of RPC 4.2. Although, this is not a well-reasoned analysis of the facts, this finding is not as ridiculous as what was to follow.

After I filed bar complaint number three, Upham did the very same thing again and contacted me on September 5, 2016, just over a month later. This resulted in complaint number four. I wrote to the bar the following: “If there was any question that I was a represented party on July 31, 2016 (and there is not any question), those questions were definitively put to rest when I filed a bar complaint for contact with a represented party.” Despite my bar complaint alleging Upham had improperly contacted me, just over a month later, he did it again. This could not be a more blatant violation of RPC 4.2. Despite this blatant violation, the bar completely ignored this allegation in its entirety: 100% ignored, no analysis, no mention. There is a distinct pattern here.

I even expressed that Upham’s increased desire to violate the rules of ethics to contact me directly, combined with Upham’s mental instability, now created a physical safety concern. In fact, I initiated a complaint with the Washington County Sheriff’s Department to document the continued unwanted contact, such that if Upham showed up at my house, I could request Upham’s arrest. With no help from the bar, Upham is now civilly prohibited from contacting me and my family. That is telling.1

In recent events, like the shooting in Parkland Florida, various agencies were warned about the shooters likelihood for violence. Recently, an Oregon attorney was arrested after allegedly firing shots into another attorney’s office. Based on that reporting, the bar was on notice because that attorney already had a pending complaint, unresolved by the bar. Here, I made repeated complaints about Upham’s obsession on directly contacting me and his temper. On September 5, 2016, I wrote to the bar: “I believe his behavior/obsession is only escalating, particularly with his determination to contact me directly, and he will push the boundaries of physical safety. He might be an old man, but I am no match to a mentally unstable man brandishing a weapon.” I am concerned that the bar will be the next agency that fails to protect members of the public. By allowing unstable attorneys to remain in a position that requires constant contact with others in what is already an adversarial system, it creates a potentially dangerous situation.

1 Part of my agreement with Upham in the lawsuits is that he would not contact me. The agreement reached in these cases in general is interesting. Pursuant to the resolution between myself and Upham’s client in October of 2015, of the nearly $5 million demanded, I was required to pay $15,000 immediately (according to the woman these were costs/fees incurred) and $25,000 by September of 2017. In exchange, I received a mutual no contact agreement with the woman, something I had been requesting since 2010. Because of Upham’s incompetence in filing additional lawsuits, Upham, was required to pay the $25,000 due in September of 2017 to his own client. This is not a typical arrangement and the bar knew that this occurred. With respect to the five lawsuits Upham’s client filed against me and her demand for $5 million, Upham paid more on that than I did.
In sum, with respect to the violations in bar complaint number four, the bar could not have dismissed the complaints, if it was forced to provide an analysis on complaint number four and the violation of RPC 4.2 contained within. Therefore, it was simply ignored.

3. No basis in law or fact.

Because Upham is incompetent, he often takes positions without a basis in law or fact, which are violations of RPC 3.1. I have no desire to rehash all the facts of the many cases that led to the complaints, those are in the complaints themselves, but to understand the missteps of the bar, some portions of those facts must be discussed.

Upham filed a lawsuit on behalf of his client and alleged dissemination of sexually explicit materials. At the onset, there were two things wrong with that lawsuit. First the materials were not disseminated and second, the woman in the photo alleged to be “disseminated” was fully clothed. The statute logically requires some degree of nudity for the claim dissemination of sexually explicit materials.

When Upham’s client was asked about this photo/email in the her deposition, Upham instructed his client not to answer, alleging that even showing her that email/photo, the basis for her lawsuit, during her deposition, was dissemination. Because questions about the actual claims in the lawsuit could not be asked, the deposition was pointless and required suspension and court intervention. If attorneys could instruct their clients not to answer questions about the actual lawsuit filed, in Oregon we would have no use for depositions. There would be no point to that discovery method. I logically argued that Upham’s position in the deposition had no basis in law or fact and therefore violated RPC 3.1 and RPC 1.1 (competency).

The disciplinary counsel recommended dismissal and explained, “[t]hat Kveton disagreed with Upham’s objections on the record during the deposition does not mean that it lacked any legal or factual basis. Disagreement with opposing counsel is inherent in litigation matters. Kveton’s allegation did not appear to implicate the RPCs.” This logic is absurdly flawed. If a plaintiff could refuse to answer questions about the lawsuit they filed, there would be no depositions. Depositions are one of the basic tools of discovery in civil lawsuits. I know of no State or Federal law in civil court that would allow a plaintiff, in a case like this, not to answer questions about the basis for their own lawsuit. This is not a “disagreement”, but a position that contradicts the fundamental and universal principal of civil procedure and the American civil judicial system. A first-year law student would understand why Upham was wrong, or even someone searching Wikipedia for acceptable conduct during depositions. As explained above, some of the bar’s positions were ill-reasoned and other allegations were simply ignored, this analysis falls into the category of ill-reasoned. The following actions on this same topic fall into the category of being completely ignored.

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2 In simply reading the complaint it is clear that there is no legally valid claim for disseminated based on the allegations within.

3 Depositions are expensive. Interfering with the taking of a deposition causes real financial harm, including paying additional attorney fees to get a ruling by the court on opposing counsel’s unreasonable position and delays the case. Upham’s conduct is not some flippant comment in an email, but this type of conduct creates real harm.
Upham actually sent the OSB the photo and email that halted the deposition. This is the email/photo that was the entire basis for a dissemination lawsuit where Upham claimed that even showing the client the picture of herself fully clothed, during her deposition was dissemination of sexually explicit materials. But, Upham sent it, or one could say disseminated it, to the bar. This is proof that Upham did not even subjectively believe that the photo was explicit or providing it was dissemination of sexually explicit materials.

Upham sending this photo/email to the bar was a twofold admission. First, it is an admission that his objections during the deposition had no basis in law or fact. Second, it is an admission that the entire lawsuit around this material lacked a basis in law or fact and, Upham knew it lacked a basis in law and fact. I identified this as an issue in follow up correspondence with the bar. Again, allegations the bar ignored in their entirety.

4. *The opinion explains that one act is not sufficient for punishment.*

The bar said on multiple occasions that “one act” does not warrant punishment. I agree, one act or one mistake may not warrant punishment, although members of the bar are often punished for one act. I have never alleged that Upham committed one bad act. Upham’s repeated actions create a pattern of misconduct. That said, how often in one opinion can separate actions be categorized by the bar as one bad act before it becomes multiple? The bar’s analysis is flawed.

5. *Upham failed to respond to the bar and the bar cited this as a lack of evidence.*

It was my understanding that as a member of the bar, when a letter is issued asking for an attorney’s account or explanation of conduct, that an attorney must respond, or the attorney will be disciplined. Apparently, that is not the case.

Upham never formally responded to the allegations, despite multiple requests by the bar to provide his account. He did not respond because he had no explanation. When specific questions were posed to Upham he refused to answer at times, others he indicated he did not understand the questions and if he provided anything in response it only solidified concerns. On one occasion, Upham refused to answer the bar regarding whether he personally served a subpoena in the Sheraton matter. He claimed this information was “privileged.” Privilege generally relates to communications, not actions like serving a subpoena. Further, attorney client privilege does not apply to persons that are not the attorney’s client. Upham has been a member of the bar for over 40 years. Upham’s explanation of why he could not answer the bar should have been another example of his incompetence. Wikipedia could provide better legal analysis than Upham.

Upham also first refused to answer the bar, stating that he was bound to silence based on a confidentiality clause in an agreement with me. Upham’s representation delayed the process for six months. That agreement was produced to the Oregon State Bar because Upham’s

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4 It is important to note that if Upham or his client actually believed this material is explicit, by submitting it to the bar, Upham made that email/photo one of public record.

5 [https://en.wikipedia.org/wiki/Attorney%E2%80%93client_privilege](https://en.wikipedia.org/wiki/Attorney%E2%80%93client_privilege)
representation to the bar was false. Nothing restricted Upham’s ability to discuss the five lawsuits, the underlying facts or his conduct. Even after it was pointed out to the bar that Upham lied to delay his response, he was not reprimanded, he was allowed additional improper extensions of time, and the bar ignored this in its final opinion. It takes a blatant disregard for all authority and reasonableness for an attorney to blatantly lie to the Oregon State Bar, especially when there are documents that objectively prove that lie. But, the bar took no issue with this in its formal opinion. Alternatively, if Upham was not lying and truly believed the agreement prevented him from discussing the facts of the case, that argument had competency implications about his ability to interpret the plain language in a document. Yet again, 100% ignored by the bar.

Upham’s refusal to respond worked out for him. The bar cited “lack of evidence” in its opinion on multiple occasions and this reason was reported on by local media as one of the reasons the complaints were not pursued. This “lack of evidence” excuse however, is without merit. If the bar lacked evidence, the disciplinary counsel had the power to conduct a further investigation, but evidence was not lacking. My first bar complaint alone was supported by no less than 28 exhibits, totaling 965 pages. For all five formal complaints, 44 Exhibits were provided. Each allegation against Upham was supported with an exhibit and page number indicating where the objective evidence was located that supported the claim. The bar would not need to rely just on the written allegations, but could verify them in documents. The allegations were uncontroverted.

Upham’s case provides a bad example for other attorneys. That example is there is no need to respond to the bar or to provide truthful information. If any attorney is later reprimanded for this type of conduct, they can point to this case as an example of why they should not be reprimanded. This is bad precedent.

6. The Disciplinary Counsel’s opinion on Upham’s retaliation lawsuit was ill-reasoned and ignored the issues.

Attorneys are prohibited from suing someone in retaliation for a good faith bar complaint. Upham threatened to sue me on multiple occasions and did. He also threatened Natalie Hedman, an attorney in the Kempster matter, for her response to Upham’s bar complaint against her where she expressed concerns with Upham’s ability to competently practice. The lawsuit Upham filed against me was dismissed and I was entitled to attorney fees. The analysis on this issue from the bar was both short and illogical.

Kveton alleged that Upham filed a lawsuit against him in retaliation for Kveton’s complaints to the Bar about Upham’s conduct and that suit was later dismissed. The fact that a claim or lawsuit has been dismissed does not lead to the conclusion that an attorney lacks any plausible theory for his claim. In re Marandas, 351 Or 521, 533-540 (2012). It did not appear that there was sufficient evidence to warrant additional investigation of this issue.
The writer completely missed the point and combined two separate issues that each required an independent analysis. The writer understands that the lawsuit was filed in retaliation for the bar complaint but does not perform an analysis regarding the fact that attorneys are not allowed to retaliate for bar complaints. Next, she alleges that because the case was dismissed, it does not mean the lawsuit was frivolous. Although, that is an accurate statement of law, it is not supported by any analysis of the facts in this case.

In bar complaint four I warned Upham that his claims would be dismissed because his claim lacked merit, I had immunity under ORS 9.537, and the case would also be dismissed under ORS 31.150. I explained the exact theory of why I would be successful and how Upham should know that he would get nailed because this happened to him in a separate lawsuit in 2007. I even wrote in the complaint, “[w]hen these lawsuits against me are dismissed, the only remaining question will be, what accounts Mr. Upham and Ms. McCoy would like to use to pay my attorney fees”. Upham proceeded full force ahead, I won, and I was entitled to fees. If Upham’s claim did in fact have merit, how was it so easy to predict exactly what would occur, how it would occur, that he would encounter the same issue that he did in the previous lawsuit, and that I would be collecting fees based on the statute that allowed for dismissal? I’m either able to predict the future, or it is objectively true that the claim had no basis in law or fact.

It is easy to see why the State Professional Responsibility Board agreed with the Assistant Disciplinary Counsel, when it does not appear that there was an understanding of the issues, no analysis was presented and the recommendation was simply dismissal.

7. Conclusion

Members of the public and the legal community have been stunned by the bar’s dismissal of my complaints against Upham. There is a general sense of, “how did this happen?” In examining the Assistant Disciplinary Counsel’s opinion it becomes clear how the bar reached this recommendation. The bar reached its recommendation of dismissal of the claims against Upham by ill-reasoned analysis or by simply ignoring allegations and the evidence presented.

It is the bar’s turn to act. As you know, the bar has the authority to open an independent investigation, especially in light of the most recent publicity surrounding the Sullivan matter. Additionally, the issues in the Kempster case and the award of $10,000 against Upham’s client for attorney fees in that matter also remain available for prosecution. Given the bar’s stamp of approval on Upham’s retaliation efforts, it seems prudent that this time, the bar takes initiative.

Sincerely,

Scott Kveton

CC: Linn Davis
Stacy Owen

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The Assistant Disciplinary Counsel, which is one person handling the review and issuing an opinion.
OREGON STATE BAR
Board of Governors Agenda

Meeting Date: April 20, 2018
From: Helen M. Hierschbiel, Chief Executive Officer
Re: Statement on White Nationalism and Normalization of Violence

Issue

Discuss feedback from the BOG’s Statement on White Nationalism and Normalization of Violence and determine what action to take in response.

Decisions

1. Whether to refund bar fees for publication of the statement(s).
2. Whether to publish a new statement that supports, withdraws, or clarifies the original statement.

Discussion

The Board of Governors first discussed whether to issue a statement on white nationalism and the normalization of violence at its November 2017 meeting. The Washington State Bar Association had issued such a statement in September 2017 (at the urging of its Civil Rights Section), which was shared with the BOG as a reference point for discussion. The BOG expressed support of issuing a similar statement. A draft statement was provided to the BOG at its January 5, 2018 special meeting for further discussion. The BOG expressed support of the statement as written, but agreed that it should be sent to the Advisory Committee on Diversity and Inclusion for approval prior to adoption. The ACDI approved the statement without changes at its January 22, 2018 meeting. Because no changes were made to the draft considered by the BOG at its January 5 meeting, the statement was included on the BOG’s February 23 consent agenda. No one asked to remove the item from the consent agenda, and all items on the consent agenda were approved unanimously.

The statement was distributed to the membership in the BOG Update email in conjunction with a joint statement from all of Oregon’s specialty bar associations. It was also posted on the Oregon State Bar website and published in the April 2018 Bar Bulletin. Since distribution of the statement, feedback has been overwhelmingly positive. A handful of members, however, have expressed opposition to the statement because of concerns that it is political and ideological. All emails we have received in response are attached hereto.

Two responses that oppose the OSB Statement bear particular attention: one contends that publication of the OSB Statement in conjunction with the Specialty Bar Statement violates Keller v. State Bar of California (Crowe emails); the other opposes the use of bar resources to advance what he describes as a political agenda (Lindsay email).
When a bar member objects to the use of bar fees for activities that he or she considers in support or opposition of political or ideological causes, the Board must review the member’s concerns to determine whether it agrees with the objections. OSB Bylaw 12.6 provides that:

**Section 12.6 Objections to Use of Bar Dues**

**Subsection 12.600 Submission**

A member of the Bar who objects to the use of any portion of the member’s bar dues for activities he or she considers promotes or opposes political or ideological causes may request the Board to review the member’s concerns to determine if the Board agrees with the member’s objections. Member objections must be in writing and filed with the Chief Executive Officer of the Bar. The Board will review each written objection received by the Chief Executive Officer at its next scheduled board meeting following receipt of the objection. The Board will respond through the Chief Executive Officer in writing to each objection. The Board’s response will include an explanation of the Board’s reasoning in agreeing or disagreeing with each objection.

**Subsection 12.601 Refund**

If the Board agrees with the member’s objection, it will immediately refund the portion of the member’s dues that are attributable to the activity, with interest paid on that sum of money from the date that the member’s fees were received to the date of the Bar’s refund. The statutory rate of interest will be used. If the Board disagrees with the member’s objection, it will immediately offer the member the opportunity to submit the matter to binding arbitration between the Bar and the objecting member. The Chief Executive Officer and the member must sign an arbitration agreement approved as to form by the Board.

The primary concern with the statement seems to be the method of publication. Published as part of the BOG update and on the OSB website, it received no response. Placed next to the statement from the specialty bars in the OSB Bulletin, however, it raised concerns. The side-by-side publication, using common design elements and a single date for the two statements, suggests to some that they are tied to one another. They are not. The specialty bar statement was developed wholly separate from the OSB statement. Although written in response to and in support of the OSB statement, the specialty bar statement was neither vetted for compliance with Keller nor submitted to the Board of Governors for approval in advance of its publication. Moreover, the Board of Governors did not even consider—let alone approve—the publication of either statement in the Bulletin.

It’s worth noting the goals of the OSB Bulletin, which are to provide information that benefits members in their practices and to increase member awareness of bar priorities and services. Each issue of the Bulletin includes columns on legal ethics, law practice management and legal writing. In addition, the magazine balances features on substantive law and legal trends with features, profiles and opinion pieces that touch on OSB priority issues.

**Attachments:**
- WSBA Statement on White Nationalism and the Normalization of Violence
- OSB Statement on White Nationalism and the Normalization of Violence
- Specialty Bar Statement on White Nationalism and the Normalization of Violence
- Member responses to the statements
Bulletin Editor:

I am disappointed that BOG has chosen to promote a false narrative. Is it their intent to scare the membership? Why did BOG release their February 23rd letter to the membership without backing up their allegations. I ask each BOG member to provide to the membership a list of actual DOCUMENTED incidents IN OREGON upon which they based their "Statement on White Nationalism and Normalization of Violence." Where, oh where, is the increased violence? In fact, 99% of political violence in Oregon is by Antifa, & others who are unhappy with the last election, who have had some success in preventing their fellow Americans from expressing their First Amendment Rights. [Antifa uses acid, baseball bats, brass knuckles, balloons full of urine, eggs, screaming & threats to keep Oregonians from speaking. Look what happened at Lewis & Clark Law School this March 5th.]

As a blog writer and engaged American, I have been researching nationwide for over a year to determine if, as the race-baiters claim, there really has been a recent increase in DOCUMENTED incidents of hate crimes involving "whites" attacking "people of color." I am especially sensitive about this possibility since my husband & I have two sets of godkids, all "of color." Early last year one expressed concerns to me, so I have been on the lookout for this, both in my personal life and in my research.

"We equally condemn the proliferation of speech that incites such violence." BOG appears to be threatening members who want to exercise their First Amendment Rights. I have seen NO such speech by Bar members, unless you are referring to the members on "the left" who refuse to accept a Constitutional election. AS ANY OTHER AMERICAN, our membership has as much right to express themselves, in any manner they choose, absent "crying fire in a crowded theater."

The Southern Poverty Law Center claims that there has been an increase in "whites" committing "hate crimes" since May 2014. A closer look at the mentally ill men they were claiming to be "white supremacists" one sees that they couldn't find enough "whites" so they claimed a number of Asian-Americans committed their crimes BECAUSE THEY WERE WHITE SUPREMACISTS, when in fact they were just extremely mentally ill. They also included white on white crimes in this group of "racially motivated" crimes. Say what? I am SO pleased that the number of real hate crimes is so low that SPLC had to make up crimes to keep their donations flowing in.

http://www.cscmediagroupus.org/diane-gruber/splc-white-supremacists
The FBI reports there are no more than 20,000 "white supremacists" (WS) in America today. The BOG letter talks about "white nationalism" (WN) but does BOG even know what that means? Does BOG know the difference between WN & WS? Carol M. Swain, Ph.D, who happens to be black, coined this term during her research in 2001 (& her 2003 book) when she discovered that there was an intellectual, non-violent, movement among some (white) Americans who felt aggrieved because Affirmative Action had blocked them from pursuing the educations & jobs they wanted. In the following article Dr. Swain explains the difference between WS & WN:  
http://www.dailypresser.com/educated-blacks-stay-put-on-dem-plantation/

BOG claims a "current climate of violence, extremism and exclusion gravely threatens . . . ." Where, who, when, how, what? Please provide DOCUMENTED evidence of this happening in Oregon. PROVE to the membership that there has been an INCREASE in "hate crimes" by "whites" against "non-whites," since the election. If BOG can, I will publicly eat humble pie. If you can't, I suggest you withdraw your inflammatory and racist statement, and apologize to the membership.

Diane

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Bulletin Editor:

I am disappointed BOG has chosen to promote a false narrative. Is it their intent to scare or intimidate the membership? Why did BOG release their February 23rd letter without backing up their allegations? BOG needs to provide the membership a list of DOCUMENTED incidents IN OREGON upon which BOG based its "Statement on White Nationalism and Normalization of Violence." A mentally ill man, who claims to be "from a large Vietnamese family," stabbing 3 (white) men on a MAX train does not create a trend of "White Nationalism Violence."

As a blog writer, I have been researching to determine if there has been a recent increase in incidents of "white" on "non-white" hate crimes. I am sensitive about this possibility since my husband & I have two sets of godkids, all "of color." Last year our godson expressed concerns to me, so I have been on the lookout for this.

FBI reports there are no more than 20,000 "white supremacists" in America today. The BOG letter talks about "white nationalism" but does BOG even know what that means? Carol M. Swain, Ph.D, who happens to be black, coined this term during her research in 2001 when she identified an intellectual, non-violent, movement among some (white) Americans who felt aggrieved because Affirmative Action had blocked them from pursuing the educations & jobs they wanted.

"We equally condemn the proliferation of speech that incites such violence." BOG appears to be threatening Bar members from exercising their First Amendment Rights. I have seen NO such speech by Bar members, unless you are referring to the members who refuse to accept a Constitutional election. Our membership has every right to express themselves absent "crying fire in a crowded theater."

If BOG can prove their allegations, I will publicly eat humble pie. If they can't, I suggest they withdraw their inflammatory & racist statement, and apologize to the membership.

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Dear Ms. Gruber,

I received your email of April 4, below. Vanessa Nordyke, Chris Costantino, Liani Reeves and Jonathan Patterson—four of the six signatories to the statement—also received an identical email from you, which we discussed yesterday. Jonathan Puente, the OSB Director of Diversity & Inclusion, did not receive your email, although he also signed the statement. He was included in our discussion, as we respect him for his leadership and expertise in matters relating to diversity, equity and inclusion. We all agreed that I—as CEO for the Oregon State Bar—would respond to you.

We stand by the statement as written. The Board of Governors approved the statement at its meeting on February 23, 2018. We will, however, bring your email to the Board’s attention at its meeting on April 20.

As for your specific questions, I will defer to Mr. Puente, and invite you to contact him directly. He is copied on this email.

Best regards,

Helen Hierschbiel
Chief Executive Officer
503-431-6361
HHierschbiel@osbar.org

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Please note: Your email communication may be subject to public disclosure. Written communications to or from the Oregon State Bar are public records that, with limited exceptions, must be made available to anyone upon request in accordance with Oregon’s public records laws.
Ms. Hierschbiel:

I read with dismay your February 23rd letter to the membership. As a blog writer and engaged American, I have been researching nationwide for over a year to determine if, as some claim, there really has been a recent increase in documented incidents of hate crimes involving "whites" attacking "people of color." I am especially sensitive about this possibility since my husband & I have two sets of godkids, all "of color."

Early last year one of our godsons expressed concerns to me, so I have been on the lookout for this, both in my personal life and in my research. In December 2016 a Canadian woman who came in to discuss divorce expressed concerns that Canadians in Portland were being "targeted." This seemed a little silly as the great majority of Canadians are "white." Indeed, I spent an hour with her and could not tell from her appearance or speech that she was Canadian. I looked into her concerns and could find no such incidents.

Please provide me with documented incidents in Oregon upon which you based your conclusions. The great majority of political violence in Oregon is by Antifa & others who are unhappy with the last election, and they have had some success in preventing their fellow Americans from expressing their First Amendment Rights. [Antifa uses acid, baseball bats, brass knuckles, balloons full of urine, eggs, screaming & threats to keep Oregonians from speaking. The riot at Lewis & Clark Law School this March 5th is just one example.]

The FBI reports there are no more than 20,000 "white supremacists" in America today, and a very, very small fraction of "white supremacists" are violent. How many reside in Oregon? Also, what is your definition of "white nationalism" and how does it differ from "white supremacism?" How many "white nationalists" reside in Oregon? You claim a "current climate of violence, extremism and exclusion gravely threatens . . . ." Where, who, when, how, what? Please provide documented evidence of this happening in Oregon.

Thank you,

Diane

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WWW.ExperiencedOregonAttorney.com

However, the OSB position that “white nationalism” is to blame for this climate is ludicrous. The “normalization of violence,” as you call it, comes almost entirely from the left. From ANTIFA and the like, who encourage their followers to “punch a nazi,” and include as “nazis” anyone who voted for or supports President Trump, and anyone who disagrees with leftist “social justice warrior” orthodoxy.

Today, when police lawfully use force to enforce the rule of law, they are called “racist” and riots ensue. When a “conservative” scholar is invited to speak at a university, infantile students demand their “safe spaces” and faculty members insist that non-conforming (i.e., actually diverse) views be excluded from the academy, and again, riots ensue. When some mentally ill individual unlawfully uses a gun to commit a horrific crime, the left insists that law abiding citizens surrender their rights; rights enshrined in our Constitution and protected by rule of law.

Yes, the attack that occurred on the MAX, was a violent, racist crime. But it was committed by a single individual, one so deranged that he was (before the MAX attack) shunned by those you label “white nationalists” (as reported by the local Portland press).

No, it is not “white nationalists” who are a threat to rule of law and our Constitutional rights. Actual white nationalists are few in number, and are denounced and repudiated by the right. Rather, the threat comes from the “identity politics” that is now the core of “progressivism,” and imposed as a mandatory ideology by universities, mass media, the Oregon State Bar, etc., under penalty of being labeled a “nazi” or “white nationalist” for dissenting.

As a mandatory professional organization, the Bar should be politically neutral. Sadly, it is not. It is just another “social justice warrior” demanding that its members “toe the line” (see Frost, Oregon State Bar Bulletin, April 2018, page 13). The line being toed is the standard victimhood narrative, and the result is the balkanization of the Bar into “Specialty Bar Associations” (see Oregon State Bar Bulletin, April 2018, page 43).

Your policy requires letters to the editor be signed. I expect by signing this one I will be deemed a “nazi”, perhaps even be accused of a violation of RPC 8.4(a)(7) (but perhaps saved by 8.4(c)). In any case, I’m pretty sure, as the saying goes, I’ll “never work in this town again”. So it would probably be better if you didn’t publish my name.

Sent with ProtonMail Secure Email.
Helen,

Although I support the underlying message of the Statement (fair and equitable administration/equal justice for all), you and the other signers went far beyond that by making it biased and political. You and the other signers have the right to educate and make statements, but you should do so by presenting impartial information and unbiased statements. You did not do so. Indeed, the statement was meticulously crafted to create a particular political narrative. I’m no Trump supporter, nor did I vote for him. But I’m incredibly offended that my bar dues were spent to print a such biased and political statement.

Shawn M. Lindsay
Colleagues,

I would suggest that each of you as members of the Military and Veterans Law Section consider the Open Letter published, on behalf of the Oregon State Bar, in this month’s Bar Bulletin titled “White Nationalism and the Normalization of Violence.” Along with the BOG President and President-elect and the OSB CEO, several “Specialty Bar Associations” signed on to this document. I cannot imagine a stronger imprimatur of the Oregon Judicial Department unless the Oregon Supreme Court published this directly.

This Open Letter implicates two issues:

First: Was this an appropriate pronouncement from the executive agent of the Oregon Supreme Court? This consideration I will leave to each MVLS member and to what I imagine will be a robust public debate.

Second: In light of this Open Letter, is it appropriate that our Section has been directed on numerous occasions by agents of the selfsame Bar Association to curtail our activities on behalf of Oregon’s Veterans, Servicemembers, and their Families because of OSB’s status as a “Unitary Bar?” We have been repeatedly admonished that Oregon’s status as a “Unitary Bar” requires a level of circumspection from our Section which has not made achieving our mission any easier, so you can imagine my chagrin when a manifesto signed by Bar Leadership and printed in our in-house Oregon State Bar Bulletin appears to have been held to a different, lower standard. At the very least, equal treatment under the law would seem to have been violated by this letter, a factor which one would imagine would have been considered by our State Bar Association leaders before publishing.

Because I am sending this from my Metropolitan Public Defender email, I want to be perfectly clear that I take no position on the merits or demerits of the sentiments espoused in the Open Letter, except that I am certain that the rhetoric espoused falls far outside of the OSB’s lane and absolutely does not reflect the opinions of at least one member of the Bar Association to which I must pay dues as a condition of being able to fight for my indigent clients and for which the signatories have taken the liberty of speaking. “Tolerance from thee, but not from me,” is a poor motto to hear from officers of a public corporation which is part of the Oregon Judicial Department.

Very respectfully,
/z/
Daniel Zene Crowe
Veteran’s Advocate | Metropolitan Public Defender Veterans’ Justice Project
630 SW 5th Ave, Suite 500
Portland, OR 97204
dzcrowe@mpdlaw.com
phone: (503) 225-9100
fax (503) 295-0316
Dear Editor,

An essay on "white nationalism and the normalization of violence" from some of the OSBA management and some of the BOG, plus a supporting statement from "specialty" bar associations, is hidden on pages 42 to 43, all surrounded on those pages by a PC green stripe, to show that the groups support each other.

It is not right for the bar association to take sides in political issues. The minority bar letter blatantly slams the Trump administration, and the OSBA supports their statement and politically asserts as if it were a fact that there is a "resurgence of white nationalism and normalization of violence and racism" here in the USA. Not just the same old problems, but a resurgence and normalization of violence and racism. Heavy charges. The OSB forgets the violent attacks on Seattle and the WTO from a few years ago, undoubtedly the work primarily of leftists. They probably forget the official doctrine of the Communist party to take over government by force. They probably forget the violent riots against President Trump in Portland, the day after the election, and there are constant left wing riots in PDX now. Middlebury College, too.

The bar association is an offshoot of the Supreme court, and as a government agency as well as an associate of the court, it has a duty to be neutral and detached to all. The court must be neutral and detached because equal justice and equal protection mean the court must decide cases without regard to the race or irrelevant qualities of the parties. The American way. The bar is not the
court but it does not have the right to use the taxpayers' money to promote a political agenda. If the OSB wants to talk about violence, it should talk about all violence.

As to white nationalism, the term has no meaning but the idea is to associate subliminally with the Nazi party, which almost everyone justly despises. The bar association and the race-sex bar associations muddle together a lot of words which are designed to make people think that Donald Trump and millions of other people who aren't devout leftists are tainted with Naziism.

This is a bad example of demonization. Of course there are demons on the left and on the right and everywhere else, but most people bear good will most of the time, and that includes most people on the left and on the right. We in the US and everywhere need to stop demonizing each other and stop and talk civilly about ourselves and what is best for our country. Step out of your house, find your neighbor, put aside your prejudice, and talk. Roger B. Ley
Dear Diane,

You can save you and me time if you take me off your mailing list. If I happen to run across something you’ve written I’ll be happy to look at it, but I’m just not as upset as you are by the statements in the OSB Bulletin and I doubt I’m passionate about many of things that get your juices going.

Both statements in the Bar Bulletin explicitly draw the First Amendment line on statements inciting violence, which is right where the US Supreme Court drew it in *Brandenburg v. Ohio*. I don’t see this as liberal hypocrisy. I see it as hewing to the law. I highly doubt conservatives would defend the First Amendment right of a group of foreign or domestic terrorists to incite violence against coal miners, loggers, hunters or white nationalists. I know I wouldn’t defend that.

Contrary to your blog article criticizing Bar statement and the subject line of your email about it, the Bar’s official statement made no reference at all to Trump supporters.

The accompanying minority bar groups’ statement did attack President Trump for various statements and actions that in their view promote racism. I agree with their assessment.

The minority bar groups did also say that President Trump has made white nationalists “the” base of his support. I don’t believe anywhere close to all of Trump’s 40 per cent base are white nationalists, or virulent racists, or deplorable. Presumably along with you I disagree with that statement. If it had been phrased “a” base of his support, or even “a substantial” or “an important” base of his support, I would agree with that. I also think it’s a nuance. You may object as a Trump supporter to being linked to white nationalists, but given our president’s strategy and tactics, the many intelligent, patriotic Americans who support him have the inevitable misfortune, for worse or worser, of tying themselves to that substantial, important and unhealthy part of his base. Their problem would greatly diminish or perhaps even go away if our president unequivocally repudiated white nationalists and their support. But he hasn’t.

Best regards,

Rick Pope

---

Rick Pope
Lawyer
3045 SW Ridgewood Avenue, Portland, OR 97225-3362
(TEL) 503-797-6316   rick@rp-lawyer.com
From: Diane L. Gruber <dlgesq@aol.com>
Sent: Saturday, April 14, 2018 7:46 PM
To: dlgesq@aol.com
Subject: OSB ACCUSES TRUMP SUPPORTERS OF BEING WHITE SUPREMACISTS

Fellow Attorneys:

The recent statements by the Bar are so disgusting that I am having a hard time wrapping my head around the fact that they would issue them. Since I did not actually see them in April's Bar Bulletin (several attorneys brought them to my attention), I wanted to be sure you saw them.

Recently, I purchased our membership's contact list. You are probably aware that it is a public record and anyone can buy your contact information. If you do not want to receive emails from me, just let me know as I may be sending you more. I am not interested in filling up your inbox with unwanted emails.

http://www.dailypresser.com/oregon-state-bar-trump-supporters02/

Diane

Diane L. Gruber
Attorney At Law
5400 Windsor Terrace
West Linn, OR 97068
503-650-9662
WWW.ExperiencedOregonAttorney.com
Dear Deryl,

Thank you for your thoughtful questions, as well as your consent to send this response out to our membership generally. As we discussed, several other members were curious to learn the backstory of these issues.

“The mission of the Military and Veterans Law Section is to provide a voice for the Oregon State Bar to address the unique legal needs of Oregon’s veterans and Service members. Through collaborative relationships and proactive initiatives, the Section works to secure that Oregon offers a legal environment which does not prejudice the men and women who have served our State and Nation.”

Troy Wood, who is the OSB Rep to our section (and a Marine and a great guy) has admonished us as a Section that the MVLS couldn’t act freely, as we are an “instrumentality of the OSB.” This admonishment was a product of an ongoing controversy over different models of regulating the practice of law.

There are two models of Bar Associations in the country: Unitary Bars (also known as Integrated Bars) combine lawyer governance and eleemosynary functions within one bar association. “Non-Unitary Bars” bifurcate advocacy (including Bar Sections) from lawyer discipline, with only the latter being authorized to utilize compulsory bar dues.

As the Supreme Court has described it, “an ‘integrated bar’ [is] … an association of attorneys in which membership and dues are required as a condition of practicing law -- created under state law to regulate the State's legal profession.” This is the case in Oregon.

The seminal case is *Keller v State Bar of California* (also a Unitary Bar), 496 U.S. 1 (1990). In *Keller*, “Petitioners, State Bar members, brought suit in state court claiming that, through these latter activities [California Bar political advocacy], the Bar expends mandatory dues payments to advance political and ideological causes to which they do not subscribe, in violation of their First and Fourteenth Amendment rights to freedom of speech and association. They requested, *inter alia*, an injunction restraining the Bar from using mandatory dues or its name to advance political and ideological causes or beliefs.”

Held: The State Bar's use of petitioners' compulsory dues to finance political and ideological activities with which petitioners disagree violates their First Amendment right of free speech when such expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services.

*Keller* kicked off a furious scramble, wherein some bars split into two (thus, “Non-Unitary Bars”) in order to separate lawyer regulation from advocacy “on behalf of” some or all of the members of the Bar Association. Obviously, because the Oregon State Bar is a Unitary Bar (and an instrumentality of the State of Oregon), Federal and State Constitutional questions are implicated. By virtue of *Keller*, voluntary associations within the Oregon State Bar, like the MVLS, arguably have standing to object under Federal Constitutional grounds when OSB resources are utilized to make political statements *in an inconsistent manner.* (Members of a Unitary Bar, clearly, have standing to complain on Constitutional grounds when *any* Bar political advocacy is found.) Under
the logic of Keller, it is difficult to imagine how Equal Protection is not also implicated when an
agent of the OSB says MVLS can’t engage in certain activities which other aspects of the OSB
are allowed to do.

By telling us that we couldn’t conduct fundraising to assist Veteran Legal Representation, for
example, we were precluded from speaking. If there are two standards and an arguable violation
of Keller, then that’s a problem.

As one can note from a simple review of the letter, the words “Oregon State Bar” are
prominently displayed at the top of the letterhead. The two letters are not differentiated, not are
any disclaimers contained in either letter. While the second letter is far more politically
inflammatory than the first, it is reasonable to conclude from the totality of the circumstances that
the OSB leaders who caused this material to be published were making an overtly political
argument intended to undermine a perceived political opponent. The first letter by itself might just
pass muster, but the inclusion of the second letter makes that interpretation impossible.

One might observe that Section 8 of the Oregon Bill of Rights provides far broader protections
for expression than the 1st Amendment; but State Constitutions can only increase protections
from governmental action, not diminish them. Thus, political statements by the OSB would only
be protected under Oregon’s Constitution provided that neither OSB resources were used to
produce this communication nor that the communication in question did not carry the imprimatur
of the OSB/Oregon Judicial Department/Oregon Supreme Court.

Bottom line: This was, at the very least, a colossal and self-inflicted screw-up. At worst, this is
the type of thing that induces the U.S. Supreme Court to break up the Oregon State Bar because
it is hopelessly politicized.

As my email indicated, I am not advancing any political argument to the Section, except
inasmuch as I would argue that a State Bar should not gratuitously stomp on the Constitutional
rights. I am certainly not using resources (my MPD email) that have been provided by me to do
anything other than attempt to advance the mission of the MVLS. In response to your question, I
am expanding the analysis solely to contextualize the delict here. I believe the MVLS, as a
Section, would be mollified by being allowed to conduct broader advocacy in furtherance of our
own mission. (It suits us to be able to advocate more broadly.)

Whether I, or some other offended member of the Bar, elects to pursue this matter as a violation
of our individual rights is a completely separate matter. As a Section, we must decide whether we
want redress as a Section. This is the exclusive purpose of my communications to the Section.

As for your final questions: What prompted me to join the section is that I believe the State of
Oregon, and the profession of law in Oregon, desperately needs to be made aware of the need to
better care for our Veterans, Servicemembers, and their Families under Oregon law. We have a
capability gap here, and I believe the 93-16 result of Measure 96 (the Veterans Services
Constitutional Amendment which the MVLS was instrumental in getting onto the ballot) in 2016
shows that our people our of the same opinion. I also believe our work betters the lives of
everyone in the State of Oregon by making the law more just and by showing that we, as a
people, value those who have sacrificed for Oregon and for America. I am mindful of our oath to
support and defend the Constitution, which really is the legal embodiment of our people, without
whom the Constitution has no meaning.

As a Judge Advocate, I worked in countries where the Rule of Law has broken down, and in
every case those who were most vulnerable suffered the most. I am concerned that the powerful
invariably arrogate unto themselves moral superiority and rationalize their behavior by demonizing
their opponents, and I have seen the Rule of Law prostituted to advance repression. On the part of those doing the suppressing, the subjective sense of their own righteousness is never here nor there; and I know that the Rule of Law (the purest distillation of our country’s most fundamental values) is the only thing worth dying for, aside from my wife and kids. In point of fact, my West Point classmates Bill Hecker, Mike Haas, and Paul Haggerty – along with 22 of my other classmates – would agree if they weren’t all dead now; and they knew what they were getting into. As it says on our MVLS website, “I tried to explain why young service members agree to go to war. The best I could offer was this: “Our Service Members go to war because, by going, we believe we are preserving something to come home to … even if we do not.”

Returning to Oregon, I am desperately afraid that the Rule of Law here has been subordinated to ideological considerations. It is inconceivable to me that those who were once powerless have taken their newfound power and devoted it to “paying back” their perceived oppressors, and it seems to me that the new bullies have learned nothing … and forgotten nothing. Oregonians despise bullying as much as we do sanctimony, and all I have seen since I came home is that one set of bullies has been supplanted by a new set, just as convinced of their probity and righteousness, just as ignorant, just as cruel. My oath, given voluntarily on the West Point Plain as a 17-year-old in 1987, bound me for life; and as long as I am an Oregon lawyer, I will side with the untouchables, whomever they may be this year.

I hope this addresses your concerns, and I appreciate your permission to share this explanation with our section.

Very respectfully,
/z/
Daniel Zene Crowe
Veteran’s Advocate │ Metropolitan Public Defender Veterans’ Justice Project
630 SW 5th Ave, Suite 500
Portland, OR 97204
dzcrowe@mpdlaw.com
phone: (503) 225-9100
fax (503) 295-0316
Julie Hankin

From: Gilbert Feibleman
Sent: Monday, April 16, 2018 8:29 AM
To: Julie Hankin
Cc: Gilbert Feibleman
Subject: FW: Gruber accusation against OSB

Julie

I do think the placement of the supporting statement was a grave error as it certainly appears as if the OSB is joining in the supporting statement.

I do not think the bar should be giving Gruber a gift like that to justify her agenda. That is what I have encourage people on the family law list serve to not “engage” her when she goes political.

Gilbert B. Feibleman – Shareholder

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From: Gil Feibleman
Sent: Monday, April 16, 2018 8:21 AM
To: Diane L. Gruber <dlgesq@aol.com>
Cc: Gil Feibleman <Gil@feiblemancase.com>
Subject: Gruber accusation against OSB

Diane

Both left and right should accurately state facts. Since your link and article did not actually show the bar’s statement, I had to look for it in the bulletin and I found it on p.42.
The OSB’s statement did not say what you accuse it of saying. If you want to be taken seriously, then you need to report accurately. On p. 42 of the April Bulletin the OSB issued a statement. Neither President Trump’s name nor any of your claims are to be found in that statement by the OSB.

On P. 43 of the April Bulletin, 7 Bar Association “groups” issued their own statement with your quoted words. In fact its title makes it clear it is not the OSB speaking. Though on opposing pages, the latter was not an OSB statement or declaration.

But I would agree that the editor of the bulletin, by putting them on opposing pages with the same boarder certainly made it “look” like they were together, thus implying that the “supporting” statement was an OSB statement. I would not have made that editorial decision.

Gilbert B. Feibleman – Shareholder

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From: Diane L. Gruber <dlgesq@aol.com>
Sent: Sunday, April 15, 2018 6:34 AM
To: dlgesq@aol.com
Subject: OSB ACCUSES TRUMP SUPPORTERS OF BEING WHITE SUPREMACISTS

Fellow Attorneys:

The recent statements by the Bar are so insulting to the membership that I am having a hard time wrapping my head around the fact that they would issue them. Since I did not actually see them in April’s Bar Bulletin (several attorneys brought them to my attention), I wanted to be sure you saw them.

Recently, I purchased our membership’s contact list. You are probably aware that it is a public record and anyone can buy your contact information. If you do not want to
receive emails from me, just let me know as I may be sending you more. I am not interested in filling up your inbox with unwanted emails.

http://www.dailypresser.com/oregon-state-bar-trump-supporters02/

Diane

Diane L. Gruber
Attorney At Law
5400 Windsor Terrace
West Linn, OR 97068
503-650-9662
WWW.ExperiencedOregonAttorney.com
Julie Hankin

From: mjohnson@efn.org  
Sent: Wednesday, April 18, 2018 9:17 AM  
To: Diane L. Gruber  
Subject: Oregon Attorney issues bizarre statement

Dear Ms. Gruber:

I have no idea what you are talking about. The statements in the bar bulletin are an appropriate calling out of racists and racism. This is an important role of my bar organization and I encourage the leadership to continue to do this. Your bizarre reading of these statements is baffling.

Your attempt to create controversy is inappropriate and appears to be motivated by hate, racism or both. I do not appreciate your email and direct you to not send any further communications to me by email or any other method.

P.S. The first sentence in the second paragraph is grammatically incorrect.

Matthew Johnson  
Attorney at Law P.C.  
P.O. Box 23033  
Eugene, Oregon 97402  
541-485-7769  
541-485-1440 (FAX)

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From: Diane L. Gruber  
Sent: Wednesday, April 18, 2018 6:22 AM  
To: dlgesq@aol.com  
Subject: OSB ISSUES RACIST STATEMENTS

Fellow Attorneys:

Please allow me to point you to two full-page statements in the April issue of the Bulletin, pages 42 & 43. They are so insulting to the membership that I had a hard time wrapping my head around the fact that they would publish them. I had to re-read them about 10 times to be sure.

The statement signed by seven "leaders" of diversity bars was the worse, trash-talking a sitting president, while calling over half of Americans "white supremacists" and "white nationalists." The Bar would never have published such a statement if it criticized President Obama during his second year. One example comes to mind: the Criminal Bar complaining about Obama's disdain for police (Ferguson, Gates are just two examples)
and disdain for the Rule of Law (DACA and George Zimmerman case are just two examples).

The Bar has received a GREAT DEAL of backlash for publishing such partisan and insulting statements. Letters to the Editor and emails to BOG have flowed in. If they are honest, they will publish each one of them in the May issue even if they take up every page. It is time for a dialogue about the Bar's blatant partisanship and their pushing of various political agendas (long recognized). THIS IS NOT THEIR FUNCTION. Should our dues be used for this? Should we receive a partial refund?

Recently, I purchased our membership's contact list. You are probably aware that it is a public record and anyone can buy your contact information. If you do not want to receive emails from me, just let me know as I may be sending you more. I am not interested in filling up your inbox with unwanted emails, but I do welcome comments.

http://www.dailypresser.com/oregon-state-bar-racist04/

Diane

Diane L. Gruber
Attorney At Law
5400 Windsor Terrace
West Linn, OR 97068
503-650-9662
WWW.ExperiencedOregonAttorney.com
I was very surprised by this attack on the statements published in the Bar Bulletin. When I first read the published statements, I thought they were very thoughtful and important. I just reread them, and still have the same opinion. I am among the many who worry about the future of our country and the future of our democracy. The Bar has an important leadership role here, and I am proud of these statements. They do not contain racist statements and they respond to real threats to our democracy.

**HERSHNER HUNTER LLP**
**K. Patrick Neill | Attorney**

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**From:** Diane L. Gruber [mailto:dlgesq@aol.com]
**Sent:** Wednesday, April 18, 2018 6:24 AM
**To:** dlgesq@aol.com
**Subject:** OSB ISSUES RACIST STATEMENTS

Fellow Attorneys:

Please allow me to point you to two full-page statements in the April issue of the Bulletin, pages 42 & 43. They are so insulting to the membership that I had a hard time wrapping my head around the fact that they would publish them. I had to re-read them about 10 times to be sure.

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http://www.dailypresser.com/oregon-state-bar-racist04/

Diane

Diane L. Gruber
Attorney At Law
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FYI

Sent from my iPhone

Begin forwarded message:

From: SCHROETTNIG Matthew <Matthew.Schroettnig@EWEB.ORG>
Date: April 18, 2018 at 8:45:41 AM PDT
To: Vanessa Nordyke <vnordyke@osbar.org>
Subject: FW: OSB ISSUES RACIST STATEMENTS

Good Morning Vanessa,

And what a morning, eh? Not quite sure what’s going on with this issue, but I wanted to share my response to Diane’s email, below.

I hope this finds you well, and wish you the best in dealing with the many interesting issues facing the Bar today.

Sincerely,
Matt Schroettnig

Matthew A. Schroettnig | Power Resources Counsel | Eugene Water & Electric Board
(o) 541-685-7496 | (c) 541-913-6065 | (e) matthew.schroettnig@eweb.org

From: SCHROETTNIG Matthew
Sent: Wednesday, April 18, 2018 8:41 AM
To: 'Diane L. Gruber' <dlgesq@aol.com>
Subject: RE: OSB ISSUES RACIST STATEMENTS

Diane,

I fully support the statements you reference from the April issue of the Bar Bulletin. What you decry as “trash talking” I read as objective statements of fact. Further, how it is possible to interpret any of the language therein as, in your words “calling over half of Americans “white supremacists” and “white nationalists”” is beyond me. I am proud to be a member of a State Bar committed to equity and justice for all, and one that is willing to speak out against the normalization of racism and violence.

That having been said, I’ve come to understand that this sort of baseless righteous
indignation is kind of your thing. However, I am uninterested in your opinions, and I have no interest in engaging with you on any subject, or in any manner. I would appreciate it if you would leave me out any and all future hate-filled ramblings, emails, and communications of any kind. Kindly lose my email address, phone number, and all related contact information.

In short, please never contact me again.

Warmly,
Matt

From: Diane L. Gruber [mailto:dlgesq@aol.com]
Sent: Wednesday, April 18, 2018 6:22 AM
To: dlgesq@aol.com
Subject: OSB ISSUES RACIST STATEMENTS

Fellow Attorneys:

Please allow me to point you to two full-page statements in the April issue of the Bulletin, pages 42 & 43. They are so insulting to the membership that I had a hard time wrapping my head around the fact that they would publish them. I had to re-read them about 10 times to be sure.

The statement signed by seven "leaders" of diversity bars was the worse, trash-talking a sitting president, while calling over half of Americans "white supremacists" and "white nationalists." The Bar would never have published such a statement if it criticized President Obama during his second year. One example comes to mind: the Criminal Bar complaining about Obama's disdain for police (Ferguson, Gates are just two examples) and disdain for the Rule of Law (DACA and George Zimmerman case are just two examples).

The Bar has received a GREAT DEAL of backlash for publishing such partisan and insulting statements. Letters to the Editor and emails to BOG have flowed in. If they are honest, they will publish each one of them in the May issue even if they take up every page. It is time for a dialogue about the Bar's blatant partisanship and their pushing of various political agendas (long recognized). THIS IS NOT THEIR FUNCTION. Should our dues be used for this? Should we receive a partial refund?

Recently, I purchased our membership's contact list. You are probably aware that it is a public record and anyone can buy your contact information. If you do not want to receive emails from me, just let me know as I may be sending you more. I am
not interested in filling up your inbox with unwanted emails, but I do welcome comments.

http://www.dailypresser.com/oregon-state-bar-racist04/

Diane

Diane L. Gruber
Attorney At Law
5400 Windsor Terrace
West Linn, OR 97068
503-650-9662
WWW.ExperiencedOregonAttorney.com
Marc raises a good point. Can you guys craft a response?

Begin forwarded message:

From: <Marc.D.Brown@opds.state.or.us>
Date: April 11, 2018 at 11:30:01 AM EDT
To: Nordyke Vanessa A <vanessa.a.nordyke@doj.state.or.us>
Subject: Statement on White Nationalism and Normalization of Violence

Hi Vanessa,

I just wanted to touch bases on the Statement on White Nationalism and Normalization of Violence published in the Bar Bulletin. It is probably not a surprise that I agree with the statement. However, I was a bit troubled that the statement referred to the attack on the MAX train. That trouble arises from the fact that the criminal trial for the accused is still pending. To have it highlighted in a statement from the Oregon State Bar whose members include the attorneys who are defending the accused and the judge who will be presiding (and, if there is an appeal, the appellate judges and appellate defender). I must also point out the irony that the statement later states that the Oregon State Bar "remains committed to equality and justice for all[.]" I understand that the statement probably intended to condemn the act and not the actor but as a mandatory bar organization, I think that a line was crossed by referring to a case that is not yet resolved.

Thanks,

Marc

Marc D. Brown
Chief Deputy Defender
Office of Public Defense Services-Criminal Appeals Section
503.378.2401 (Phone)
503.378.2163 (Fax)

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To the Editors of the Bulletin:

As a member of the Oregon Bar, I am proud to stand with the OSB's recently published statement on white nationalism and normalization of violence and accompanying statement of the Oregon Specialty Bar Associations. In these troubled times, it is vital to renew our commitment to equal access to justice and equal treatment for all Oregonians and all Americans, not just for the privileged few--and against those who would deny essential freedoms to any American.

One would think that support for these values among those who meet the high intellectual and moral standards of our bar membership would be a given. Unfortunately, I recently received what I believe to be a mass emailing from an Oregon attorney who apparently shares our current President's view that actual American Nazis are "very fine people"; who claimed that a statement in opposition to white nationalism was somehow a "racist statement", and who argued that "the Bar would never have published such a statement if it criticized President Obama during his second year." (I agree that the Bar most likely would not have and did not publish such a statement about Obama, because it, unlike the statements published this year, would have been false). The massage further threatened "a GREAT DEAL of backlash" and a letter-writing campaign against the State Bar.

Oregon sadly has a checkered past in issues of racial fairness, and many of us are going the extra mile to make amends and make our state shine with the light of liberty and truth, not with the light of burning crosses. I am disappointed that other attorneys may take their cue from the alt-right and Breitbart media, and not from our ideals of justice and freedom. The people behind that mass mailing do not speak for me. The State Bar does.

Thank you and thank the Specialty Bar Associations for letting your moral compass shine as an example to others.

Best,

Andrew M. Ross,
Eugene
If purchased through our advertising contractor, the price for a one-time placement of a full page ad is $1,845.

In reality, I think the only actual cost would be staff time to design the ad. For each issue -- after all editorial content and paid ads are placed -- we fill any gaps in the layout with “house” ads. These ad spaces are available both to OSB programs, legal group partners and charitable organizations. The once exception to the space-availability guideline is for CLE Seminars and Legal Publications, for which we typically reserve the center two pages of each issue. For the April issue, we placed the two statements in the center pages and placed separate CLE Seminars and Legal Publications ads elsewhere in the magazine.

No fees were charged for these ads, and since they are placed to fill space, they do not incur any additional paper, printing or postage costs. (If you’re asked, the Bulletin is put together in eight-page sections. We generally need to add filler, or sometimes make cuts, so the total page count is in a multiple of eight.)

I will ask Anna for an estimate of the time she spent on preparing the statement pages. Let me know if there’s anything else I can get you.

Kay

Kay Pulju
Communications & Public Services Director
503-431-6402
kpulju@osbar.org

Oregon State Bar • 16037 SW Upper Boones Ferry Road • PO Box 231935 • Tigard, OR 97281-1935 • www.osbar.org

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Amber—I would appreciate your help with an analysis of the Keller issue. I have begun a draft of a memo to the Board. I also wonder whether this should be on the Closed Agenda, as opposed to the open agenda?
Kay—I will need information from you about the cost of printing both the OSB statement and the specialty bar statement in the Bulletin.

Thank you.

Helen Hierschbiel  
Chief Executive Officer  
503-431-6361  
HHierschbiel@osbar.org

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From: Helen Hierschbiel  
Sent: Saturday, April 14, 2018 1:47 PM  
To: 'Shawn Lindsay' <shawn@hbclawyers.com>  
Subject: RE: OSB Statement in Bulletin

Dear Shawn,

I appreciate you sharing your concerns. Pursuant to OSB Bylaw 12.6, I have placed this issue on the agenda for the Board of Governors meeting on Friday, April 20, and I will share your email with the Board at that time. If you have any other information you would like to share with the Board, please let me know as soon as possible.

In the meantime, please do not hesitate to contact me with any questions.

Best regards,

Helen Hierschbiel  
Chief Executive Officer  
503-431-6361  
HHierschbiel@osbar.org

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State Bar are public records that, with limited exceptions, must be made available to anyone upon request in accordance with Oregon’s public records laws.

From: Shawn Lindsay [mailto:shawn@hbclawyers.com]
Sent: Wednesday, April 11, 2018 5:14 PM
To: Helen Hierschbiel <HHierschbiel@osbar.org>
Subject: OSB Statement in Bulletin

Helen,

Although I support the underlying message of the Statement (fair and equitable administration/equal justice for all), you and the other signers went far beyond that by making it biased and political. You and the other signers have the right to educate and make statements, but you should do so by presenting impartial information and unbiased statements. You did not do so. Indeed, the statement was meticulously crafted to create a particular political narrative. I’m no Trump supporter, nor did I vote for him. But I’m incredibly offended that my bar dues were spent to print a such biased and political statement.

Shawn M. Lindsay
I commend the Bulletin for publishing the OSB “Statement on White Nationalism and Normalization of Violence” and I want to express my gratitude to each individual who signed the Statement. Likewise, I am grateful to the leadership of our Specialty Bar Associations for their Joint Statement. Our legal community may have a wide range of views on race and politics, but I hope all reasonable members of our Bar can agree that violent expressions of bigotry threaten the rule of law and and undermine fundamental American values. It is discouraging to see that recent FBI statistics (collected from 170 law enforcement agencies across Oregon) reflect an increase in racially motivated violence. Whether increasing or decreasing, any amount of racially-motivated violence should be publicly denounced. I am glad to see so many members of our legal community have already done so.

Cruz H. Turcott | Associate Attorney
McCarthy Holthus LLP
920 SW 3rd Avenue, 1st Floor
Portland, Oregon 97204
Office. (971) 201-3200 | Fax. (971) 201-3202

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Federal law requires us to advise you that communication with our office could be interpreted as an attempt to collect a debt and that any information obtained will be used for that purpose.

Sent from my iPhone.
To the Editor of the OSB Bulletin

We lawyers on the family law list-serve have had an ongoing debate about limiting the use of the list serve so as to not to promote one’s own political agenda. That debate now appears to be ripe regarding the OSB Bulletin. In the April 2018 Bulletin the Board of Governors published a Statement on “White Nationalism and Normalization of Violence.” Certainly the Board in entitled to take positions on matters it feels impact the constitution and the rule of law. However I believe the Bulletin grievously erred in two ways when it then published a supporting statement signed by seven other legal “association” groups.

The first error was to publish it on the opposing page with the same font and shared green borderer. These should have never been joined at the hip in such a way as this gave the very clear impression that both messages were from a message from and endorsed by the Board of Governors.

The second error was to publish the “supporting statement” at all. The supporting statement was very anti-Trump and political. Though I personally agree with many of the points in the supporting statement, I do not believe the bulletin was the proper place for it. I do not want to see the Bulletin become a battleground over politics. Once the Bar decides it is going to publish political speech by its members or advertisers then the Bar will be required to publish all political speech regardless if it is offensive to other members of the Bar. Then are we going to fill the bulletin with letters and full page statements for and against policies or personalities. Every issue will be just one more counterpoint to the last issue and there will be no moral high ground left for the Bar to say “stop.”

I think the Bar messed up on this one and it needs to stick to policy whereby the Bulletin is not to be a used as a vehicle for political debate by it’s members or advertisers. Further the Bar needs to be more careful about how it publishes its own statements.

Gilbert B. Feibleman – Shareholder

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Ms Gruber

"The Bar has received a GREAT DEAL of backlash for publishing such partisan and insulting statements. Letters to the Editor and emails to BOG have flowed in."

While tempted to engage you on your Trump-like interpretation of the statements published by the Bar deploaring white supremacy and racism, as set out below, it really seems pointless. I did check with the editor of the Bar Bulletin and was told that it had received 10 letters referencing these articles. Given that there are now just over 15,000 attorneys who are on active status with the Bar, those 10 letters constitute 1 out of every 1,500 members of the Bar being stirred to action. Certainly looks more like a few rain drops in the ocean rather than your breathless hyperbole of a "GREAT DEAL of backlash".

Do not add me to your list for future communications.

______________________________
"I came into the world to live out loud" Emile Zola

Jim Hargreaves
Fulbright Specialist in Law
Legal Observer and Commentator
Amicus Curiae Consulting

Begin forwarded

From: "Diane L. Gruber" <dlgesq@aol.com>
Date: April 18, 2018 at 6:16:35 AM PDT
To: dlgesq@aol.com
Subject: OSB ISSUES RACIST STATEMENTS

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half of Americans "white supremacists" and "white nationalists." The Bar would never have published such a statement if it criticized President Obama during his second year. One example comes to mind: the Criminal Bar complaining about Obama's disdain for police (Ferguson, Gates are just two examples) and disdain for the Rule of Law (DACA and George Zimmerman case are just two examples).

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http://www.dailypresser.com/oregon-state-bar-racist04/

Diane

Diane L. Gruber
Attorney At Law
5400 Windsor Terrace
West Linn, OR 97068
503-650-9662
WWW.ExperiencedOregonAttorney.com
Dear Colleagues:

I hope that I am not the first (nor, for that matter, the last) to write but I am distressed with what I am hearing is happening to members of the bar’s minority community. In short, many have been verbally attacked and even more are frightened about whether they, or their family, will be next. Few, if any of us, know how to react.

By way of example, in the last week one of our Hispanic members (not only legally here but married to a native born citizen) was verbally assaulted while leaving a downtown parking lot. While I can only paraphrase, she was called a f*cking Mexican and told “you will be deported soon, Trump is president now”. Another was told “I hope your n***** boyfriend can help you when you get deported you Chinky bitch”. Yet another member’s child was attacked, physically and verbally, for not attending a dance that was held on a Jewish holiday. The verbal taunt was akin to “you Jew’s ruined our dance”. Another member was called a “f****** rag head” and flipped off while driving down Carmen Drive, only three blocks from the bar center. This same member reports that all of his non-resident immigration clients cancelled their appointments, last week, out of fear of being picked up by ICE. The attorney is now expressing his concern over being afraid to have children lest they look “dark” like him and be subjected to the current trend of vitriol. An acquaintance of Angela’s and mine wants to leave her position working at an elementary school because white students recently surrounded Hispanic students while chanting “build a wall”. One lawyer friend reports that in his community, Lake Oswego—a community of affluent and well educated people, students are being singled out and harassed for their ethnicity. In one instance a large photo of an Auschwitz crematorium was posted in the commons area with the caption “easy bake oven” written underneath. In another instance a FaceBook page for the class of 2017 proposed that, for “senior prank” day, they form a KKK Club and sacrifice all black students.

Closer to home, my law partner Angela (a third generation Hispanic American whose peeps have been here longer than mine) is growing ever increasingly apprehensive about going downtown. She wonders if it is safe to have her parents come to visit for Thanksgiving. Last night she bravely refused my offer to accompany her and went forth to a meeting that lasted until well after dark. The meeting was preceded by emails advising of routes to take to avoid conflict and where it was optimal, for safety, to park. After the meeting she took comfort in a suggestion, by a fellow female Hispanic lawyer, that they walk together to the parking lot. Apparently there is still the perception of safety in numbers. I do know that I was concerned for her safety and relieved to know she got home safe and un-accosted. Her comment to me, this morning, was sobering: “it’s sad when you are afraid to get on an elevator with white people”. At a deposition this week our Hispanic client had to sit through being deposed in the presence of two elderly (my age) white people proudly wearing their red “Make America Great Again” hats while loudly and frequently extolling the virtues of the new order.
I know, in some instances, and have reason to believe, in other instances, that our minority bar associations and some of our specialty bars are formulating a thoughtful response to, and uniting against, the current sense of bigoted empowerment that seems to be more pervasive with each passing day. Ironically one of my greatest concerns for the ongoing success of the minority legal community is now being solved. Where for years minority lawyers have been breaking out from under the umbrella of OMLA and forming their own unique ethnic bar associations, they are now working together for a greater and more important cause—the rights and dignity of our entire minority community.

My question are many. Has the BOG, like the minority and specialty bars, started working on the “Big Bar’s” response and, if not, will it be starting the process soon? Will there be a forthcoming statement in support of and honoring diversity? Can the bar afford to not make such a statement? Can and will the bar openly call for civilized dialogue and use this crisis as a springboard to emphasize and reinforce the importance of the rule of law and the absolute necessity of an independent judiciary? Can we call upon the organization and its members to encourage the citizenry to stop making assumptions based upon outward appearances and to let due process and the rule of law take its course?

I also ponder the following: Should the Bar be keeping and disseminating data? Should we be creating a mechanism and encouraging an environment for the sharing, memorializing and documenting racial attacks. Should we be training people on how to appropriately react when they witness or are subjected to events such as I have above described. Should those events be recorded on cell phones and preserved as a deterrence to bullying? When and how does a person of good will get involved? Is there a way our members can stand up to crass displays of ignorance and/or spite without violating the law or putting themselves in imminent danger? Should we encourage people to be courageous and speak up, albeit civilly, or should we advise them to retreat? Is there a middle ground that could/should be taught on how to effectively confront bigotry while minimizing the risk of retribution? We teach our lawyers to stand up to child and elder abuse, can we/should we offer them guidelines on how to deal with ethnic harassment? (And please, I am not asking for another mandatory CLE requirement.) Should the Bulletin be putting together and publishing an insightful and (hopefully) instructive series on what is happening in our community?

I know you are limited in what you can do. Though the case name evades me, I am fully aware of your limitations against entering the political arena. But, if properly approached, this could be an opportunity to promote the science of jurisprudence with a strong component of education for the membership for the protection of the community. I am not advocating a polarizing political stand. I am not proposing any form of protest against the President Elect and/or his appointees. If it has not already happened, what I am asking is for the Bar to begin a dialogue on how to promote healing by taking a unifying, supporting and educating stand in furtherance of our diversity mission; a stand that thoughtfully encourages our membership to accept the oath they took when sworn in to protect and preserve the constitution and the laws of the United States and the State of Oregon. That oath promotes respect for people’s rights and the rule law. Therein lies our salvation.

There are few things I love or am more committed to than the Oregon State Bar and its form of governance. I envy you the opportunity history has handed you to make some of the most
meaningful decisions yet in the rich history of our bar. You are on the front line to what may be the biggest challenge to the rule of law since *Marberry v Madison*. I have every confidence in the board and in you, the board’s leadership. Thank you for your time and God’s speed to you all.

Tom Kranovich  
Attorney At Law

KRANOVICH & LUCERO, LLC  
Attorneys At Law  
4949 Meadows Road, Suite 630  
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tom@tkatlaw.com

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The Oregon State Bar’s Statement and the Joint Statement of the Oregon Specialty Bar Association on “White Nationalism and Normalization of Violence” begins with a bold assertion—that there is a resurgence of “white nationalism” that is normalizing racism and violence in this country. The evidence cited is a criminal assault by an individual that occurred on Portland’s MAX train and the riots and violence that occurred in Charlottesville. The writers did not mention the riots and violence that occurred in Ferguson, Baltimore, Berkeley, Portland or the many other cities and churches, as well as a Congressman, that have suffered from agenda driven violence in the past two years. I would hope that in the interest of promoting equity and justice for all, all acts of violence and property crimes would be condemned by the Bar. Instead, the Specialty Bar Assoc. engaged in an ad hominem attack against anyone that voted for President Trump by stating: “[Trump] has himself catered to this white nationalist movement, allowing it to make up the base of his support and providing it a false sense of legitimacy.” Really? This is simply labeling and attempting to silence those the signatories disagree with—and represents millions of voters. Then we are told that there are limits to the First Amendment. But what type of speech is to be limited? Is it only speech that “incites violence”? But that has already been addressed in existing law (such as 18 USC 2102). The inference is that it is certain types of political speech that the signatories find offensive. Speech that provokes disagreement or challenges preconceived ideas or beliefs is worthy of protection, not restriction. Such statements raise the specter that an authority will define what is acceptable speech and may determine that certain types of political speech “incites violence.” What is coming next? Will there be bar sanctions coming against who engage in “unacceptable” political speech or belong to a group that has fallen out of favor—such as certain types of churches, associations or political organizations? The strength of a free republic rests upon the ability of the people to enter into the marketplace of ideas and engage in robust and free debate and comment. I thought that as members of the Bar, we have an obligation to defend this right. I am reminded of the comment of Supreme Court Justice Louis Brandeis in Whitney v. California, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”
BY FIRST CLASS MAIL

Oregon State Bar
P.O. Box 231935
Tigard, OR 97281-1935

Dear Sirs and Madams:

I write as a Republican member of the Oregon State Bar, Chairman of the Multnomah County Republican Party, and a strong supporter of putting American interests first in a competitive global economy. We demand that the Bar acknowledge that the two-page spread in the April’s Oregon State Bar Bulletin attacking “white nationalism and the normalization of violence,” was a violation of federal law, apologize for its publication, and assure the membership and the public that such a violation will not occur again.

_Keller v. State Bar of California, 496 U.S. 1 (1990),_ established that where attorneys are required to join and pay for bar membership as a matter of law, bar associations may not hijack the funds exacted to pursue ideological and political positions. The Bar may not lawfully tax its members to push policies not directly related to the administration of the Oregon legal system, much less push these policies with _ad hominem_ attacks. To do so violates our First Amendment rights to freedom of speech and association. We feel violated by statements attacking our President as a racist, “white nationalist,” and legitimizer of racist violence.

Republicans, including President Trump, are not neo-Nazis and the Bar’s attempts to tar Republicans with the misdeeds of racist fringe groups is reprehensible. For the Bar to spend its members’ funds implicitly attacking President Trump’s advocacy of conservative policies as “speech that incites [racist] violence” (the first page) is not only illegal, but also an abandonment of core American Constitutional values acknowledging that free speech is how we _avoid_ violence. The second page is even worse, arguing that racist fringe groups constitute the “base” of the President’s support.

One mentally-ill person’s attack on a MAX train does not begin to establish that there is any normalization of violence and racism in Oregon. The normalization of violence we see has been normalization of violence against conservatives, with Portland officials normalizing Antifa violence and taking no action whatsoever against death threats to Oregon Republicans. Indeed, violence against conservatives in Oregon has been normalized to the point where our Party is now barred from the public events it attended for years, such as the 82nd Avenue Avenue of Roses Parade, for fear of such violence.

We even see law students at a leading Oregon law school shouting down a conservative speaker, "acts or conduct which would cause a reasonable person to have
substantial doubts about the individual’s honesty, fairness and respect for the rights of others and for the laws of the state and the nation" (ORS 9.220). The Bar has stood silent about all these developments, and these latest statements suggest it is mute with malice.

It is a dark day for Oregon when the Bar stoops to serve as the puppet of Leftist forces who claim that patriotism is bigotry, that the Constitution is an outmoded instrument to uphold white supremacy, and that the First Amendment must be discarded. An America based on these positions would be not be under the rule of law, but suffer the unprincipled exercise of power for plunder for an ever-evolving hierarchy of identity groups. This form of government has brought ruin and enslavement wherever applied.

The Bar’s goal of diversity and inclusion is legitimate where it works toward a legal system that, to paraphrase Dr. Martin Luther King, Jr., evaluates lawyers and litigants not by the color of their skin, but by the content of their character and the truth of the evidence they present. All violence is to be condemned, all human life is to be cherished, and modern legal theories that abandon equal protection against violence are corrosive to this Nation.

Sincerely,

[Signature]

James L. Buchal

cc: Julie Hankin, Editor, OSB Bulletin (e-mail only, jhankin@osbar.org)
April 20, 2018

As leaders in the Military and Veterans Law Section (MVLS), we read the communique from the Oregon State Bar (OSB) in the April edition of the Oregon State Bar Bulletin with heavy hearts. While some of our members might agree with the sentiments expressed therein (and others might not), personal opinions are irrelevant when placed against our responsibility to preserve and protect the Rule of Law.

Like members of the U.S. Military in general, the members of the MVLS bridge the political spectrum from Conservative to Liberal, Straight to Gay, Old to Young, Male to Female. What unites us as a Section is our desire to care for those who have volunteered to go into harm’s way for America and their families. What unites us as Military Service Members is a belief that, by putting our lives on the line, we preserve something worth coming home to ... even when we do not.

The Military sits alongside America’s Courts as the two most universally respected institutions in our country. We believe this is so because the military has long adhered to a policy of complete neutrality in politics. We serve America. Our duties are made immeasurably more difficult when the OSB itself, part of Oregon’s Judicial Department and itself subject to the rules of absolute impartiality which also govern our Military, violates its duty.

Without commonly-accepted and -honored rules, the Rule of Law stops functioning. Many of us have served in foreign lands where the Rule of Law has broken down. An America in which the Rule of Law is not respected is not the America we solemnly swore to support and defend against all enemies, foreign and domestic.

When the Rule of Law is unavailable to resolve differences, the only other recourse is force. Many of us have seen firsthand the horrific costs of war. Many of us placed our lives on the line to ensure that our peaceful traditions of conflict resolution are preserved; we believe our traditions are far too sacred to be toyed with to score cheap political points or to advertise superior virtue. But peaceful resolution of disagreements can only happen when both sides of political disputes play by the rules.

Our Section very much appreciates that OSB CEO Hirschbiel and General Counsel Hollister came to our monthly MVLS Board meeting on April 17th to answer our questions about what went wrong. We had been informed previously that we were absolutely forbidden from taking any public positions concerning Veterans and the law in Oregon without receiving advance permission from the OSB, and we were concerned that the prohibition appears to have been inconsistently applied.

We are hopeful that the OSB Board of Governors will address this situation and take appropriate measures, beginning at its meeting this Friday, 20 April. We pray that the Oregonian traditions of moderation, consensus, and live-and-let-live guide our legal leaders back to an Oregon in which our differences pale in comparison to our great love of America, under God; her Constitution; and our wonderful Oregon.

Daniel Zene Crowe
Immediate Past Chair, MVLS

Lawrence K. Peterson
Secretary, MVLS

The opinions expressed herein are exclusively those of Lieutenant Colonels (Ret) Crowe & Peterson.