Oregon State Bar  
Meeting of the Board of Governors  
June 21, 2019  
Open Session Minutes

Chris Costantino called the meeting to order at 12:33 p.m. on June 21, 2019. The meeting adjourned at 4:16 p.m. Members present in person from the Board of Governors were Colin Andries, John Bachofner, Jenny Cooke, Chris Costantino, Kate Denning, Kamron Graham, Eddie Medina, Vanessa Nordyke, Liani Reeves, Julia Rice, and David Wade. Present by telephone were Whitney Boise, Eric Foster, and John Grant. Not present were Rob Gratchner, Bik-Na Han, Joseph Hesbrook, Tom Peachey, Michael Rondeau, and Traci Rossi. Present by phone from ONLD was Joel Strum. Present from the PLF were Saville Easley and Betty Lou Morrow. Other members of the bar present were Blair Townsend, Ron Cheng, Nathan Sosa, Shenoa Payne, and Sonya Fischer. OSB Staff present were Helen Hierschbiel, Amber Hollister, Susan Grabe, Dawn Evans, Keith Palevsky, Danielle Edwards, Kay Pulju, and Cassandra Dyke.

Friday, June 21, 2019 12:30 pm

1. **Call to Order**

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

2. **President’s Report [Ms. Costantino]**

   Ms. Costantino gave a report of her Eastern Oregon tour. As always, local bar members were engaged and grateful for the visit. A lack of lawyers and access to justice remain concerns for rural Oregon and discussions revolved around these issues. Ms. Costantino’s goal was to visit at least a few places we had not visited before. To that end, we visited the Warm Springs Tribal Council, the Legal Aid Office in Ontario, the Morrow County Courthouse in Heppner, and local bar members in Hermiston.

3. **Lawyer Wellness Summit Report**

   Ms. Reeves presented the Policy & Governance Committee recommendation to accept the Wellness Summit Report and recommendations. [Exhibit A]

   Ms. Nordyke said that she would encourage us to hold another summit. There was a lot of interest in this program and she thinks that the OSB could make it annual or an every other year event. It really opened the eyes of many people about the mental health crisis that is plaguing the legal profession. Mr. Bachofner and Ms. Costantino stressed the importance of the bar continuing to provide high-quality, in depth CLEs that qualify for the mental health credit.

   **Motion:** The board voted unanimously in favor of the committee motion to accept the Wellness Summit Report and recommendations. The motion passed.
Closed Sessions – CLOSED Agenda

A. Executive Session (pursuant to ORS 192.660(2)(f) and (h) and ORS 192.690(1))

4. 2019 Strategic Areas of Focus

A. Referral Fees Committee Report

Ms. Costantino gave a summary of the Referral Fees Committee Report and the committee’s effort to identify possible amendments to RPC 5.4 that would address consumer protection concerns while still allowing for potential improvements to access to justice. The Policy & Governance Committee moved that the board accept the report. [Exhibit B]

Motion: The board voted unanimously in favor of accepting the Referral Fees Committee Report. The motion passed.

Public Comments:

Blair Townsend, of Wise and Townsend, P.C. in Lake Oswego; HOD delegate and Oregon Trial Lawyers Association (OTLA) board member.

Ms. Townsend spoke against adoption of the Referral Fees Committee Report’s recommendations. She explained her opposition was based on her desire to protect and maintain the integrity of the judicial system. She asserted the proposed amendment would result in referral services like AVVO becoming the only resource for clients to connect with a lawyer. She expressed concern that sharing legal fees with AVVO could make many cases unprofitable for lawyers and lawyers would decline to take those cases, resulting in a lack of access to justice. She urged the board to consider other alternatives to increase access to justice. She also expressed concern that AVVO is not bound by Oregon Rules of Professional Conduct.

Ron Cheng, of Kaplan Law, LLC in Portland; OTLA New Lawyer Section, President-Elect of the Chinese Lawyers Association, and HOD delegate.

Mr. Cheng spoke against adoption of the Referral Fees Committee Report’s recommendations. He expressed concern about the effect the proposals on solo attorneys and new lawyers. He stated that referral fee entities have no concerns about the competence or abilities of the lawyers.

Nathan Sosa, of Vames & Wang in Gresham.

Mr. Sosa spoke against adoption of the Referral Fees Committee Report’s recommendations. He is concerned with this proposal because referral services are not regulated by the bar or any other entity, and they do not have a duty of confidentiality to client’s equivalent to that lawyers have under the Oregon Rules of Professional Conduct.

Shenoa Payne, of Shenoa Payne Attorney at Law PC, Portland; OTLA board member.
Ms. Payne spoke against adoption of the Referral Fees Committee Report’s recommendations. She stated that the proposed amendments would produce an even greater access to justice problem. She asserted that many clients cannot afford to pay legal fees except through a contingency fee arrangement and requiring payment of a referral fee only reduces the chances that a lawyer will take a contingent fee case. She sees this as impeding, rather than promoting, access to justice.

Sonya Fischer, family law practitioner, OTLA President.

Ms. Fischer spoke against adoption of the Referral Fees Committee Report’s recommendations. She urged the board to reject the proposed changes to ORPC 5.4 to maintain high ethical standards. She noted that the State could not effectively regulate lawyer referral services and the OSB does not have the authority to do so.

Questions & Comments from BOG members and staff:

Mr. Wade: The OSB is not in the business to protect the lawyers; we are here to protect the public. Mr. Wade asked how the proposed rule changes are going to hurt consumers and potential clients.

Mr. Sosa gave an example: Say a client needs an attorney for a personal injury case. They go to Rocket Lawyer. Rocket Lawyer may give the client a referral to a lawyer, but might also provide the client’s information to a loan company. The loan company then targets the client who is vulnerable and in need of money.

Ms. Fischer: Clients will get lawyers who can pay the highest referral fee, rather than those with good reputations. Also, because of the algorithms used to make the referrals, most cases will go to white men, which is contrary to the bar’s diversity, equity and inclusion goals.

Mr. Bachofner: The bar cannot simply protect our own. He sees, however, genuine issues with the proposals to amend RPC 5.4 regarding diversity, access to justice, and confidentiality.

Ms. Hollister: A new provision in Oregon law, ORS 40.225(f)(3), provides that information provided to referral services is attorney-client privileged and therefore confidential.

Ms. Rice: Ms. Rice asked whether there other options available to address the consumer protection concerns since OSB does not have the authority to regulate referral services.

Mr. Grant: The concerns raised here have come up multiple times in both working groups. Recommendations came out of the Futures Task Force around the access to justice gap. We have had two full bodies that have met over the last two years and have come to similar conclusions. Mr. Grant asked whether there is a substantive difference between a referral fee shared between attorneys and one shared between a lawyer and a referral service.

Mr. Cheng: Ethics is the difference. Lawyers are bound by rules of professional conduct and regulated by the OSB. Referral services are not.
Ms. Payne: Referral fees between lawyers are not as common as you might think. A referral service would have a greater ability to monopolize the system.

Ms. Costantino: Ms. Costantino inquired what happens to consumers when cases are not taken, and whom they get legal advice from if not a licensed attorney.

Ms. Fischer: The OSB Lawyer Referral Service is a great service. They can go there.

Ms. Costantino: The internet is where consumers are going. Is that what we should be thinking about?

Ms. Payne: Cases from the internet are very rare; most cases come from other lawyers. She gives younger lawyers who she respects the cases that she is not taking.

Mr. Medina: The second option exempts contingent fee cases entirely. Does that address any concerns?

Mr. Sosa: It doesn’t answer any of the confidentiality concerns.

Ms. Townsend: Who will regulate the flat fee for AVVO and who is going to cap that and make them follow the rules?

Mr. Foster: The attorney fee still needs to be reasonable and that is what matters.

Ms. Townsend: If the referral fee is unreasonable, then the cost for the lawyer to take the case will increase and make it less likely they will take the case.

Mr. Bachofner: The tension we have is the study we did two years ago. The study showed that many go without representation when they need it, but it did not address the consumer issues. Need to balance consumer protection and access to justice.

Mr. Grant: He understands why they have made a boogeyman out of AVVO, but AVVO is no longer in the referral service business. There are two legal companies trying to enter this market: Text-a-Lawyer and Basic Counsel. It might be interesting to invite them to testify.

Ms. Hierschbiel: Ms. Hierschbiel inquired whether referral fee sharing would be appropriate if there were a statutory definition of lawyer referral service and a regulatory structure imposed on them. For instance, she asked, if Oregon were to impose regulations on lawyer referral services that require confidentiality, reasonable fees, reporting on how many people were served and other helpful data—would that satisfy the concerns raised.

Ms. Fischer: There is a cost to regulation and do we want to use state resources for that? We know how limited resources are for regulation.

Mr. Sosa: The State is overburdened and enforcement would not happen.

Ms. Fischer: Also there is no regulation of the internet right now.
Mr. Andries: Mr. Andries inquired if a statutory amendment to provide a private right of action under some circumstances would address the concerns expressed.

Mr. Sosa: A private right of action just shifts enforcement responsibly to the consumer. It would create a cascading effect and hurt lower income people.

Mr. Wade: Mr. Wade inquired whether it would be sufficient to require the attorney to ensure that the referral entity keep client information confidential.

Ms. Townsend: What would that look like?

Ms. Costantino: Ms. Costantino suggested a lawyer could require confidentiality in a contract with the referral entity.

Ms. Townsend: OTLA would like to work with the bar to get to a solution.

Ms. Fischer: OTLA provided an updated letter to the bar with new information [Exhibit C].

Closed Sessions – CLOSED Agenda

A. Executive Session (pursuant to ORS 192.660(2)(f) and (h) and ORS 192.690(1))

Moved back to Open Session

Motion: Mr. Wade moved and Mr. Grant seconded to present to the House of Delegates the Referral Fees Committee Report Option A with the addition of the following paragraph “(iii) the lawyer obtains an agreement from the referral service that the referral service will not disclose any information obtained from the client or prospective client to the third party.”

Mr. Andries asked whether this approach would make it unethical for the Oregon attorney to make an oral fee agreement.

Mr. Bachofner stated the board should reject motion because of the facts we received today related to lack of consumer protection.

Ms. Rice stated this is not the right way; we can do better and should explore other options.

Mr. Foster stated he still has concerns about lawyer referral services’ data sharing; however, he believes that allowing for referral fees is the way we will have to go.

Ms. Nordyke noted that proposed changes to the rules of professional conduct can come from the BOG or HOD; therefore, should the board not choose to recommend an amendment, the HOD may still consider the question.

Mr. Wade and Mr. Grant voted in favor of the motion. Mr. Andries, Mr. Bachofner, Mr. Boise, Mr. Foster, Mr. Medina, Ms. Reeves, Ms. Rice, Ms. Denning, and Ms. Cooke voted against the motion. The motion failed.
Motion: Mr. Andries moved to refer to the House of Delegate Option A as written in the report. Mr. Wade seconded. Mr. Andries, Mr. Wade, Ms. Denning, Ms. Reeves, Mr. Grant, and Mr. Boise voted in favor. Mr. Medina, Ms. Cooke, Ms. Rice, Mr. Bachofner, Ms. Graham, Mr. Foster, and Ms. Costantino voted against the motion. The motion failed.

Motion: Mr. Bachofner moved and Mr. Medina seconded a motion that the board request that the Supreme Court exercise its inherent authority to review the decision not to amend ORPC 5.4 in January 2020.

Mr. Andries said that technology is changing and this is the right way to go. The way of legal services is changing and we need to change. It is more transparent to share with the clients that we are using referral services and it seems like the right thing to do.

The board voted unanimously in favor of the motion. The motion passed.

B. Program Review

Ms. Reeves presented the Policy and Governance Committee proposed amendments to the Program Review Policy as set forth in the memo. [Exhibit D]

Motion: The board voted unanimously to approve the proposed amendments to the Program Review Policy.

5. BOG Committees

A. Establish Ad Hoc Awards Committee

Ms. Costantino requested a motion to create an ad hoc committee of members to help in the annual awards selection process. [Exhibit E]

Motion: Ms. Rice moved, Mr. Bachofner seconded, and the board voted unanimously to form a committee to review nominations for the bar’s annual awards and develop recommendations for the full board.

B. Policy and Governance Committee [Ms. Reeves]

1. Amendments to OSB Bylaw 2.201

Ms. Reeves presented the Policy & Governance Committee recommendations for amendments to OSB Bylaw 2.201 as set forth in the memo [Exhibit F].

Motion: The board voted unanimously in favor of accepting the Policy & Governance Committee’s recommended bylaw amendments as above. The motion passed.
2. Bylaw Amendments Related to Sections

Sunsetting

Ms. Reeves presented the Policy & Governance Committee motion to amend OSB Bylaw 15.2 regarding formation and sunsetting of sections, as set forth in its memo [Exhibit G] and to amend the last paragraph of Standard Section Bylaw, Article XII, Section 2 as follows:

If the Section fails to meet the above minimum requirements, has less than 100 members, or does not sponsor or co-sponsor at least one CLE program every two years, it is subject to restructuring or sunsetting by the Board of Governors pursuant to OSB Bylaw 15.2.

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

Electronic voting

Electronic voting is not permitted by public meetings laws. In order to address this issue, Ms. Reeves presented the following proposed amendment to Standard Section Bylaw, Article V, Section 5:

Section 5. Between meetings of the Section, the Section Executive Committee shall have full power to do and perform all acts and functions that the Section itself may perform. Voting on matters of Section business may not be done electronically and results of an electronic vote must be recorded in the official minutes of the Section.

**Motion:** Mr. Andries moved and Mr. Wade seconded the motion to approve the proposed amendments to Standard Section Bylaw Article V, Section 5. The board voted unanimously in favor. The motion passed.

C. Board Development Committee [Mr. Bachofner]

1. Appointments to various OSB Committees and Councils

Mr Bachofner presented the Board Development Committee recommendations for appointments as set forth in its memo except as noted below. [Exhibit H]

**Council on Court Procedures Appointments**

Ms. Rice says to add Jeff Young and Mr. Andries gives Barry Goehler his endorsement. Mr. Wade moved and Mr. Andries seconded to appoint Jeffrey Young, Barry Goehler, and Tina Stupansky and the reappointment of Ken Crowley, and Troy Bundy.

**Motion:** The Board Development Committee moved to approve the appointments to all committees as outlined. The motion passed by unanimous vote.
2. House of Delegates Election Region 1 Tie Breaker

A name was drawn and the name is Melanie Kempler.

D. Budget & Finance Committee [Mr. Wade]

1. Travel & Reimbursement Policy

Mr. Wade presented an updated travel and reimbursement policy. [Exhibit I] The primary changes highlighted:
   a) any function taking place within 5 miles of the Bar building must use either of the two locally approved hotels (The Grande or the Crown Plaza),
   b) all other hotels capped at $250 per night (excluding fees and taxes) except for staff, BOG President or President-elect staying at conference hotels with negotiated group rate, and
   c) all out of state travel or other exceptions to the policy must be approved by the CEO in advance.

Motion: The Budget and Finance Committee moved to accept the changes to the Travel & Reimbursement Policy. The board voted unanimously in favor. The motion passed.

2. Fee Proposal Recommendation

Mr. Wade reported that the HOD requested that the BOG study the fee structure with equity in mind and consider providing a reduction in fees to OSB 3rd and 4th year members. The Budget and Finance Committee studied the structure with equity principals in mind and recommends elimination of the reduced fee for 1st year and 2nd year members and elimination of the exemption for 50-year members. In their place, the committee recommends providing a 20% fee reduction for those members with an individual gross income of < $40K starting January 1, 2020.

Motion: The Budget and Finance Committee moved to provide, effective January 2020, a 20% reduction in fee for those members making $40,000 or less and to require that all other bar members pay regular bar fees.

Mr. Andries moved to table this proposal until the next meeting Mr. Bachofner seconded. Mr. Andries, Mr. Bachofner, and Ms. Cooke were in favor of tabling. Those opposed were Mr. Medina, Ms. Rice, Ms. Reeves, Ms. Denning, Ms. Graham, Mr. Foster, Mr. Grant, Mr. Wade, and Mr. Boise. The motion failed.

Motion: The board then voted on the original Budget and Finance Committee motion to adopt the proposed fee structure. Mr. Medina, Ms. Cooke, Ms. Rice, Ms. Reeves, Ms. Denning, Mr. Grant, Mr. Foster, Mr. Wade, and Mr. Boise voted in favor. Mr. Bachofner and Mr. Andries abstained.
E. Public Affairs Committee [Mr. Foster]

1. Judicial Preference Polls in Contested Elections

Mr. Medina presented the Public Affairs Committee recommendations to amend Section 2.7 of the OSB Bylaws to eliminate the use of preference polling for contested circuit court elections, as recommended by the OSB 2018-2020 Diversity Action Plan and the Diversity Section letter. [Exhibit J]

Motion: The Public Affairs Committee moved to approve elimination of judicial preference polls. The board voted unanimously in favor. The motion passed.

2. Indian Law Section recognizing Tribal Court Orders and Decrees

Mr. Medina presented the Public Affairs Committee recommendation to approve the Indian Law Section memo to the Oregon Supreme Court regarding recognition and enforcement of Tribal Court Judgments, Orders, and Decrees in Oregon State Courts and to approve that staff begin work with legislators towards its proposed ends. [Exhibit K]

Motion: The Public Affairs Committee moved to approve the Indian Law Section memo to the Oregon Supreme Court regarding recognition and enforcement of Tribal Court Judgments, Orders, and Decrees in Oregon State Courts and to approve that staff work with legislators towards its proposed ends. The board voted unanimously in favor. The motion passed.

3. HB 3145 on Indigent Defense Restructure

Mr. Medina presented the Public Affairs Committee recommendations to fully support legislative efforts to ensure a constitutionally adequate level of funding for indigent defense services, including addressing deficiencies in the system identified in the Sixth Amendment Center report. [Exhibit L]

Motion: The Public Affairs Committee moved to approve fully supporting legislative efforts to ensure a constitutionally adequate level of funding for indigent defense services, including addressing deficiencies in the system identified in the Sixth Amendment Center report. The board voted unanimously in favor. The motion passes.

6. Professional Liability Fund [Ms. Easley]

A. Financial Statement

Ms. Easley gave an update on the financials of the PLF.
B. Memo re: Complaint

Ms. Easley presented information regarding a pro se claimant who was not happy with the claims attorney’s assessment of the case.

C. Final 2018 Audit Financial Statements

Ms. Morrow presented the report from the 2018 audit.

D. 2018 Annual Report

Ms. Morrow presented the PLF Annual Report.

7. OSB Committees, Sections, Councils and Divisions

A. Oregon New Lawyers Division Report [Mr. Sturm]

Mr. Sturm presented information about the Oregon New Lawyers Division.

B. Legal Services Program [Ms. Baker]

1. Release of Unclaimed Funds

Ms. Baker presented information about disbursing unclaimed client funds to the Legal Services program.

Motion: Ms. Reeves moved and Ms. Rice seconded to accept the Legal Services Committee recommendation to not make disbursements from the unclaimed client funds account in 2019 and to set a $400,000 reserve target for all unclaimed funds combined. The board voted unanimously in favor. The motion passed.

C. Amendment to RPC 7.2 re: nominal gifts [Ms. Hollister]

Ms. Hollister presented the Legal Ethics Committee recommendation that the board approve an amendment to Oregon Rule of Professional Conduct 7.2, to allow lawyers to give nominal gifts to persons who recommend their services under certain circumstances, and place the proposed amendment on the 2019 House of Delegates Agenda. [Exhibit M]

Motion: Mr. Wade moved and Mr. Bachofner seconded to amendment to the Oregon Rule of Professional Conduct 7.2 as recommended by the Legal Ethics Committee. The board voted unanimously in favor. The motion passed.
8. Closed Session – CLOSED Agenda
   A. Executive Session and Judicial Proceedings
      (pursuant to ORS 192.660(2)(f) and (h) and ORS 192.690(1))

Back in Open Session

Motion: Ms. Reeves moved and Ms. Rice seconded to reinstate Ms. Rose. The board voted unanimously. The motion passes.

9. Consent Agenda

   A. Report of Officers & Executive Staff
      1. Executive Director’s Report
      2. Director of Regulatory Services

   B. Client Security Fund Committee [Ms. Hollister]
      1. CSF Financial Reports and Claims Paid
      2. Claims to Approve or Review
      3. Update on CSF Rule Review

   C. Approval of May 17, 2019 Meeting Minutes

Motion: Ms. Rice moved and Ms. Reeves seconded the motion to approve the Consent agenda. The board voted unanimously in favor.
OREGON STATE BAR
Board of Governors Agenda

From: Policy & Governance Committee
Meeting Date: June 21, 2019
Re: Recommendations from the 2019 Wellness Summit

Action Recommended

Refer summary recommendations from the Wellness Summit to bar departments and volunteer groups for further consideration.

Background

OSB Past-President Vanessa Nordyke hosted a Wellness Summit on January 25, 2019, bringing together bar leaders and others to discuss the issues facing our profession related to lawyer well-being.

A panel of resource experts presented, along with a panel of lawyers sharing their own experiences of overcoming stress, addiction and mental health issues. Participants brainstormed solutions in small groups in the following topic areas: Healthy Habits; Law Firm/Organizational Support; Non-Dominant Culture Attorneys; Substance Abuse, Addiction and Mental Health Issues; and Sole Practitioners, Rural Lawyers, New Lawyers and Law Students.

A total of 85 lawyers attended in person, with another 52 registered for the presentation portions via live webcast. A recording of the program is available here: https://www.osbar.org/resources/WellnessSummit.html.

OSB and PLF staff coordinated the summit with the assistance of a volunteer planning committee. After the summit, the committee met once by teleconference to review recommendations from the participants and discuss next steps.

At its meeting on May 17, 2019, the Policy & Governance Committee received a report from staff regarding recommendations generated from the summit. The Policy & Governance Committee recommends sharing the summit report and recommendations with various bar departments and existing volunteer groups whose work is related to the recommendations. These groups, many of which were represented on the planning committee, include the Quality of Life Committee, the Advisory Committee on Diversity & Inclusion and the Oregon New Lawyers Division. The Policy & Governance Committee recommends asking each of these groups to discuss how they might advance the summit findings and goals and to discuss policy considerations regarding the use of alcohol at bar events.

A summary of the issues and recommendations discussed at the summit is attached; the attachment includes notations of the staff and volunteer groups most directly concerned with each item.
1. Healthy Habits Discussion

Challenges:

- Many lawyers suffer from vicarious trauma due to the nature of their work.
- Many, if not most of us, also have “imposter syndrome,” and are afraid we don’t really know what we’re doing and that others will find out.
- Lawyers may find it hard to turn off their brains, constantly analyzing/fixing/creating.

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<tr>
<th>Solutions to Explore</th>
<th>Staff Groups</th>
<th>Member Groups</th>
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<tr>
<td>Address stigma against getting help – therapy is like exercise for your brain.</td>
<td>Communications, OAAP</td>
<td>QOL Comm.</td>
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<td>To avoid feeling overwhelmed, focus on “micro doses” of wellness activities, anything from mindfulness practice to taking walks in nature. Schedule time for wellness activities.</td>
<td>Communications, OAAP</td>
<td>QOL Comm.</td>
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<td>Use technology for support – Ted Talks, breathwork apps, etc.</td>
<td>Communications, OAAP</td>
<td>QOL Comm.</td>
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<td>Find others who will support you – be unapologetic and intentional in developing healthy habits, understanding that it may take time.</td>
<td>QOL Comm.</td>
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2. Substance Abuse, Addiction and Mental Health Discussion

Challenges:

- Law schools do not do a good job regarding lawyer vulnerability. This topic needs to expand into law schools to let students know it is okay to be vulnerable.
- There needs to be an attitude change at both the upper and lower ends of the attorney spectrum. First year law students need “wellness” as a subject matter.
- Vicarious trauma should be addressed in law school. Attorneys are expected to be “rocks” for their clients. Lawyers must be able to get tools to deal with that.
- The idea that attorneys have to ask for help is an issue. Firms need to have support in place and make sure new lawyers know about it. An example would be access to a “meditation minute.”
- Lawyers need to know what happens when they call OAAP.
- Rule 8.3 deals with reporting unethical conduct. “Drinking problems” shouldn’t be in the rules because that would cause stigma; lawyers need to know when they may, and may not, be getting a colleague “in trouble.”
• Need for increased suicide awareness, putting a name to the issue and bringing it into the open to make it easier for lawyers suffering suicidal ideation to seek help and make others more alert to the signs and symptoms that others may need help.

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<td>Work with law schools to address the challenges detailed above.</td>
<td>OAAP</td>
<td>BOG</td>
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<td>Consider whether questions asked in the bar admissions process may have a chilling effect on law students getting needed help (out of fear of creating a record that may impair bar admission).</td>
<td>Admissions</td>
<td>BBX</td>
</tr>
<tr>
<td>Law firms and other legal employers should take the lead: Supportive polices, leadership supporting and modeling healthy behavior, providing mentors and other support, encouraging lawyers in trouble to seek help without fear of negative consequences at work.</td>
<td>OAAP</td>
<td>QOL Comm.</td>
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<td>Messaging should be layered: Thread into substantive CLE seminars, publish articles in the bar Bulletin, involve new lawyers.</td>
<td>CLE Seminars, Communications</td>
<td>ONLD, QOL Comm.</td>
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<tr>
<td>Learn from practices in other high-stress professions and jobs, e.g., “critical incident debriefings” for law enforcement personnel.</td>
<td>OAAP</td>
<td>QOL Comm.</td>
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3. Non-Dominant Culture Attorneys Discussion

Challenges:

• Unspoken judgment statements that hit the core of a lawyer’s self-worth or value, creating an atmosphere that the lawyer from the non-dominant culture needs to work ten times harder to get ahead, which adds to internal pressure (e.g., micro-aggression comments: “you speak English really well for being a (ethnicity))."
• Some non-dominant culture lawyers who are serving as part of committees are not receiving the support they seek. To illustrate, someone mentioned that their request for funding that supports access to justice by having an attorney of color speak on barriers was denied.
• Systemic issues such as ableism. We need to look at how to make our environments more accessible to people with disabilities.
• Not enough leaders from the non-dominant culture.

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<td>Consistently use language that is inclusive of other cultures or social groups.</td>
<td>D&amp;I, DAC, Communications</td>
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Focus on physical accessibility -- are law firms/offices and bar services welcoming or safe for those with a physical or mental disability?  

| D&I, BART | Disability § |

Look at the way various systemic issues are impacting whether lawyers seek the help they may need. Have culture-specific or gender-specific treatment options available.  

| D&I, OAAP |

Relationships -- be more supportive of committee activities promoted by lawyers from non-dominant cultures; elevate leadership from them and make that an agenda  

| D&I | BOG, ACDI |

Turn the concept of inclusivity into a philosophy so true equity can be reached, a place in which people from different cultures are free to be themselves without the expectation that they are representing everyone in their group.  

| All | All |

4. Sole Practitioners, Rural Lawyers, New Lawyers and Law Students Discussions

Challenges:

- Finding connections and support can be an issue for this group, especially introverted lawyers.
- The stigma against self-care is strong.
- Lawyers need safe structures and resources for seeking help.
- Work-related anxiety – the point of realizing what you don’t know is more than what you do know; a tendency to perfectionism.
- Sole practitioners don’t have the benefit of sabbaticals, paid time off, paid leave, etc. If time is needed, are there options other than to just economize? Disability insurance?
- Need to set expectations and boundaries with clients to take time off, get balance.
- Help in how to find mentors – calls, emails and other ways to build connections.
- Older lawyers have issues other than cognitive decline; may need help with retirement planning.

Solutions to Explore:

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<tr>
<td>Promote the importance of meaningful, supportive connections – help lawyers feel comfortable reaching out and encouraging everyone to offer help when they can.</td>
<td>Communications, CLE</td>
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<tr>
<td>Mentoring, networking events – including groups not just for lawyers. Create informal groups.</td>
<td>Mem. Services</td>
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<td>Promote OSB and PLF services that can help.</td>
<td>RIS, OAAP, Communications</td>
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<tr>
<td>Assistance with financial planning for law practice, retirement planning, help with student debt.</td>
<td>CLE Seminars</td>
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Help with creating boundaries, maintaining a work/life balance for sole practitioners.

5. Law Firms and Organizational Support Discussion

Challenges:

- Wellness and health/fitness challenges can build camaraderie and reinforce good habits but partners and leaders need to participate for these programs to be successful.
- “Buying the answer” sometimes works for physical wellness programs, but should also be there from the mental health standpoint.
- Lawyers in firms need to support each other, share their stories – reach out to colleagues and connect on an authentic level – including partners, associates and staff.
- Career damage for lawyers who don’t want to take promotions or handle certain case types (e.g., sex abuse cases) because they don’t want to damage their mental health.
- Supporting parents who decline committee and other work that could advance their careers.
- Billable hours can be a barrier to asking for and getting help or accommodations for lawyers who need support. How do we define profitability beyond billable hours?
- Need structures in place to protect against and compensate for our own implicit biases.
- An obsessive need to monetize an intellectual product without regard to the human toll it takes.
- Unrealistic expectations regarding partner compensation as a percentage of firm profitability.

Solutions to Explore

<table>
<thead>
<tr>
<th></th>
<th>Staff Groups</th>
<th>Member Groups</th>
</tr>
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<tbody>
<tr>
<td>Leaders and partners need to talk about mental health and model asking for help as well as supporting others in getting help.</td>
<td>OAAP</td>
<td>QOL Comm.</td>
</tr>
<tr>
<td>Require lawyers to do something to decompress after stressful/traumatic projects or experiences; rotate people through the highest-stress areas.</td>
<td>QOL Comm.</td>
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<tr>
<td>Offer support for lawyers returning from leave; think about how to extract value for the firm from the leave, e.g., give presentations or mentor others.</td>
<td>QOL Comm.</td>
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<tr>
<td>Provide and facilitate support groups for lawyers experiencing various issues, e.g., parenthood, retirement planning, managing a health issue, maintaining good physical and mental health.</td>
<td>OAAP</td>
<td></td>
</tr>
<tr>
<td>Have reasonable financial expectations; examine billable hour requirements and profitability through a wellness lens.</td>
<td>QOL Comm., ONLD</td>
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BACKGROUND

Origin of the committee

The Referral Fees Committee (the “Committee”) was created in response to the Oregon State Bar House of Delegates (“HOD”) meeting on November 3, 2017. At that meeting, the HOD considered a Board of Governors (“BOG”) resolution that would have amended Oregon Rules of Professional Conduct (“ORPC”) 5.4(a)(5) and 7.2(b)(2). Rule 5.4 protects the lawyers’ professional independence by prohibiting sharing legal fees with non-lawyers except in specified circumstances. Rule 7.2 addresses attorney advertising, and restricts lawyers from paying others to recommend the lawyer’s services in most circumstances. The BOG resolution would have allowed—with some limitation—lawyers to share fees with for-profit lawyer referral services.

The HOD declined to adopt the recommended rule changes, and instead sent the issue back to the BOG for further study. To that end, the BOG created this committee. In creating the committee, the BOG sought to include individuals with a variety of backgrounds, perspectives and experience. The committee roster is included at the end of this report as Appendix A.

Committee charge

The Referral Fees Committee was charged to:

Study the rules that govern the circumstances under which a lawyer may pay a for-profit company for directing clients to that lawyer (esp. 5.4(a)(5) and 7.2(b)), in light of changing models for obtaining and delivering legal services. Consider how such rules should be amended in order to account for these changes, while still protecting the public and allowing for greater access to legal services.

The committee began meeting in April of 2018 and met a total of 7 times. It commenced its work by reviewing the Futures Task Force Report and the proposal to amend Rules 5.4 and 7.2 that was considered by the HOD at its November 2017 meeting.

OSB Futures Task Force

The committee discussed proposed rule changes in light of the larger recommendations of the OSB Futures Task Force. The Futures Task Force was convened by the BOG in April of 2016. At that time the Task Force was charged to:

Examine how the Oregon State Bar can best protect the public and support lawyers’ professional development in the face of the rapid evolution of the manner in which legal services are obtained and delivered. Such changes have been spurred by the blurring of traditional jurisdictional borders, the introduction of new models for regulating legal services and educating legal professionals, dynamic public expectations about how to...
seek and obtain affordable legal services, and technological innovations that expand the ability to offer legal services in dramatically different and financially viable ways.

The Futures Task Force was split into two committees, a “Legal Innovations Committee” and a “Regulatory Committee.” Since the Futures Task Force Report was adopted, the OSB has worked to implement most of the recommendations from the report. The Futures Task Force Executive Summary can be found here.

Among the recommendations of the Futures Task Force were proposed changes to ORPCs 5.4(a)(5) and 7.2(b)(2) intended to “remove barriers to innovation.” Specifically, the Regulatory Committee recommended that Rules 5.4 and 7.2 be amended as follows:

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

***

(5) a lawyer may pay the usual charges of a bar-sponsored or operated not-for-profit lawyer-referral service, including sharing legal fees with the service, only if:

(i) the lawyer communicates to the client in writing at the outset of the representation the amount of the charge and the manner of its calculation, and

(ii) the total fee for legal services rendered to the client combined with the amount of the charge would not be a clearly excessive fee pursuant to Rule 1.5 if it were solely a fee for legal services, including fees calculated as a percentage of legal fees received by the lawyer from a referral.

RULE 7.2 ADVERTISING

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

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

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1 http://www.osbar.org/_docs/resources/taskforces/futures/FuturesTF_Summary.pdf
2 Recommendation 2.2 – Amend current fee-sharing rules to allow fee sharing between lawyers and lawyer referral services, with appropriate disclosure to clients. OSB Futures Task Force Executive Summary, page 10. See also Appendix B of this report.
(2) pay the usual charges of a legal service plan or a lawyer-referral service in accordance with Rule 5.4; and

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

***

The Regulatory Committee report related to this recommendation is attached as Appendix B.

**ISSUES DISCUSSED**

**Impact of lawyer referral services on access to justice**

The committee began with a discussion about the types of online services available and how they operate. The committee identified the following three models:

- Marketing model (directories, search engines, matching services)
- Document provider
- Lawyer referral service

While there is no general statutory definition of a “lawyer referral service,” in 2018 the Bar assisted with the passage of **HB 4095**, which added the following definition of the term to the Oregon Evidence Code:

“Lawyer Referral Service” means an entity that, as a regular part of its business, refers potential clients to lawyers, including but not limited to a public nonprofit entity sponsored or operated by the Oregon State Bar.

There was considerable discussion about the extent to which the access to justice issues described in the Futures Task Report can be meaningfully addressed by for-profit lawyer referral services. Proponents of the use of for-profit lawyer referral services have argued that they can result in both:

- Connecting potential clients with lawyers who will charge the client a lower rate than the client could otherwise have obtained; and
- Informing some individuals that problems they face are in fact legal problems with which a lawyer can help.

Proponents identified for-profit businesses that are effective at advertising, and indicated that if for-profit referral services offered advertising and educational content relating to legal services, licensed attorneys in Oregon participating in a lawyer referral service would be able to

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3 The definition appears in Rule 503 (ORS 40.225) and addresses attorney-client privilege as related to a lawyer referral service.
spend more time providing legal services rather than advertising on their own. Proponents also argued that consumers have grown accustomed to finding professional services via the internet, and current rules regarding fee sharing are an impediment to developing new and innovative business models.

Some committee members believed these factors result in some clients hiring lawyers who would not have otherwise done so. Other committee members expressed concern that there is little or no empirical evidence to support either claim, and that the main interest of for-profit referral entities is to make a profit, not to ensure access to justice for clients. Those committee members expressed concerns about consumer protection, and that the harm to Oregonians may be greater than any theoretical benefits identified by proponents.

The only data point available is the Oregon State Bar Lawyer Referral Service. In 2017:

- 47,000 referrals were made;
- 47% made no contact with the lawyer;
- 48% contacted and had consultation but did not retain lawyer, and;
- 5% retained lawyers and paid fees

Some committee members expressed concern that allowing fee sharing with lawyer referral services could actually harm access to justice because increased costs to lawyers would simply be passed on to clients, resulting in decreased access to justice.

Consumer protection concerns

Current regulation of for-profit lawyer referral entities

One objection to allowing lawyers to share fees with for-profit lawyer referral services is the lack of existing robust regulation. The Oregon State Bar does not currently have any regulatory authority over such entities. It was noted that the Oregon Department of Justice (“DOJ”) Financial Fraud Division has some regulatory oversight through the Unlawful Trade Practices Act, which applies to lawyer referral services. To get a sense of the numbers and types of complaints DOJ receives regarding online legal services, the committee requested DOJ to provide information regarding complaints it received about AVVO, Legal Shield, Legal Zoom and Rocket Lawyer. A summary of those complaints is attached as Appendix C.

Between 2008 and 2017, the DOJ received a total of 13 complaints directed at the above four entities. Of those, four related to allocation of fault or misleading claims of services offered; four others were pricing related complaints; and three were complaints about the quality of services provided by the law firm provider. These complaints come from a pool of between 8,000 and 12,000 written complaints DOJ receives each year.

Some committee members said that the fact that DOJ has only received 13 complaints since 2008 regarding on-line lawyer referral services does not capture the spectrum of activity. A
number of committee members reported receiving regular solicitations from such services for personal injury claims in violation of ORS 9.500 et seq. Some committee members believe the frequency with which such services are violating Oregon law indicates that some form of regulation is necessary to protect consumers, particularly in the areas of confidentiality of information and disclosure regarding captive lawyer referral networks.

**Interference with independent professional judgment**

The primary consumer protection concern expressed by some committee members was that a fee-sharing arrangement with a for-profit institution could threaten a lawyer’s independent professional judgment. This could manifest in a number of ways. Specifically, some committee members felt that if lawyers are reliant on a for-profit service to attract clients, they may be susceptible to pressure from that service to resolve cases in a particular manner or within a particular time frame for fear of losing future referrals from the service. Similarly, other lawyer fiduciary obligations to clients may succumb to the pressure of a third-party referral service in the interests of its own profit.

Young new lawyers may be particularly susceptible to these pressures. Other committee members felt that the existing rules regarding undue influence in the ORPCs may be sufficient to guard against these concerns.

**Other Consumer Protection Concerns**

Some committee members expressed concerns that consumers might receive lower quality legal services because legal claims could be sold to the highest bidder or sold to out-of-state, aggregators lacking experience with Oregon courts. Other members thought those concerns were unfounded: the highest bidders would not necessarily be unqualified providers of legal services, or even less qualified providers than the lower bidders, and that allowing in-state lawyers to accept referrals from for-profit companies would, if anything, reduce referrals to out-of-state aggregators.

Some members also expressed concern that it could be unclear to consumers who is actually handling their claim and what the relationship between the lawyer and the referral service really is.

Other committee members argued instead that the consumer is free to evaluate the quality of lawyer once their lawyer has been identified and is free to end the relationship. They also noted that this concern already exists in many lawyer-client relationships. Lawyer referral services would likely argue they are providing higher quality services because of their ability to allow for direct consumer feedback regarding the quality of the legal services they received.

**Impact on lawyers**

The committee also discussed which practitioners were most likely to be impacted if lawyers were permitted to contract with for-profit lawyer referral services. One train of thought was
that the proposed change to RPC 5.4 would primarily benefit newer and solo lawyers because it would provide a possible route to attracting clients that would not be controlled by larger, existing firms. In theory, this could benefit attorneys who have nontraditional practices or who are less likely to be hired by traditional firms.

Other committee members were skeptical of this outcome, based on the idea that existing, established firms could outbid younger independent attorneys for cases, which would create barriers to entry for younger attorneys. This was especially a concern to such members if online lawyer referral services succeed in dominating search engine results, making it extremely difficult for younger attorneys to launch their own websites and compete for legal work on the internet.

This point was discussed extensively by the committee, as well as by outside groups who raised the concern with committee members. Ultimately, the committee was not able to reach a consensus on which was the more likely outcome.

**OPTIONS CONSIDERED**

The committee considered a number of specific recommendations regarding how to proceed on this issue, including the following 6 options:

1. **Recommend adoption of the 2017 HOD resolution in its current form.**
2. **Recommend amending Rule 5.4 to permit a lawyer to pay a for-profit referral service a flat fee— but not a percentage fee— that is calculated based on payment for services rendered.**
3. **Recommend amending Rule 5.4 to permit a lawyer to pay a for-profit referral service a fee based on a percentage of legal fees received for a limited scope representation.**
4. **Recommend adoption of a rule similar to one proposed in North Carolina whereby lawyers may pay a portion of a fee to an online marketing platform so long as the amount paid is for administrative or marketing services, and there is no interference with the lawyer’s independent professional judgment.**
5. **Recommend amending Rule 5.4 to permit payment of a flat or percentage fee to a for-profit lawyer referral service so long as the referral is for a short-term limited representation and the fee is not contingent on the outcome of the representation.**
6. **Recommend making no changes to existing rules.**

Concerns were expressed about any solution that would attempt to limit fee sharing to limited scope representations. As members pointed out, most representations in modern law practices are limited in some respect, and crafting a definition of “limited scope” that would truly restrict the application of a fee sharing rule would be difficult. This could make any limitations on fee sharing in a modified Rule 5.4 illusory, as they would end up applying to only a few attorney-client relationships.
While some committee members were uncomfortable with any form of fee sharing, most members expressed a level of comfort with allowing some form of fee sharing when it was limited to cases where the amount paid to the referral service was a flat fee, and not related to either the amount paid to the attorney by the client or to the outcome of the case.

The task force selected a workgroup to further explore the second of the above options – that fee sharing with a for-profit lawyer referral service be permitted so long as the amount paid was not based on the outcome of the case.

The workgroup debated adding a subsection to the proposal, which would reiterate that the total fees charged to a client – including both fees for legal services, and any additional fees paid to the lawyer referral service – cannot constitute an unreasonable fee. While there was some support for including additional language to this effect, the majority of the committee determined that the additional language was unnecessary and could cause confusion, as Rule of Professional Conduct 1.5(a) already prohibits a lawyer from charging “an illegal or clearly excessive fee or a clearly excessive amount for expenses”. Committee members agreed that a lawyer should not be permitted to charge a client an additional amount if that caused the total fees paid by the client to be excessive or unreasonable under the rules.

COMMITTEE RECOMMENDATIONS

A majority of the Referral Fees Committee felt it was important to make a recommendation. From among the options considered, a single proposal with two variations was identified as best balancing the concerns raised with the potential benefit to access to justice. It is important to note that the Committee did not reach a consensus on the overall desirability of implementing any rule change and no recommendation received the unanimous approval of the committee.

A majority of the committee did, however, recommend that Rule 5.4(a) be amended as follows:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

***

(6) a lawyer may pay the usual charges of a for-profit lawyer referral service for referral of a matter, only if:

(i) the amount of the payment is fixed at the outset of representation, is not a percentage of legal fees, and is not based on the outcome of the matter; and

(ii) the lawyer discloses to the client in writing at the outset of the representation the amount of the payment to the lawyer referral service and the nature of the lawyer’s relationship with the lawyer referral service.
Should the Board of Governors choose not to recommend the above change be made to the Rules of Professional Conduct, the Committee recommends in the alternative that the BOG recommend the following change, which includes an additional subsection.

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

***

(6) a lawyer may pay the usual charges of a for-profit lawyer referral service for referral of a matter, only if:

(i) the amount of the payment is fixed at the outset of representation, is not a percentage of legal fees, and is not based on the outcome of the matter;

(ii) the lawyer discloses to the client in writing at the outset of the representation the amount of the payment to the lawyer referral service and the nature of the lawyer’s relationship with the lawyer referral service; and

(iii) the fee charged by the lawyer to the client is not contingent on the outcome of the matter.

The addition of the third subsection is intended to address concerns about contingent fee cases.

Several committee members expressed that their concerns about fee sharing were particularly acute in the case of contingent fee cases. To these members, the addition of subsection (iii) made the proposal less objectionable, though they still expressed reservations about amending Rule 5.4 at all for all of the reasons detailed above.

Other members opposed the addition of subsection (iii) because they felt that many of the practice areas in which there is unmet legal need are areas in which lawyers traditionally charge contingent fees. These include landlord-tenant disputes; small-value tort and contract claims subject to ORS 20.080 and 20.082, and employment-related proceedings.

The committee members in support of subsection (iii) argued instead that in contingent fee cases, the fees charged by lawyer referral services could result in such a small margins as to discourage attorneys from taking these lower value cases at all. This could result in increasing, rather than decreasing any unmet legal need.
The primary recommendation passed the committee by a vote of 7-3 with one abstention. The alternate recommendation passed the committee by a vote of 6-3 with two abstentions. Different committee members objected to each proposal, meaning that 6 of the committee members voted “yes” to one recommendation and “no” to the other, while 3 other members voted “yes” on each proposal. One member abstained from both votes.

Respectfully submitted,

Kurt Hansen
Referral Fees Committee Chair
Appendix A

**Referral Fees Committee Roster**

**Committee Members**
Kurt Hansen, Chair
Steven Berman
Mika Blain
Jermaine Brown
Thomas Christ
Ankur Doshi
Leigh Gill
John Grant III
C Scott Howard
Robert Kline
Sarah Litowich
Tara Millan
Michael O’Brien
Erin Pettigrew
Rep. Karin Power
Catherine Schulist Yao
Erin Zemper

**BOG Liaisons**
Christine Costantino
Vanessa Nordyke
Michael Rondeau
Robert Gratchner

**Staff Liaisons**
Helen Hierschbiel
Susan Grabe
Matt Shields
Kellie Baumann
RECOMMENDATION 2.2: Amend Lawyer-Referral Services Fee-Sharing Rules

2.2 The Bar should amend current fee-sharing rules to allow fee-sharing agreements between lawyers and lawyer-referral services, with appropriate disclosure to clients.

Oregon lawyers are generally prohibited from “giv[ing] anything of value to a person for recommending the lawyer’s services,” RPC 7.2(b), subject to exceptions for advertising and the usual charges of a lawyer-referral service, RPC 7.2(b)(1)–(2). Similarly, Rule 5.4 prohibits lawyers from sharing a legal fee with a nonlawyer, including an advertiser or referral service, unless the referral service is a bar-sponsored or not-for-profit service. RPC 5.4(b)(5).

The historical justification for such prohibitions has been a concern that allowing lawyers to split fees with nonlawyers and to pay for referrals would potentially compromise the lawyer’s professional judgment. For example, if a lawyer agreed to take only a small portion of a broader fee paid to one who recommends the lawyer’s services, that modest compensation arguably could affect the quality of the legal services. Similarly, a percentage-fee arrangement could reduce the lawyer’s interest in pursuing more modest claims.

We acknowledge that important concern, and we do not propose discarding regulation of lawyers’ fee arrangements. We do believe, however, that the current rule is ill-suited to a changing market in which online, for-profit referral services may be the means through which many consumers are best able to find legal services. Innovative referral-service models that could assist in shrinking Oregon’s access-to-justice gap should not be stifled by a rule that was written for a very different time.

Rather, borrowing from the approach taken for attorney fee splits in Rule 1.5(d), we suggest a revision that balances the legitimate historical concerns with relaxed regulation by requiring written disclosure of the fact of the fee split and the manner of its calculation. Because the rules should also continue to ensure that any fee is reasonable, we further recommend new wording that essentially prohibits the overall fee shared by a lawyer and a referral service from being clearly excessive as defined in RPC 1.5.

Finally, we note that, despite the existence of Rule 5.4, Oregon lawyers are currently participating in an online attorney-client “matchmaking” service that has been found by other bars to be referral services.

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4 Rule 7.2(b)(2) was amended on January 1, 2017, to remove the requirement that the lawyer-referral service be “not for profit.”
that engage in the improper sharing of fees\(^5\). Although the Oregon State Bar has not squarely addressed this issue, and no bar complaints have yet been filed arising from such activity, it is entirely possible that the Bar will soon be required to decide whether lawyers who participate in popular online attorney-client matchmaking services are engaged in unethical conduct. This is yet another reason to carefully examine the continuing utility of Rule 5.4 in its current form.

Accordingly, we recommend that Rule 5.4 be amended to provide:

**RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

***

(5) a lawyer may **pay the usual charges of a lawyer-referral service, including sharing legal fees with the service** pay the usual charges of a bar-sponsored or operated not-for-profit lawyer referral service, only if:

(i) the lawyer communicates to the client in writing at the outset of the representation the amount of the charge and the manner of its calculation, and

(ii) the total fee for legal services rendered to the client combined with the amount of the charge would not be a clearly excessive fee pursuant to Rule 1.5 if it were solely a fee for legal services, including fees calculated as a percentage of legal fees received by the lawyer from a referral.

In addition, we recommend that Rule 7.2 be amended to provide:

**RULE 7.2 ADVERTISING**

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communication, including public media.

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

***

(1) **pay the usual charges of a legal service plan or a lawyer-referral service in accordance with Rule 5.4**;

This proposed change to Rule 5.4 would equal the playing field between for-profit, nonprofit, and bar sponsored lawyer-referral services. It would allow for-profit referral services to take advantage of the same fee-sharing exception currently offered to bar-sponsored and nonprofit lawyer-referral services, but would ensure consumer protection through fee-sharing disclosures and a requirement that the overall fee not be clearly excessive.

We discussed at length whether, in addition to written disclosure as discussed above, lawyers should be required to obtain a client’s informed consent to share a legal fee with a lawyer-referral service. This approach would be consistent with other approaches taken when there is some concern that a lawyer’s

fiduciary duty of loyalty to the client could be implicated by self-interest or a relationship with a third party. See, e.g., RPC 1.5(d) (fee splitting among lawyers not at the same firm); RPC 1.7(a)(2) (material limitation conflict); RPC 1.8(a) (business transactions with clients). Although we have stopped short of making that recommendation, we note that our proposal could be easily amended to require informed consent, should the Board wish to do so.

Taken together, these proposed changes to RPC 5.4 and RPC 7.2 would allow lawyers to use a broader range of referral services, while increasing price transparency for consumers and continuing to ensure an overall reasonable fee.
The Department of Justice has received 13 written complaints involving Avvo, LegalShield, Legal Zoom, and Rocket Lawyer since 2008. Legal Shield has been the subject of seven complaints; Legal Zoom, four; and Avvo and Rocket Lawyer, one each.

A summary of the complaints follows by year.

2008

- **Avvo**: A California attorney complained that he was listed and ranked on Avvo’s website; that the company did business in 19 States, including Oregon; that the website’s information was “incomplete, inaccurate, false and misleading”; and that its rating system was “arbitrary and capricious.” The attorney challenged the company’s claim that the site’s information was culled from publicly available sources and complained that the company had ignored his requests to have his listing removed. The attorney alleged that, in fact, the company had changed his listing in such a way that it provided more incorrect information. The attorney reiterated that he did not want to be affiliated with the company and was concerned that the company interfered with his ability to control his marketing strategy.

2009

- **Legal Zoom**: The complainant explained that her spouse’s employer offered access to the company’s discounted services and that she had visited the company’s website after having seen an advertisement featuring one its founders, Robert Shapiro. The complainant did not use the company’s services. Nevertheless, she was concerned that the website and advertising left the impression that the company would obtain legal counsel on consumers’ behalf or perform a substantive review to ensure that the documents created using its software were legally sufficient, but had fine print stating otherwise.

- **Legal Zoom**: The complainant, an attorney, was concerned that the company’s advertisements left the impression that attorneys would be assisting in the preparation of documents, including living trusts.

2011

- **Legal Zoom**: The complainant appears to have been the victim of a telephonic business investment scam. The complainant’s attorney provided several documents identifying unauthorized charges on her credit card, one of which was a charge for Legal Zoom. The complainant later received a document from Legal Zoom, who had in turn, received a document from the Oregon Secretary of State. The document advised that a limited liability company had failed to file an annual report.
2014

- **Legal Zoom:** The complainant expressed concern that he was still being billed for a monthly $17 fee despite having cancelled his services with Legal Zoom several months prior. The complainant later contacted DOJ to report that the matter was resolved.

2015

- **Legal Shield:** The complainant reported that her son had been approached by a friend about Legal Shield and she was concerned that the company was a multilevel marketing scheme. The complainant found it concerning that the company had recently changed its name from Pre-Paid Legal after having been investigated by the Federal Trade Commission and the Securities and Exchange Commission.

- **Legal Shield:** The complainant appears to have been a contractor for the company and was responsible for promoting its services to consumers. The complainant states that she was unwilling to promote the services without first “test driving” the company’s services and alleged that the letters provided by the company’s law-firm partner were of low quality. The complainant was also concerned that the company’s website featured a testimonial from a consumer that stated: “I was owed a refund. My lawyer made sure I got it.” The complainant had the law-firm provider author a demand letter, but unlike the consumer in the testimonial, did not receive a refund.

- **Legal Shield:** The anonymous complainant alleged that a local Oregon resident was employed by Legal Shield, had advertised herself as a licensed attorney and real estate broker offering loan modification services.

2016

- **Legal Shield:** The complainant had purchased a membership in order to have a letter written to her landlord. She was dissatisfied because, despite repeated efforts, the law-firm provider was unable to provide an adequate letter. She was concerned that the letters had not been proofread, contained grammatical errors, and contained basic errors of fact. In its response to the complainant, the company acknowledged that the complainant had wanted changes to be made to the letter and that the company had declined to make a change to the last letter because the complainant insisted that the letter contain false information.

2017

- **Legal Shield:** The complainant, a small business owner, purchased a small business legal policy. The complaint alleges that the law-firm provider claims to have a conflict of interest. As a result, the business cannot use its accumulated hours and must pay the bulk of the attorney bill. The complainant was also frustrated because the law-firm provider will only speak to him with respect to legal business, not his employees, a practice that he deems inefficient. His requests for a new provider have gone unheard.

- **Legal Shield:** The complainant alleged that the attorney working on her case had failed to resolve her case and had not provided an explanation for his failure to do so. She was also concerned that the company had not honored her refund requests. In its response,

*REVISED 6/19/18*
• the company stated that it had provided to promised services, including mailing a letter to the opposing party that had been returned undeliverable, at which point, the complainant advised the provider that the matter had been resolved.

• **Legal Shield:** The complainant purchased a membership in 2014, but was unable to use it because the law-firm provider was unable to provide services to a Spanish speaker. The complainant alleged that he had been told that, upon cancellation, he would receive a refund of all amounts paid, but he had only received a partial refund of the amounts paid. The company declined to give a full refund, explaining that, the complainant had called shortly after purchasing the service and explained that he only spoke Spanish. Before being transferred to the Spanish line, the complainant ended the call. The company reasoned that, had the call been completed, it would have learned about its inability to provide the services earlier and would have cancelled the membership after the first call.

• **Rocket Lawyer:** The consumer reported that, in 2015, he had created an account to use a legal form and agreed to a free trial within a $39.95 monthly charge if he failed to cancel or downgrade the account. The consumer received no further correspondence, invoices, or payment notifications from the company and did not notice the recurring charges to his credit card until December 2016. The consumer was concerned that the company was not complying with Oregon laws governing automatic renewal contracts and recommended state and federal legislative action to regulate free offers. The company provided the consumer with a full refund.
Dear Members of the Oregon State Bar Attorney Referral Fee Committee,

We are writing to you as co-chairs of the Oregon Trial Lawyers Association Minority Caucus and New Lawyer Committee. We join the OTLA Board of Governors in strong opposition to the proposed changes to Oregon Rule of Professional Conduct 5.4. We write separately to address the detrimental impact the rule changes would have on new lawyers and Oregon lawyers from underrepresented communities.

Our mission within OTLA is to provide a space where newer lawyers and lawyers from underrepresented communities can gather to learn more about civil law practice (the practical skills you don’t learn in law school), meet colleagues from similar practice areas, cultural backgrounds, and community interests to help us all become better lawyers.

We believe the proposed rule changes would have a devastating effect on new lawyers and our minority caucus members. The proposed rule changes would force a “pay-to-play” model, cases would be sold to the highest bidder. Newer plaintiff’s lawyers often out on his/her/their own, would have a difficult time competing with more experienced, better financed lawyers with the resources to buy such cases. The effect of the rule would pit newer lawyers against better funded, veteran lawyers. While those veteran, established lawyers would have the money for the lead, they may well lack relevant experience or insight as to the specific matter or legal issues. Indeed, many cases our newer lawyers take on are smaller value cases so they can learn and gain experience. The proposed rule changes would effectively allow “mills” to buy those cases out from under these new lawyers, and then churn the cases for a quick financial return. If the newer lawyer is able to compete and obtains such a case, the cost of that case has just gone up because the lawyer will have to pay an additional “finders fee” to the lawyer advertising corporation.

As newer lawyers, and people from historically underrepresented communities, we are committed to providing legal services to our communities. The proposed rule changes to allow potential clients to be sold to anyone with a law degree willing to pay would prevent us from ensuring that members of our communities are represented by lawyers who have our community members’ best interest at heart.

We are concerned that there is no empirical evidence to show that allowing fee-sharing with for profit lawyer referral services would benefit clients and potential clients. We are similarly concerned that there is a complete absence of empirical data as to how the proposed rule changes would impact new lawyers and lawyers who are from underrepresented communities. We believe the proposed rule changes would dramatically harm the clients we represent and our practices, to the benefit of faceless, investors in for-profit attorney referral fee services.

Sincerely,

Ron Cheng           Meredith Holley
New Lawyers Committee Co-chairs

Shenoa Payne            Nathan Sosa
Minority Caucus Co-chairs
Dear Members of the Oregon State Bar Attorney Referral Fee Committee,

I am writing as President of the Oregon Trial Lawyers Association on behalf of our board and membership of more than 1000 civil plaintiff’s lawyers statewide. Our membership represents injured Oregonians in business, consumer, civil rights, employment, family law, elder abuse, professional negligence, personal injury, Workers’ compensation and other practice areas.

In courthouses throughout the state and in the state capital, OTLA members fight to protect Oregonians’ access to justice and constitutional right to a jury trial.

We are writing to voice our strong opposition to the proposed changes to the Oregon Rule of Professional Conduct 5.4 to allow “fee-sharing” with for profit lawyer-referral services. Although the most recent proposal approved by the Committee has not yet been made available for public review, we understand that the proposed changes from the committee would allow a lawyer to pay a flat fee to a “for-profit lawyer referral service” for referring a client to the referral service.

We see multiple flaws with these proposed changes, including:

• The proposed rule changes effectively would allow, even encourage, for-profit online legal referral services to sell a claim to the attorney/firm willing to pay the highest referral fee. This would all but cut out the new lawyers, many with huge student loan debt and without the resources to afford the high cost of “pay to play” in a bidding war over cases.

• “Lawyer-referral service” is not defined in the proposed rule changes or elsewhere in Oregon law. Any person or entity – from a car title lender to a pawn shop – could adopt the title “lawyer-referral service” and solicit clients, regardless of skill or ability.

• The Bar does not have the authority to regulate “lawyer-referral services.” “Lawyer-referral services” are not regulated – or even licensed – under Oregon law. It is impractical and unrealistic to believe that the Attorney General’s office has the staff or resources to oversee the conduct of “lawyer-referral services”.

• “Lawyer-referral services” are not bound by duties of confidentiality, honesty or good faith. They have no obligation to maintain client confidentiality.

• “Lawyer-referral services” are not required to screen lawyers for competence or diligence. This is particularly concerning given that such services already are heavily soliciting lawyers with the promise of the exclusive right to all clients solicited in a particular geographic area, such as Multnomah County.

The result is that clients – Oregonians in need of legal representation – would lose under the proposed rule changes. Those clients would become commodities, with “lawyer-referral services” auctioning off clients and their potential claims to the highest bidders. “Lawyer-referral services” have no interest in finding the most qualified lawyer to represent people; the sole interest of those services is to generate income. And, unfettered by the ethical duties that apply to lawyers, “lawyer-referral services” need not worry about whether the “prospect” receives good, or even adequate, legal representation, as long as the referral makes money for the “lawyer-referral service.” Even more distressing, the claims of many Oregonians will go to out-of-state bidders that offer the highest referral fee rather than local attorneys that are better qualified to handle the claims.
The Futures Task Force report noted Oregonians have difficulty finding representation in the following areas: family court, dissolutions, custody and support, FAPA, protective orders and landlord/tenant disputes. This flat fee proposal will do nothing to solve this challenge. Often these are smaller value cases. Adding another layer of costs will not help these litigants find attorneys willing to take on these cases and will instead make them even more cost prohibitive.

We understand that the purported need for the rule change is to facilitate “access to justice” for people who either do not know that they have a legal problem or are unable to find a lawyer to represent them. The proposed rule changes will not resolve either issue. There is no independent, empirical data whatsoever that suggests that lawyer referral services actually facilitates potential clients obtaining qualified, necessary legal services. As lawyers who represent plaintiffs in civil litigation, we are convinced that the proposed rule changes would greatly impede access to justice for individuals who have been harmed through no fault of their own. In fact, we see the rule change as decreasing access to justice because the fees charged by the lawyer referral services will increase the overhead of lawyers whom, in turn, will likely pass along the higher overhead in the form of increased fees to clients for legal services.

We also are concerned that the proposed rule changes would have the effect of shutting younger lawyers out from newer cases, because those lawyers would not be able to pay the referral fee for “good cases.” At OTLA, we strive to ensure that newer lawyers receive the training and education necessary to continue Oregon’s long-standing tradition and well-deserved reputation as a state where plaintiffs can receive a fair trial. The proposed rule changes would preclude newer lawyers – those who cannot afford to pay a high “referral” fee to a for-profit, unregulated lawyer referral service – from developing their own practices. The practice of selling cases to the highest bidders would foreclose the next generation of lawyers from developing into the skilled advocates that Oregonians need to ensure they have access to justice.

We strongly urge you to keep ORPC 5.4 as written and to not become the first state in the country to allow lawyer referral services to become an economic partner in legal cases with no oversight or ethical obligation to the clients we serve.

Sincerely,

Sony Fischer
President
Action Recommended

Approve proposed amendments to Program Review Policy.

Background

At the recommendation of the Policy & Governance Committee, the Board of Governors adopted in June 2018 a program review policy to ensure bar programs and services are run efficiently and effectively and continue to be aligned with the bar’s mission and strategic goals.

The policy is being implemented for the first time this year. As expected, implementation revealed the need for some changes in the process. The Policy & Governance Committee recommends the following changes to the program review policy, which are set forth in detail in the attached redline version of the policy:

- Change the scoring scale to 1 to 3, rather than 1 to 5.

- Change the word “benefit” to “impact.” The word “benefit” is highly subjective and more difficult to measure than “impact.” Also, benefit doesn’t really align with the bar’s mission and goals.

- Move “public impact” ahead of “member impact.”

- Change the word “factor” to “considerations.”

- Change “impact on members from non-dominant cultures” to “impact on individuals from non-dominant cultures.” The purpose of this change is to provide a better measure of the bar’s impact on equity and inclusion across all of its programs and services and to recognize the bar’s public service mission.

- Expand the competition factor to include both internal and external competition. This should help avoid the creation of silos within the bar and ensure we are being efficient internally with our programming.

- Add measures for volunteer engagement. The current measure is just the number of volunteers. The recommendation is to include hours of service and the value of
volunteer service in the particular program (both for the volunteer and for the bar), as components of the volunteer engagement factor.

- Remove “cost per member served.” This factor is too difficult to apply consistently and in way that is meaningful. If the committee decides to undertake a more in-depth review of a program for which this measure would be meaningful, staff can provide the information at that time.

- Change “cost per member” to “percentage of budget.” This arose out of a discussion about whether the considerations were being valued appropriately. There was some concern that the budget was being given double value by having two measures for it. In addition, the number reflected is not the actual cost per member, because it does not take into account revenue for the program. The real measure we are trying to present is the size of the program—that is, the percentage of the budget the program occupies. Because this number presents a different budgetary measure than the net revenue/cost, staff agreed it should remain as a consideration, but that it be renamed.

- Change the goals under mission alignment to reflect the board’s recent adoption of new strategic goals and functions. The first three factors relate to function 1, the second three to function 2, and the last three to function 3. All functions are represented equally in the mission alignment goals.

- Remove operational functions from the program review. “Operations” are back-office functions that support the work of the bar as a whole and include: Accounting, Creative Services, Information Technology, Finance and Administration, Human Resources, Distribution Center, and General Counsel Administration.

Attachments:  Program Review Policy, Redline
                    Program Review Scoresheet, Redline
                    Program Review Short Form
Oregon State Bar Program Review Policy

I. Purpose. The purpose of this policy is to implement the Board’s obligations to ensure that the limited resources of the Oregon State Bar are effectively used to support the Bar’s mission and strategic goals.

II. Policy

A. All current programs, services and activities (PSA) of the Oregon State Bar shall undergo a review at least once every three years, or more frequently as appropriate, using the process and criteria outlined below.

B. All proposed new PSAs shall undergo the same review process before being approved by the Board of Governors (BOG), and shall be reviewed after the first year of the new program before being recommended for continuation to the BOG.

C. Scores are for informational purposes only and do not bind the BOG with respect to the particular program.

D. The Policy and Governance Committee (PGC) will be responsible for the review.

III. Process

A. Once every three years, staff shall provide to the PGC at the beginning of the year, the following information regarding all current PSAs of the Oregon State Bar:

   1. Brief description of the existing PSA and how it supports the OSB statutory charge, mission and functions.
   2. Most recent annual budget for the PSA, including % of OSB overall operating budget;
   3. Cost per member and cost per member served (if applicable);
   4. Most recent program measures and program evaluation for the PSA;

B. Upon review of the information provided, the PGC shall determine which PSA or PSAs to review in depth, considering the following factors:

   1. Cost per member and cost per member served (if applicable);

C. The Policy and Governance Committee (PGC) will be responsible for the review.
1. BOG strategies and areas of focus for the year.
2. How recently an in-depth review was conducted for the PSA.
3. Resources available to conduct the review.
4. Whether the PSA is new. (See II.B.)

C. The PGC shall determine the information needed to conduct the in-depth review and develop a proposed action plan and schedule for completion of the review. In conducting its in-depth review, the PGC shall use the evaluation and scoring criteria set forth below as a foundation for its analysis.

IV. Evaluation and Scoring Criteria

A. Description of Existing/New Program, Service, Activity (PSA).

B. Member Impact. Number and/or % of bar members served or projected to benefit impacted on an annual basis; for new PSA include basis for projection; rate on a scale of 1 [low impact] to 5 [high impact].

C. Impact on Members - individuals from Non-Dominant Cultures. Number and/or % of bar members from non-dominant cultures served or impacted; number of members of the public from non-dominant cultures served or projected to benefit impacted on an annual basis; for new PSA include basis for projection; rate on a scale of 1 [low impact] to 5 [high impact].

D. Public Impact. Number of members of the public served or projected to benefit impacted on an annual basis; for new PSA include basis for projection; rate on a scale of 1 [low impact] to 5 [high impact].

E. Competition. Competing PSAs; describe and compare with SBASBAOSB and outside entity parallel PSAs; rate on a scale of 1 [high competition] to 5 [low competition].

F. Volunteer Engagement. Number of volunteers engaged in the PSA and % membership; number of hours of volunteer service, and; value of volunteer engagement. Rate on a scale of 1 [low volunteer engagement] to 5 [high volunteer engagement].

G. Annual Cost/Revenue of PSA. Rate on a scale of 1 [net cost] to 3 [net revenue] to 5 [net revenue].
1. Direct Cost
2. Indirect Cost (includes personnel and related overhead expenses)
3. Capital Cost (if applicable)
4. Revenue Generated (if applicable)
5. Net
6. % of Operating Budget

H. Cost per member served. Rate on a scale of 1 [high cost relative to other PSAs] to 5 [low relative cost].
I. Alignment with Statutory Functions and Mission.
The OSB Board of Governors (BOG) is charged by the legislature (ORS 9.080) to “at all times direct its power to the advancement of the science of jurisprudence and the improvement of the administration of justice.” The Oregon State Bar (OSB) is also responsible, as an instrumentality of the Judicial Department of the State of Oregon, for the regulation of the practice of law. As a unified bar, the OSB may use mandatory member fees only for activities that are germane to the purposes for which the bar was established.

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

Rate each factor on a scale of 1 [low alignment] to 5 [high alignment], total score = average.

1. Ensure competence in the legal profession.
2. Ensure integrity in the legal profession.
3. Promote professionalism in the legal profession.
4. Supporting and protecting the quality and integrity of the judicial system.
   This includes ensuring that courts are adequately funded, impartial, independent, and have structural integrity, independent, impartial, fair, efficient and effective. This also includes maintaining the Bar Act and rules pertaining to regulation of the legal profession.
5. Improving the administration of justice. This includes ensuring that laws and court rules are fair, efficient, and effective.
6. Promote the quality and integrity of the judiciary. Protecting the public by ensuring the competence and integrity of those engaged in the practice of law. This includes the regulation and discipline of those admitted to practice law.
7. Advancing diversity, equity and inclusion within the legal community and the provision of legal services.
8. Advancing the science of jurisprudence. This includes providing education to the public and government officials regarding the science of jurisprudence.
   Foster public understanding of the law and justice system.
9. Promoting professional excellence of bar members. This includes promoting high standards of competence, integrity, professional conduct, learning and public service.
10. Increasing access to justice. This includes fostering public understanding of and access to legal information, legal services, and the justice system.

IV. PSA Review Matrix. The attached matrix shall be used to capture the evaluations of existing and proposed PSA’s and shall be included as an attachment to a board reporting form for presentation to the Board of Governors to validate existing and approve proposed PSAs.
### Factors Considerations

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<td>Impact on lawyers individuals from non-dominant cultures</td>
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<td>Public-Member Impact</td>
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<td>Revenue/Cost</td>
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<td><strong>Cost per Member</strong> Percentage of Budget</td>
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**Total**

### Mission Alignment

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<td>Ensure integrity in the legal profession</td>
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<td>Promote professionalism in the legal system</td>
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<td>Support judicial system</td>
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<tr>
<td>Improve administration of justice</td>
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<tr>
<td>Protect public Promote the quality and integrity of the judiciary</td>
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<td>Advance DEI in the bench and bar</td>
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<tr>
<td>Educate public Foster public understanding of the law and justice system</td>
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<tr>
<td>Promote professional development</td>
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<tr>
<td>Increase access to justice</td>
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**Total**

**Average**

Combined Total (Factors + Mission Alignment Average)  

_______
Action Recommended

Form a committee, to be chaired by OSB President Chris Costantino, to review nominations for the bar’s annual awards and develop recommendations for the full board.

Background

Every year the board forms an ad hoc committee of members interested in the annual awards selection process. Committee members receive a complete package of nomination materials for review, then meet by conference call to discuss the nominees and develop recommendations for the board. The conference call will take place in early or mid-July, and may be followed by an in-person meeting on July 26. Recommendations will be submitted to the full board at a special meeting on July 26.

The 2019 Awards Luncheon will be held on Wednesday, November 15, at the Sentinel Hotel in Portland.
Action Recommended

Approve proposed amendments to OSB Bylaw 2.201.

Background

The Policy & Governance Committee recommends that OSB Bylaw 2.201 be amended as follows:

(a) Time of Election
The President and President-elect are elected at the last regularly scheduled board meeting of the calendar year. The only candidate for President is the President-elect.

(b) President-Elect
Any lawyer member of the second-year class may be a candidate for the office of President-elect by notifying the Chief Executive Officer by September 1. Each candidate must submit with said notice a statement outlining the candidate’s qualifications, reasons for seeking the position, and vision for the bar. A Nominating Committee, consisting of the fourth–year class and the current President-elect, will interview each candidate and members will confer with the remaining board members to discuss their view about each candidate’s respective qualifications. The Nominating Committee will announce its candidate for President-elect at least 15–20 days prior to the last regularly scheduled board meeting of the calendar year. The Nominating Committee’s selection will be the sole candidate for President–elect unless at least six members nominate another candidate by written petition delivered to the Chief Executive Officer not less than 10 days prior to the last regularly scheduled board meeting of the calendar year. If the Nominating Committee is unable to select a sole candidate for President-elect, the board will elect a President-elect at its last regularly scheduled board meeting of the calendar year, pursuant to Subsection 2.201(c).

(c) Voting
If there is only one candidate for an office, the candidate is deemed elected without a formal vote. When there are two nominees for President-elect, the candidate receiving the most votes will be elected. If there are three nominees for President-elect and no candidate receives more than 50 percent of the votes on the first vote, the candidate receiving the fewest votes is eliminated and another vote will be taken. Only board members present at the meeting may vote.
During the 2018 officer election process, there was some disagreement over whether the current bylaw requires the Nominating Committee to meet with the board as a whole to discuss the candidates for president-elect. Since the nominating committee process was adopted in April 2007, the practice has been for nominating committee members to talk with the remaining board members one-on-one. Regardless of the past practice, there was also some concern that this process could result in nominating committee members receiving an incomplete or inaccurate picture of the candidates.

The Policy & Governance Committee discussed the history of the election process and the concerns raised and recommends to continue the practice used since 2007. The addition of the phrase “nominating committee members” and replacement of the word “meet” with “confer” are intended to clarify that members of the nominating committee may confer with board members individually, rather than as a group, while still providing flexibility for committee members to hold a meeting with the board as a whole.

The purpose of changing 15 to 20 is to give board members more time to gather signatures for a written petition. When the current time frame was adopted in November 2018, it was done solely to allow the nominating committee to provide its recommended candidate to the board in time for its last scheduled meeting on November 17. At the same time, some members expressed concern that five days was insufficient to gather signatures for a written petition. The Policy & Governance Committee agrees that more time ought to be allowed for the petition process.
OREGON STATE BAR  
Board of Governors Agenda  

Meeting Date: June 21, 2019 
From: Policy and Governance Committee 
Re: OSB and Section Bylaw Amendments Related to Sections 

Action Recommended  
Consider feedback from sections on proposed amendments to OSB and Standard Section Bylaws. Approve the proposed amendments to the OSB and Section Bylaws. 

Background and Discussion  
In 2014 the BOG began a program review of sections and proposed several changes to policies focusing on CLE programming, online member directories, and websites. After meeting with section leaders to obtain feedback, the BOG made additional modifications and to the policies and scheduled implementation to coincide with the launch of the OSB’s association management software. 

Last year the Budget & Finance and Policy & Governance Committees continued discussing section related policies with a focus on membership threshold and fund balances. At its November meeting, the P&G Committee approved amendments to the OSB Bylaws and Standard Section Bylaws related to these topics. See the attached November 17, 2018, memos for additional background. 

When the BOG proposes amendments to the Standard Section Bylaws, section leaders are afforded an opportunity to provide comment. All Section leaders were sent the attached email and a link to a red-line version of the proposed changes. The written feedback submitted by nine executive committees and individual section leaders is attached for your consideration. 

Changes were proposed in three areas, which are outlined in greater detail below: membership threshold, section fund balance, and electronic voting. 

Membership Threshold  
As shown below, amendments to OSB Bylaw 15.2 and Standard Section Bylaw, Article XII, Section 2 do not substantively change the BOG’s authority to merge, reorganize or abolish a section. Rather, the proposed amendments streamline the bylaws by moving the factors for sunsetting a section to one location- Article XII of the Standard Section Bylaws. 

OSB Bylaw 15.2 Formation  
Any 100 members of the Bar who wish to form a section in a particular area of law may submit a petition to the Board to create a section. The petition must state that the signators are committed to becoming members of the section, if the Board approves forming the section. The Board must consider creating a section when it receives the petition and determines that the proposed section does not duplicate another section’s
activities or area of legal interest. The Board may merge, reorganize or abolish sections at the request of affected sections or as the Board deems appropriate. Factors that the Board must consider include, but are not limited to, the section’s membership falling below 100 members, failure to conduct Continuing Legal Education activities or failure to hold regular meetings—the requirements outlined in Standard Section Bylaws, Article XII, Section 2.

Standard Section Bylaws, Article XII, Sunsetting the Section

Section 1. A Section Executive Committee may recommend that the Board of Governors sunset the section if it has accomplished its goals or is otherwise deemed no longer necessary. A sunset recommendation submitted to the Board of Governors must include a proposal for distribution of any section assets.

Section 2. The Section has a duty to its members, and at a minimum each year, must:

A. Hold regular Executive Committee meetings.
B. Appoint a Nominating Committee.
C. Hold a Section Annual Business Meeting.
D. Elect officers and executive committee members at large by November 15 of each year.
E. Submit an annual budget.
F. File an annual report.

If the Section fails to meet the above minimum requirements, has less than 100 members, or does not sponsor or co-sponsor at least one CLE program every two years, it is subject to restructuring or sunsetting by the Board of Governors.

One of the goals in reviewing the section program has been to ensure that the OSB support to sections is efficient and effective. When the Budget & Finance Committee discussed this issue, members expressed concern with sections consistently not meeting the minimum requirements outlined in the bylaws, particularly the 100-member threshold requirement. This concern was highlighted for section leaders and the attached feedback was received from Donald Bowerman (Aviation Law), Judy Parker (Administrative Law), Stuart Smith (Aviation Law), Consumer Law, Disability Law, and Diversity Section.

Options

1. Approve the proposed amendments to the OSB Bylaw 15.2 and to the Standard Section Bylaw Changes, Article XII, Sections 1 and 2.

2. Reject amendments to the bylaws. Determine next steps, if any.

Fund Balances

Currently, there is no reserve policy for section funds and although sections have been encouraged to spend down reserves, the cumulative section fund balance at the end of 2018 was $705,000. The Budget & Finance Committee considered this issue and supported a policy
to limit the level of funds a section could hold without penalty. The goal is to encourage sections to spend membership dues in the year they were raised and for the benefit the current members. During its November 2018 meeting, the Policy & Governance Committee approved the following bylaw modifications to support this goal:

**OSB Bylaw, Article 15, Subsection 15.400 Dues:**

The Bar will assess and collect section dues at the same time that bar membership dues are collected. Section dues will be assessed and collected together with bar dues by the Bar. The Board must approve the dues for each section. Each section should set dues at an appropriate level to pay for programs and activities. The Bar charges each section a per capita fee equal to 50 percent of the cost of providing services to the sections. This fee is recalculated periodically as determined by the Chief Executive Officer. A section with a fund balance as of December 31 exceeding two years of section membership fees will be charged the full per capita fee for the following year. A section with a fund balance as of December 31 equal to or less than two years of section membership fees will be charged a fee equal to 50 percent of the per capita fee. No section may maintain a separate bank account. Each section’s receipts and expenditures are handled by the Bar and accounted for in the section’s monthly financial statement provided by the Bar. Interest on section accounts accrues to the Bar’s General Fund and is used to offset the calculation of the per capita fee.

**Standard Section Bylaws, Article IX, Receipts and Expenditures:**

Section 2. The Oregon State Bar shall regularly assess the Section an amount to cover both direct and indirect costs of the Section’s activities performed by the Oregon State Bar staff. This fee is recalculated periodically as determined by the Chief Executive Officer. A section with a fund balance that exceeds two years of section membership fees as of December 31 of any given year will be charged the full per capita fee for the following year. A section with a fund balance, as of December 31, that is equal to or less than two years of section membership fees will receive a 50 percent subsidy on the assessment for the next dues year.

Section 5.

(A) The Section serves as an education, communication and networking forum in the areas of law or other law related activity for which the Board of Governors approved its establishment. If the Section receives support from the Bar on other than a fee for service basis, it shall comply with the expenditure restrictions applicable to the Bar as set forth in Keller v. State Bar of California, 496 US 1 (1990) and related board policies.

(B) If the Section wishes to spend Section funds free from the restrictions imposed by Keller and related board policies it may do so if it pays the full cost of administration and other support provided by the Bar, so that the Section is entirely self-supported by voluntary dues of its members. The Section must obtain approval of its members to such election by mail or electronic vote or at a regular or special meeting. Upon exercising its right under this policy, the Section shall be provided administrative and other services by the Bar on a fee for service basis only. The election shall be effective until rescinded by a vote of the Section membership.
These proposed bylaw changes were shared with section leaders and the attached feedback was received from Consumer Law, Criminal Law, Disability Law, Diversity Section, Family Law, and Real Estate & Land Use Sections.

Options

1. Approve the proposed amendments to OSB Bylaw 15.400 and to the Standard Section Bylaws, Article IX, Section 2 and 5.

2. Reject amendments to the bylaws. Determine next steps, if any.

Electronic Voting

To comply with public meetings laws, the bar must provide adequate notice for all section meetings. Allowing executive committee members to vote electronically on section business between meetings does not comply with these requirements. As such, the following bylaw change is recommended.

Standard Section Bylaws, Article V, Section Executive Committee:

Section 5. Between meetings of the Section, the Section Executive Committee shall have full power to do and perform all acts and functions that the Section itself may perform. Voting on matters of Section business may not be done electronically, and results of an electronic vote must be recorded in the official minutes of the Section.

This bylaw change was outlined in the email to section leaders and Judy Parker urged the OSB to provide a work-around given the often tight timeline for legislative matters. The Standard Section Bylaws outline procedures for legislative activity and requires a section executive committee to have a majority vote before forwarding requests to the BOG’s Public Affairs Committee. The bylaws also provide sections the option to call a special meeting between regularly scheduled meetings so long advanced notice is provided to the OSB and the special meeting is properly noticed in accordance with ORS 192.640.

Options

1. Approve the proposed amendments to Standard Section Bylaw Article V, Section 5.

2. Reject the proposed amendments. Determine next steps, if any.
OREGON STATE BAR
Policy & Governance Committee Agenda

Meeting Date: November 17, 2018
From: Dani Edwards, Director of Member Services
Re: Bylaw Amendments for Section Formation and Abolition

Action Recommended

Approve the proposed amendments to OSB Bylaw 15.2 and Standard Section Bylaw Article XIII, Section 2 related to section formation and abolition. Send the proposed amendments to the sections for review and comment as required by Standard Section Bylaw Article XI, Section 1.

Background and Discussion

The BOG began a program review of sections in 2014 and made several changes to section policies focusing on CLE programming, online member directories, and CLE programming. Some of the policy changes were quite contentious and required the BOG to meet with section leaders and ultimately revisions to the initial policy changes. In May, this committee held a joint meeting with the Budget & Finance Committee and discussed two remaining issues from the section program review: alternative section models and fund balances. Ultimately these items were referred to the Budget & Finance Committee for further discussion which took place during their June, July, and September meetings.

Although the Budget & Finance Committee did not make a recommendation regarding alternative section models, the committee discussed the budgetary impact of continuing to support the OSB’s high number of sections[1]. The committee also discussed favorably the idea of requiring sections to maintain at least 100 members or be given the option to join another section or dissolve. This requirement would be consistent with the minimum number of members needed to create a new section. As of November 1, four sections have fewer than 100 members and three additional sections risk falling below the threshold in 2019.

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<td>Admiralty</td>
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<td>Disability Law</td>
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Smaller sections often struggle to find volunteers willing to serve on the executive committee, obtain a quorum at meetings, and provide services to their members.

For these reasons the following bylaw amendments are recommended.

[1] The OSB currently has 43 sections, a very high number when compared to bars of similar size like Alabama with 27 and Oklahoma with 24. There are a number of larger bars with fewer sections as well; Washington with 27, Arizona with 28, and California with only 16.
OSB Bylaw 15.2 Formation
Any 100 members of the Bar who wish to form a section in a particular area of law may submit a petition to the Board to create a section. The petition must state that the signators are committed to becoming members of the section, if the Board approves forming the section. The Board must consider creating a section when it receives the petition and determines that the proposed section does not duplicate another section’s activities or area of legal interest. The Board may merge, reorganize or abolish sections at the request of affected sections or as the Board deems appropriate. Factors that the Board must consider include, but are not limited to, the section’s membership falling below 100 members, failure to conduct Continuing Legal Education activities or failure to hold regular meetings the requirements outlined in Standard Section Bylaws, Article XII, Section 2.

Standard Section Bylaws, Article XII, Sunsetting the Section:
Section 1. A Section Executive Committee may recommend that the Board of Governors sunset the section if it has accomplished its goals or is otherwise deemed no longer necessary. A sunset recommendation submitted to the Board of Governors must include a proposal for distribution of any section assets.

Section 2. The Section has a duty to its members, and at a minimum each year, must:
A. Hold regular Executive Committee meetings.
B. Appoint a Nominating Committee.
C. Hold a Section Annual Business Meeting.
D. Elect officers and executive committee members at large by November 15 of each year.
E. Submit an annual budget.
F. File an annual report.

If the Section fails to meet the above minimum requirements, has less than 100 members, or does not sponsor or co-sponsor at least one CLE program every two years, it is subject to restructuring or sunsetting by the Board of Governors.

Options
1. Approve the bylaw changes and send the proposed amendments to section leaders for review and comment as required by Standard Section Bylaw Article XI, Section 1. Any feedback from sections will be shared with the P&G Committee during its April meeting and a final recommendation can be sent to the BOG at that time.

2. Modify the recommended bylaw changes to increase the minimum number of members required to create and maintain a section.

3. Reject amendments to the OSB Bylaws or the Standard Section Bylaws and continue to discuss the issue or send it back to Budget & Finance Committee for further consideration.

4. Decline amendments to the bylaws and retain all 43 sections.
OREGON STATE BAR
Policy & Governance Committee Agenda

Meeting Date: November 17, 2018
From: Dani Edwards, Director of Member Services
Re: Bylaw Amendments related to Assessments for Section Administrative Support

**Action Recommended**

Approve the proposed amendments to OSB Bylaw 15.4 and Standard Section Bylaw Article IX, Section 2 and 5, waiving the 50% subsidy on the per member assessment fee for sections with excessive fund balances. Send the proposed amendments to the sections for review and comment as required by Standard Section Bylaw Article XI, Section 1.

**Background and Discussion**

The last remaining issue from the BOG’s program review of sections is excessive fund balances. The P&G Committee held a joint meeting with the Budget & Finance Committee in May and, among other things, discussed section fund balances and the per member assessment fee. Budget & Finance Committee continued discussion of these issues over the next few meetings and unanimously recommend the following:

1. Raise the 50% subsidized section per member assessment fee from $8.00 to $9.50 beginning in 2019.
2. By the year 2020, any Section with a fund balance in excess of two years membership fees will no longer receive the 50% subsidy on the per member assessment fee until their fund balance drops below the two year threshold.

As provided in OSB Bylaw Subsection 15.4000, the CEO has the authority to determine the section per member assessment fee. At the recommendation of the B&F Committee, Ms. Hierschbiel has agreed to raise the assessment to $9.50 but has opted to implement the increase in 2020. Delaying implementation will allow sections with smaller fund balances time to increase membership fees and budget accordingly. Since the CEO has authority over the increase, no additional committee action is necessary.

Although the assessment increase will affect all section budgets, likely the more controversial recommendation is to eliminate the 50% subsidy of the assessment for sections with more than two years of membership fees in their account. When Budget & Finance Committee considered the policy recommendation, only 18 of the 43 sections had fund balances less than 2 years’ worth of membership dues. The below chart shows section fund balances as of August 1.

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[1] The OSB subsidizes sections by sharing the administrative costs of basic section services. Administrative costs include: dues collection, general accounting services, legislative coordination, bar liaison expenses, maintenance of membership and executive committee rosters, coordination of meeting notices and agendas, and electronic communications (primarily broadcast emails and list serve maintenance). As a policy matter, since 1992 the assessment has been set at 50% of the actual costs. The cost-sharing policy reflects the importance of sections to the bar, the financial needs of smaller sections and the reality that reliance on administrative services varies by section as well as by year.
Despite encouragement from the bar, the section fund balance has significantly grown over the years. At the end of 2005 the fund total was nearly $508,000; by the end of 2016 it had reached approximately $800,000. During 2017 the pooled section fund balance decreased for $728,000, a reduction of 10%. It is likely this reduction was prompted by the BOG’s review of fund balances and communication efforts with sections to reduce excessive fund balances.

The expectation is that sections spend membership dues in the year the money was raised and that members receive the benefit for their dues within a reasonable time-frame. As a means of incentivizing sections to achieve this standard, the following bylaw amendments are recommended.

**OSB Bylaw, Section 15.4 Finances**

**Subsection 15.400 Dues**

The Bar will assess and collect section dues at the same time that bar membership dues are collected. Section dues will be assessed and collected together with bar dues by the Bar. The Board must approve the dues for each section. Each section should set dues at an appropriate level to pay for programs and activities. The Bar charges each section a per capita fee, equal to 50 percent of the cost of providing services to the sections. This per capita fee is recalculated periodically as determined by the Chief Executive Officer. A section with fund balance as of December 31 exceeding two years of section membership fees will be charged the full per capita fee for the following year. A section with fund balance as of December 31 equal to or less than two years of section membership fees will be charged a fee equal to 50 percent of the per capita fee. No section may maintain a separate bank account. Each section’s receipts and expenditures are handled by the Bar and accounted for in the section’s monthly financial statement provided by the Bar. Interest on section accounts accrues to the Bar’s General Fund and is used to offset the calculation of the per capita fee.
Standard Section Bylaws, Article IX, Receipts and Expenditures

Section 2. The Oregon State Bar shall regularly assess the Section an amount to cover both direct and indirect costs of the Section’s activities performed by the Oregon State Bar staff. This fee is recalculated periodically as determined by the Chief Executive Officer. A section with fund balance that exceeds two years of section membership fees as of December 31 of any given year will be charged the full per capita fee for the following year. A section with a fund balance, as of December 31, that is equal to or less than two years of section membership fees will receive a 50% subsidy on the assessment for the next dues year.

If the committee approves modification to the bylaws in this manner General Counsel recommends deleting Article IX, Section 5 (B) in its entirety to ensure the OSB and its sections remain in compliance with Keller.

Section 5.

(A) The Section serves as an education, communication and networking forum in the areas of law or other law related activity for which the Board of Governors approved its establishment. If the Section receives support from the Bar on other than a fee for service basis, it shall comply with the expenditure restrictions applicable to the Bar as set forth in Keller v. State Bar of California, 496 US 1 (1990) and related board policies.

(B) If the Section wishes to spend Section funds free from the restrictions imposed by Keller and related board policies it may do so if it pays the full cost of administration and other support provided by the Bar, so that the Section is entirely self-supported by voluntary dues of its members. The Section must obtain approval of its members to such election by mail or electronic vote or at a regular or special meeting. Upon exercising its right under this policy, the Section shall be provided administrative and other services by the Bar on a fee for service basis only. The election shall be effective until rescinded by a vote of the Section membership.

Options

1. Approve the bylaw changes and send the proposed amendments to section leaders for review and comment as required by Standard Section Bylaw Article XI, Section 1. Any feedback from sections will be shared with the P&G Committee during its April meeting and a final recommendation can be sent to the BOG at that time.

2. Reject amendments to the OSB Bylaws or the Standard Section Bylaws and continue to discuss the issue or send it back to Budget & Finance Committee for further consideration.

3. Decline amendments to the bylaws. Determine next steps, if any.
From: Danielle Edwards, Oregon State Bar  
To: All Section Executive Committee Members (650+ members)  
Subject: OSB Section Policy Changes – OSB [insert bar number]

[First name],

The Board of Governors (BOG) is engaged in an ongoing review of all bar programs and services to ensure each is aligned with the bar’s mission and operating as efficiently as possible. As a result of the board’s review of OSB Sections, I have a number of updates to share with you. The first portion of this email includes several policy reminders, followed by informational items highlighting a few changes to section policies the BOG has already approved. The final portion of this email describes pending bylaw changes the BOG will consider further at its June meeting. As a member of the [Section Name] Section Executive Committee, the BOG welcomes your feedback on the pending bylaw changes.

**Policy Reminders**

1. Contracts: Reminder that all section contracts must be processed through, and executed by, OSB General Counsel. Please contact Nik Chourey, Deputy General Counsel, at nchourey@osbar.org before entering into legal agreements.

2. Websites: All section websites should be hosted on the main OSB site for member convenience, ease of content management and consistent visual branding. If the section chooses to use bar services for website content updates, or to schedule WordPress administrator training, contact Gonzalo Gonzalez, Director of Information and Technology, at ggonzalez@osbar.org.

**BOG-Approved Policy Changes**

1. Per Member Assessment: Effective January 1, 2020, the section assessment fee will increase to $9.50 per member, consistent with the OSB Bylaw 15.400. The cost to support section activities has continued to rise since 2013, when the last calculation resulted in a raise to the current $8.00 assessment. The list of bar services included in the assessment are outlined at https://www.osbar.org/_docs/leadership/resources/OSBServices.pdf.

2. Electronic Voting: The bar is subject to public meetings laws and must comply with ORS 192.640, which requires all meetings be properly noticed. Voting on section business by email between meetings does not meet the notice requirements set forth in the statute. As such, sections may not conduct email votes on section-related business. A section may hold a special meeting between regularly scheduled meetings but must provide notice to the Member Services Department 72 hours in advance of the special meeting.

3. List Serve Guidelines: During its February meeting the BOG approved changes to the OSB list serve guidelines and considerations; the updated guidelines are available at https://www.osbar.org/mos/listserves/listservé_FAQ.html.

4. CLE Activities: As discussed with section leaders since 2015, the BOG approved policy changes related to CLE program registration and co-sponsorship. Implementation of the new policies coincided with the bar’s transition to a new association management software system, which occurred late last year.
Accordingly, the BOG has approved changes to OSB Bylaw Section 15.6 related to CLE activities, which can be found on page 44 of the OSB Bylaws. CLE staff are available to help sections incorporate the new policies into the sections’ CLE planning process. CLE registration services information is available at https://www.osbar.org/_docs/sections/CLERegServices.pdf. Questions about co-sponsorship or registration services can be directed to Karen Lee, Director of CLE Seminars at klee@osbar.org, or to Kes Joerg, CLE Seminars Planning Specialist at kjoerg@osbar.org.

Standard Section Bylaw Amendments to be Considered by the BOG

Based on its findings during the program review, the Board of Governors is considering changes to the Standard Section Bylaws. If you would like to provide comment on the pending changes please submit your feedback to me by June 7.

1. Membership Threshold: The staff time and resources required to support sections has been a focus of the program review process. Administrative time and expense to support sections increases with the addition of each new section. The BOG is concerned about the growing number of OSB sections, which is higher than comparably sized state bars. For example, Oregon has 43 sections while Alabama has 31, Oklahoma has 28, and Utah has 37. Some smaller sections struggle to find volunteers for their executive committee and provide services to their members. Recognizing this, and the requirements around creating a section outlined in OSB Bylaw 15.2, the BOG is considering a bylaw change requiring each section to maintain at least 100 members or be subject to restructuring or sunsetting.

2. Fund Balances: The OSB does not currently have a policy for individual section fund balances. Despite encouragement to spend down reserves, the section accumulative fund balance has continued to grow through the years. At the end of 2005 the fund total was $500,000; this amount has continued to increase and by the end of 2018 it reached $705,000. The BOG is considering a new policy to encourage sections to spend member dues in the year the money was raised and for the benefit of current section members. Under the new policy, sections with a fund balance exceeding two years of membership fees at the end of a year would be charged the full cost to provide support to section members beginning the following year. Sections with less than the equivalent of two years of member fee revenue would continue to receive a 50% subsidy on the per-member assessment.

A redline version of the proposed OSB Bylaw and Standard Section Bylaws are available at http://www.osbar.org/_docs/sections/BylawRevisionsreSections.pdf.

I understand that these are significant changes and expect many of you will have questions. Please let me know if you would like me to attend an upcoming executive committee meeting. I look forward to hearing your feedback and sharing your thoughts with the BOG.

Best regards,
Danielle

Danielle Edwards
Director of Member Services
503-431-6426
dedwards@osbar.org
Oregon State Bar Bylaws

Amendments to be considered by the BOG are in redline below. Current full version of OSB Bylaws available at https://www.osbar.org/_docs/rulesregs/bylaws.pdf.

Article 15: Sections

Section 15.1 Purpose
Sections are an integral and important part of the Bar. Sections are intended to provide bar members who share particular interests an opportunity to develop and improve skills and to provide a forum for communication and action in matters of common interest.

Section 15.2 Formation
Any 100 members of the Bar who wish to form a section in a particular area of law may submit a petition to the Board to create a section. The petition must state that the signators are committed to becoming members of the section, if the Board approves forming the section. The Board must consider creating a section when it receives the petition and determines that the proposed section does not duplicate another section’s activities or area of legal interest. The Board may merge, reorganize or abolish sections at the request of affected sections or as the Board deems appropriate. Factors that the Board must consider include, but are not limited to, the section’s membership falling below 100 members, failure to conduct Continuing Legal Education activities or failure to hold regular meetings. The requirements outlined in Standard Section Bylaws, Article XII, Section 2.

Section 15.3 Bylaws
Sections are governed by the Standard Section Bylaws adopted by the Board. Sections may propose and the Board may approve, modified bylaws commensurate with the section’s needs.

Section 15.4 Finances

Subsection 15.400 Dues
The Bar will assess and collect section dues at the same time that bar membership dues are collected. Section dues will be assessed and collected together with bar dues by the Bar. The Board must approve the dues for each section. Each section should set dues at an appropriate level to pay for programs and activities. The Bar charges each section a per capita fee equal to 50 percent of the cost of providing services to the sections. This fee is recalculated periodically as determined by the Chief Executive Officer. A section with a fund balance as of December 31 exceeding two years of section membership fees will be charged the full per capita fee for the following year. A section with a fund balance as of December 31 equal to or less than two years of section membership fees will be charged a fee equal to 50 percent of the per capita fee. No section may maintain a separate bank account. Each section’s receipts and expenditures are handled by the Bar and accounted for in the section’s monthly financial statement provided by the Bar. Interest on section accounts accrues to the Bar’s General Fund and is used to offset the calculation of the per capita fee.

Subsection 15.401 Donations
Sections may make donations to charitable causes or organizations only with prior approval of the Chief Executive Officer. The Chief Executive Officer will allow such donations on a showing by the section that the donation is germane to the Bar’s purposes as set forth in Section 12.1 of these Bylaws. The Chief Executive Officer will maintain a list of approved recipients.
Section 15.5 Administrative Services
Special services of the Bar that are not included in the calculation of the per capita assessment may be made available at cost to the sections upon adequate notification to and negotiation with the Bar. Sections must give the Bar the first opportunity to provide the necessary publications production support services before contracting with outside organizations or individuals. Sections seeking to contract for any goods or services with outside organizations or individuals must contact the General Counsel’s office of the Bar for preparation of appropriate contract documents and must obtain the Chief Executive Officer’s prior approval of all such contracts.

OSB Standard Section Bylaws

Amendments to be considered by the BOG are in redline below. Current full Standard Section Bylaws available at https://www.osbar.org/docs/rulesregs/stsecbylaws.pdf.

Article V
Section Executive Committee

Section 1. The Section Executive Committee shall be composed of the Chair, the Chair-Elect, the Immediate Past Chair, the Secretary, the Treasurer, and not fewer than two (2) nor more than twelve (12) Members-at-Large. The terms of the Members-at-Large shall be staggered as evenly as possible. Suspended members may not serve on the Section Executive Committee.

Section 2. The Section Executive Committee shall supervise and control the affairs of the Section subject to these Bylaws and the Bar’s bylaws.

Section 3. A quorum is required to conduct Executive Committee business. A quorum shall consist of a majority of the Executive Committee. Action of the Section Executive Committee shall be by majority vote of those voting.

Section 4. The Chair may, and upon the request of three members of the Executive Committee shall, call meetings of the Executive Committee.

Section 5. Between meetings of the Section, the Section Executive Committee shall have full power to do and perform all acts and functions that the Section itself may perform. Voting on matters of Section business may not be done electronically, and results of an electronic vote must be recorded in the official minutes of the Section.

Section 6. The Section Executive Committee may direct that a matter be submitted to the members of the Section by a mail or electronic vote or by a vote at the Section Annual Business Meeting; in any such event, binding action of the Section shall be by majority of those voting.

Section 7. No salary or compensation for services shall be paid to any member of the Section Executive Committee or member of any committee with the exception of the Editor and other staff of the Section newsletter (if applicable). Reimbursement may be allowed for travel and other out-of-pocket expenses for members of the Section Executive Committee and members of all Section standing and special committees.

Section 8. The membership of the Section shall have the right to rescind or modify any action or decision by the Section Executive Committee, except for filling a vacancy in the position of Officer or Executive Committee member, and also may instruct the Section Executive Committee as to future action. The
Executive Committee shall be bound by any such action of the membership. The right of the membership to direct, modify, or rescind an act of the Section Executive Committee shall not include the power to invalidate contracts or payments previously made under direction of the Executive Committee. Any vote to direct, modify, or rescind an action of the Section Executive Committee must be taken at a meeting at which two-thirds of members voting approve the Motion.

**Article IX**

**Receipts and Expenditures**

**Section 1.** Membership dues shall be collected by the Oregon State Bar and any other receipts of this Section shall be remitted promptly to the Oregon State Bar.

**Section 2.** The Oregon State Bar shall regularly assess the Section an amount to cover both direct and indirect costs of the Section’s activities performed by the Oregon State Bar staff. This fee is recalculated periodically as determined by the Chief Executive Officer. A section with a fund balance that exceeds two years of section membership fees as of December 31 of any given year will be charged the full per capita fee for the following year. A section with a fund balance, as of December 31, that is equal to or less than two years of section membership fees will receive a 50 percent subsidy on the assessment for the next dues year.

**Section 3.** Expenditure of the balance of Section funds, after such assessment, shall be as determined by the Executive Committee. Section funds shall be disbursed by the Oregon State Bar as authorized in writing by the Section’s Treasurer using forms and following procedures established by the Bar. If the Treasurer is unavailable for authorization, the Section Chair may authorize disbursement of Section funds followed by written notice to the Treasurer of the action taken. Reimbursement of expenses incurred by the Treasurer or by the Treasurer’s firm must be authorized in writing by the Section chair. Expenditures of Section funds shall not exceed the available Section fund balance, nor shall expenditures be in violation of laws or policies generally applicable to the Oregon State Bar. Expenses of spouses or guests will not be reimbursed except as specifically approved by the Board of Governors.

**Section 4.** Contracts for Section newsletter editors or other providers of personal services must be reviewed and signed by the Oregon State Bar Executive Director or the Director’s designee. Individuals who attend a section program or event for the purpose of providing a significant service to the section are eligible for expense reimbursement pursuant to Section 7.5 of the OSB Bylaws, with approval from the Executive Committee.

**Section 5.**

(A) The Section serves as an education, communication and networking forum in the areas of law or other law related activity for which the Board of Governors approved its establishment. If the Section receives support from the Bar on other than a fee for service basis, it shall comply with the expenditure restrictions applicable to the Bar as set forth in *Keller v. State Bar of California*, 496 US 1 (1990) and related board policies.

(B) If the Section wishes to spend Section funds free from the restrictions imposed by *Keller* and related board policies it may do so if it pays the full cost of administration and other support provided by the Bar, so that the Section is entirely self-supported by voluntary dues of its members. The Section must obtain approval of its members to such election by mail or electronic vote or at a regular or special meeting. Upon exercising its right under this policy, the Section shall be provided administrative and other services by the Bar on a fee for service basis only. The election shall be effective until rescinded by a vote of the Section membership.
Article XII
Sunsetting the Section

Section 1. A Section Executive Committee may recommend that the Board of Governors sunset the section if it has accomplished its goals or is otherwise deemed no longer necessary. A sunset recommendation submitted to the Board of Governors must include a proposal for distribution of any section assets.

Section 2. The Section has a duty to its members, and at a minimum each year, must:

A. Hold regular Executive Committee meetings.
B. Appoint a Nominating Committee.
C. Hold a Section Annual Business Meeting.
D. Elect officers and executive committee members at large by November 15 of each year.
E. Submit an annual budget.
F. File an annual report.

If the Section fails to meet the above minimum requirements, has less than 100 members, or does not sponsor or co-sponsor at least one CLE program every two years, it is subject to restructuring or sunsetting by the Board of Governors.
Hi Dani! Thank you for this thorough email.

I would like to offer two thoughts on the points below.

First, as to the public meetings requirements that would prohibit executive committee members from voting electronically, I would urge a work-around. I am one of the members of the legislative subcommittee for the Admin section and can tell you that having members be able to get together with 72 hours notice when we have a pending bill is near to impossible. I am copying Matt Barber, our section’s vice-chair and the other legislative sub member, to attest.

Second, I am not a member of any sections which have fewer than 100 members. But I know they exist. And I feel that groups ebb and flow based on the economy, public interest, involvement of members, and sheer cool kid status. I think that having some sections with fewer members doesn't mean that it isn't as valid as a larger section just by numbers. Practicality means there won't be as many members in the admiralty section as the construction law section - but it still offers an avenue for meeting together and for sharing best practices, etc. I would urge the Board to reject folding sections based on the number of folks in such a section. I feel that the bar’s mission is to encourage this community and build it rather than force us to be orphans, out in the world without a network to support us.

Judy Parker

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Judy Parker
J.A. Parker Law Firm LLC
The Winemakers' Lawyer
503-862-8583
judy@winemakerslawyer.com
winemakerslawyer.com

On 2019-05-03 15:36, Danielle Edwards wrote:
> [1]
> 
> Judith,
> >
> > The Board of Governors (BOG) is engaged in an ongoing review of all
> > bar programs and services to ensure each is aligned with the bar’s
> > mission and operating as efficiently as possible. As a result of the
> > board’s review of OSB Sections, I have a number of updates to share
> > with you. The first portion of this email includes several policy
> > reminders, followed by informational items highlighting a few changes
> > to section policies the BOG has already approved. The final portion of
> > this email describes pending bylaw changes the BOG will consider
> > further at its June meeting. As a member of the Administrative Law
November 27, 2018

Helen Hiershbiel, Chief Executive Officer
Oregon State Bar
PO Box 231935
Tigard, OR 97281-1935

Re: Aviation Section

Dear Helen,

I have been a long-time member of the Oregon State Bar, having served on the Board of Governors from 1976-1979, and six years on the Board of Directors of the Professional Liability Fund. I was an enthusiastic supporter of sections when they were first considered and have been pleased with the growth and substance of the section activities. At the time of their founding, my understanding was that the sections would be, for the most part, autonomous and self-regulating; as with most institutions, however, the bureaucratic growth is too tempting, and control ensued.

I have been the chair of our section two times. We consist of lawyers with very specific and compelling interests in aviation. For many years, we have provided adjunct professors at Lewis and Clark Law School; we participate in the Northwest Aviation Law Annual Aviation Law seminars, together with a similar group from the state of Washington. We encourage like-minded law students to participate in our monthly meetings and share current trends in aviation regulations, events, and planning.

We have enjoyed our interaction with the OSB’s liaison member, but if the bar is concerned about the time or expense associated with our section, I assure you that we can and will exist with or without the Bar’s blessing.

Sent Via US Mail
Correspondence to Helen Hiershbiel
Re: Aviation Section
November 27, 2018

Although we’ve requested input in the past, we have received no persuasive basis to change our mission, our interest, or our activities. We enjoy each other’s company and object to further tinkering by the OSB. On behalf of the aviation section, we welcome your comments.

Very truly yours,

[Signature]

DONALD B. BOWERMAN

DBB/ljm
cc Ross Neher, Chairperson, OSB Aviation Law Section
cc Rod Boutin, Chair-Elect, OSB Aviation Law Section
cc Sarah Hackbart, Bar Liaison, OSB Aviation Law Section
Danielle Edwards

From: Stuart Smith <aviationlawsmith@gmail.com>
Sent: Tuesday, May 07, 2019 11:30 AM
To: Danielle Edwards
Subject: RE: OSB Section Policy Changes - OSB 44209

Categories: Section Policy Feedback

Danielle,

Thank you for your email.

The Board of Governors proposed policy regarding sections runs counter to the stated purpose for sections and is not supported by the stated rationale for disbandment. Section 15.1 states: “Sections are an integral and important part of the Bar. Sections are intended to provide bar members who share particular interests an opportunity to develop and improve skills and to provide a forum for communication and action in matters of common interest.” The Aviation section is well over 50 years old, and while small in number, serves an important function in our legal community. First, the size of the section is representative of the number of lawyers who practice aviation law – it is a small number. Because it is a small number, our ability to meet, communicate and share ideas is critically important. Unlike aviation attorneys in the vast majority of the other states, we are a collaborative bar – the way lawyers are actually supposed to work together. We know each other. We trust each other. And we even like each other. Plaintiffs and defendants receive fair treatment because the lawyers actually know each other and get along with each other. What other bar can say that? Disbandment is the first step in the destruction of these critically important relationships.

The OSB provides only 2 reasons for eliminating sections; (1) the cost of providing services, and (2) section inability to operate with sufficient volunteers if too small. As to the first, If the fees collected by the bar are insufficient to cover the Oregon Bar’s expenses in providing services to sections, either the OSB should reorganize to provide services more efficiently, examine the services provided to eliminate those that do not support the sections, or raise the fees charged to the sections. All of those options should be examined carefully as a first step, and there is no indication that the bar has made that inquiry. As to a lack of volunteers, that has never been an issue for the Aviation Section. We are active and engaged participants. Those two reasons do not support the Board of Governor’s decision.

Please feel free to pass these comments on to the BOG.

Cordially yours,

Stuart W. Smith

From: Danielle Edwards <dedwards@osbar.org>
Sent: Friday, May 03, 2019 3:36 PM
To: aviationlawsmith@gmail.com
Subject: OSB Section Policy Changes – OSB 44209
Danielle Edwards

From: Matthew Kirkpatrick <MattK@MKirkpatrickLaw.com>
Sent: Friday, June 07, 2019 2:39 PM
To: Danielle Edwards
Subject: Consumer Law Section feedback RE: OSB Section Policy Changes
Categories: Section Policy Feedback

Thank you Danielle. The Consumer Law Section urges the BOG not to implement the proposed amendments to Bylaws Article 12 adding a 100-section-member requirement and to Article 15 eliminating the 50% subsidy based on a section’s size and fund balance.

First, the Section believes there is no magic number of members and that fewer than 100 interested members can justify a section’s existence. We believe the requirements that are already placed on a section ensure that a section is active and does not deserve sunsetting. The addition of a minimum-one-CLE-every-two-years requirement would further ensure that a section is sufficiently active to justify its existence, although it would seem that there could be other types of significant activities that also would justify that existence.

Second, the Section also opposes the amendment to Article 15 Subsection 15.400 tying a section’s per capita fee subsidy to its fund balance. It would not achieve its stated goal to encourage sections to spend membership dues during the year they are raised. At least our section already spends more than the amount of membership dues raised each year on per capita fees and Section activities. If we are able to increase our fund balance, it is due to successful activities, such as CLEs, which should be encouraged, not penalized.

The amendment also would hamper multi-year efforts to build up funds for more, larger, and/or more impactful expenditures such as sponsorships, scholarships, and CLEs with national speakers. In effect, it would penalize the most active sections and discourage future activity. Finally, the amendment would discriminate against smaller sections, which would be impacted at much lower fund balances than larger sections.

In any event, any change should not be retroactive and should apply only to a section’s future failure to spend at least the amount of its membership dues during the year; and only to the extent of that failure.

Thank you for sharing our concerns about these amendments with the BOG.

Best,
Matt Kirkpatrick
Chair - Consumer Law Section

Matthew S. Kirkpatrick
Attorney at Law

Kirkpatrick Law, LLC
7505 SE 18th Ave.
Portland, OR 97202
Telephone: 503-901-8739
Facsimile: 503-894-7846
MattK@MKirkpatrickLaw.com | MKirkpatrickLaw.com

From: Danielle Edwards <dedwards@osbar.org>
Sent: Wednesday, May 22, 2019 10:12 AM
From: Donna Maddux, Chair, Oregon State Bar Criminal Law Section
To: Board of Governors (BOG)
Re: Proposed Bylaw Amendments – Section Fund Balances
Date: June 10, 2019

I write on behalf of the Criminal Law Section to express our opposition to the following amendment circulated to section members via an email dated May 3, 2019.

**Section 15.4 Finances, Subsection 15.400 Dues**

A section with a fund balance as of December 31 exceeding two years of section membership fees will be charged the full per capita fee for the following year. A section with a fund balance as of December 31 equal to or less than two years of section membership fees will be charged a fee equal to 50 percent of the per capita fee.

The Criminal Law Section objects to this amendment. Sections should not be penalized for serving as fiscal stewards of section funds and maintaining a reserve.

We understand the BOG’s desire to encourage sections to spend membership fees on member services in the year those fees are incurred. Because of this direction, the Criminal Law section increased our efforts to provide educational and networking opportunities to members at reduced costs, and at times, no cost. This spend down goal will take time. There are strategies to encourage sections to move in that direction that are less draconian than this amendment.

The imposition of this amendment effective just six months from now punishes fiscally conservative sections like ours. Oddly, the Oregon State Bar stands to significantly benefit from this amendment. The BOG should not be considering an amendment that significantly benefits the OSB at the literal expense of section members. For members of the Criminal Law Section, and many sections, the imposition of this amendment would direct nearly 100% of the section fee away from the section and toward the OSB beginning January 1, 2020.

If the BOG feels the needs to pass an amendment to formally encourage sections to reduce fund balances, we suggest the following:

1) Delay implementation of the amendment until December 31, 2021. This would allow sections to plan for this new rule and not immediately risk the loss of the full section membership fee.
2) Allow sections to maintain fund balances in amounts up to three years of section membership fees.

Thank you for your consideration.
June 7, 2019

Danielle Edwards
Director of Member Services
16037 SW Upper Boones Ferry Rd.
Tigard, OR 97224

Re: Comments on Proposed Changes to Section Bylaws

Dear Ms. Edwards:

We’re writing on behalf of the Disability Law Section to offer you our feedback on the Board of Governors’ (BOG) proposed revisions to section bylaws.

As a section with a membership that often hovers just above 100, we could easily be affected by the proposed changes to the membership threshold. We are home to a wide variety of practitioners of disability law, and we bring a unique value and perspective to the Oregon State Bar. Many of our members work to preserve the civil rights of people with disabilities to live in communities of their choosing and receive the services they need to remain healthy, safe, and included. Others work to help ensure that employees with disabilities receive the accommodations they need to be successful in their jobs; and many work to help clients receive Social Security and other essential public benefits. We are also home to many attorneys who themselves experience disability.

We have offered unique CLE topics such as Social Security practice, representing clients with cognitive disabilities, and making a law practice more inclusive.

According to the Centers for Disease Control and Prevention (CDC) one in 4 U.S. adults – 61 million Americans – have a disability that impacts major life activities. We are made up of practitioners who serve this large and underrepresented population. We advocate for minority rights and provide access to justice. Losing a section like ours would mean losing a voice for people who are already underrepresented.

Small sections like ours offer unique perspectives and are often homes for attorneys who represent clients who could not otherwise have access to justice. We ask that the BOG consider the value of our section and other specialty and minority bar sections as it contemplates changes to the bylaws. We believe that bar sections which focus on minority rights should be exempt from the membership threshold requirement.
The proposed changes regarding fund balances may also disparately impact smaller sections by basing the maximum account balance on membership size and dues collected yearly. This proposed formula could inadvertently punish sections which attempt to keep their section fees low. There are some costs, such as those associated with CLEs, that may be relatively fixed. We would suggest that the bylaws allow any section to keep up to $5,000 in reserve regardless of member fees collected. This would allow any section to save up for larger expenditures like CLEs, which provide a service to the broader legal community in Oregon.

We appreciate the opportunity to share our comments with you.

Sincerely yours,

The Disability Law Section
Executive Committee

Risa Davis
Chair
June 12, 2019

Board of Governors
Oregon State Bar
P.O. Box 231935
Tigard, Oregon 97281-1935

Members of the Board of Governors:

We, the members of the Executive Committee of the Diversity Section of the Oregon State Bar, write to express our concerns regarding the proposed amendments to the standard section bylaws relating to fund balances and membership thresholds. Although we support the Bar’s mission to encourage Sections to spend funds for the benefit of current members and we generally support the proposed amendments to Subsection 15.4 Dues and Article IX, Section 2—which require OSB Sections with a fund balance as of December 31 exceeding two years of section membership fees to be charged the full per member fee for the following year—we oppose the passage of those amendments without a specific exception created for Sections holding funds earmarked for large-scale events designed to benefit their sections and the broader legal community. Lastly, we urge you to oppose the proposed amendment to Article XII, Section 2, which would subject Sections with less than 100 members to restructuring or sunsetting by the Board of Governors.

The mission of the OSB Diversity Section is to promote and support diversity and inclusion within the Oregon Bar and the judiciary, to organize educational programs that facilitate constructive discussion and enhanced understanding of diversity issues, and to assist Oregon legal professionals in advancing equity in the practice of law. Our Section was born out of the first Convocation on Equality in 2001. Every ten years, our section hosts the Convocation on Equality, an event designed to explore best practices for the recruitment and retention of diverse attorneys in Oregon, benefitting our Section and the entire legal community in our state.

In furtherance of our mission, it is necessary for our Section to save funds in anticipation of this large-scale event. We currently have $19,000 held in reserve for the anticipated 2021 Convocation—representing funds leftover from the 2011 Convocation—and we anticipate raising additional funds through donations from outside stakeholders. Although we may have what the BOG views as “excessive” funds on hand, we have retained those funds for this specific decennial event fitting squarely within our mission. Accordingly, we urge the Board of Governors to carve an exception to the proposed rule for Sections that hold money for large-scale events like the Convocation. If an exception is not made, our Section’s ability to carry out its mission will be significantly impacted.

We also write to urge the Bar to reject the proposed amendment related to membership thresholds. Some of the smaller Sections provide important support for attorneys who are minorities within the legal profession and who provide needed services to unique populations in the community that are often underserved by attorneys practicing in other areas. The Disability Law Section and the Military and Veterans Law Section are two examples of smaller Sections that have membership numbers hovering near the proposed threshold. We believe it would be a tremendous disservice to
the community to lose Sections like these that provide vital support and legal services to diverse attorneys and members of our community. Accordingly, we ask you to reject this proposed amendment.

Sincerely,

OSB Diversity Section Executive Committee

<table>
<thead>
<tr>
<th>Officers</th>
<th>At-Large Members</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rebecca Ivanoff, Chair</td>
<td>Mae Lee Browning</td>
</tr>
<tr>
<td>Lorelei Craig, Co-Chair-Elect</td>
<td>Ashley Carter</td>
</tr>
<tr>
<td>Wilson Ta, Co-Chair-Elect</td>
<td>John Haroldson</td>
</tr>
<tr>
<td>Tracy Frazier, Secretary</td>
<td>Kelsey Heilman</td>
</tr>
<tr>
<td>Percy Wise, Treasurer</td>
<td>J.B. Kim</td>
</tr>
<tr>
<td></td>
<td>Melina Martinez</td>
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<tr>
<td></td>
<td>Phylis Myles</td>
</tr>
<tr>
<td></td>
<td>Hon. Melvin Oden-Orr</td>
</tr>
<tr>
<td></td>
<td>Sarah Sabri</td>
</tr>
</tbody>
</table>
June 12, 2019

VIA EMAIL ONLY

Danielle Edwards
dedwards@osbar.org

Dear Ms. Edwards:

Stephanie Wilson contacted me and asked that I send you a letter regarding the reserves that are currently held by the Family Law section of the Oregon State Bar. I understand that the Bar would prefer that we have closer to $45,000 in reserves, while we currently have about $65,000.

The Family Law Conference moved to Sunriver in 2016. That move was made in part to better accommodate the many geographical areas of Oregon, but by making the move the overall cost of the conference increased substantially. We nonetheless have tried to keep the registration fees low for our members, understanding that the cost of attending the conference is not just the registration fee, but also travel, hotel, and food. In fact, we sent a survey out to our members a few years ago and learned that keeping the registration fees down was one of the most important issues. It is my understanding that the Family Law Section continues to be one of the most well attended CLEs in the state. We feel that the lower registration fee likely has an impact on people’s ability to attend.

Overall, Sunriver ended up costing more than what we anticipated, primarily because of the unknown costs (and annual cost increases) for things like food. I reached out to our treasurer, Zach Fruchtengarten, to get numbers that will help support our position as to why a $65,000 reserve is appropriate. In 2017 we lost approximately $8,500 on the conference and in 2018 we lost approximately $7,500. If this trend continues, we would deplete a $45,000 reserve in about six years. In order to try to temper this trend, we decided to move the conference back to Salishan beginning in 2020. Our hope is that the overall cost for the section will reduce and that as a result we can keep registration costs down without continuing to lose substantial amount on the conference each year.

Still, we realize we did not have a realistic expectation of the costs of Sunriver and understand this may occur again at Salishan. According to our treasurer, we lost approximately $10,000 at Salishan in 2016, and broke even in 2015. It is also worth noting that we may have to cap our numbers at Salishan because of the size of the resort, which may impact the bottom line. Accordingly, we feel
it would be better to evaluate the level of our reserves after we have completed a conference at Salishan (October 2020) and better understand the financial impact of the move.

One of the things that is so special about the Family Law Conference is how many people attend from all over the state. The experience is unlike other CLEs because of the number of attendees and the collegial experience. We want to be able to continue to offer that for years to come at an affordable price, but having reserves is necessary to that goal.

Very truly yours,

Shannon Snow
Shannon Snow
Shannon@YourAtty.com

c: Susan Grabe (via email only)
Hi Danielle,

I’m responding to the proposed bylaws changes re section ending fund balances. The following are the comments I provided to my BOG representative, Thomas Peachey. But I wanted to make sure that my comments are considered by the full BOG, so I’m providing them here. Thanks for your assistance.

I’m the chair of the RELU Section, and I’m concerned about one of the proposed changes in the bylaws re sections. Specifically, the change that would penalize sections whose fund balance exceeds twice the annual dues for that section. Here’s the concern – the RELU Section has historically carried a large balance (though not huge when considering the size of our section (1,000+ members)) because we’ve wanted to have a safe reserve in the event that our annual conference were ever a complete loss (because of a natural disaster or an event venue catastrophe). We got a glimpse of that 2 years ago when a large number of folks threatened to cancel because the event was in Central Oregon and they were worried about the eclipse traffic on the same weekend.

Anyway, for that reason, we’ve had a policy of trying to maintain reserves equal to approximately the cost of the summer conference. That is about $50,000. In the last couple of years, we’ve actually spent down some of our funds, so that we don’t have quite that much, but as the cost of the conference continues to rise, I wouldn’t want us to be limited to 2x annual dues. Especially when you consider that we are a section whose membership is very sensitive to the vagaries of the real estate market. Our membership drops precipitously if/when there is another real estate meltdown.

I understand the reasoning for the policy, but I don’t think it’s easily applicable to the RELU Section. I don’t think it’s fair to say that the RELU Section is collecting and hoarding dues; a large amount of our revenue each year comes from the summer conference and the advertising/sponsorships we obtain. As a result of those, last year’s conference netted more than $10,000. (If you look at our 2018 financials, you’ll see that we had $49,950 in revenue from the annual conference; that’s registration fees. In addition, the $11,277 listed as sponsorships is all attributable to the summer conference. Our expenses were about $51,000.) We think it’s fair that the excess funds from the conference go toward maintaining a reserve that assures that a catastrophic event in connection with a future conferences won’t figuratively bankrupt the section.

As a section, the RELU ExComm believes that prudent budgeting calls for us to have a reserve that is as close to the cost of the annual conference as possible so that we have protection against a disaster. We do not believe we sacrifice programming as a result – we offer the summer conference (which is an amazing bargain at only $275 registration for approximately 12 credits), monthly luncheon CLEs (for only $30), a spring forum (one-day CLE), a vibrant Listserve, and a digest that publishes 4 times a year. We’ve been very careful to cut costs where we can (for instance, this year, we made the decision to cut several thousand dollars from the ExComm budget, particularly our annual retreat, so that we can stop spending down reserves without having to sacrifice programming). I think it’s important that the section not be punished for being fiscally responsible.

Thanks,
Laura
Hi Laura,

I want to thank you again for providing feedback to the BOG regarding the proposed bylaw changes. The BOG appreciates the time the section’s EC spent discussing these issues.

As I prepare for the BOG meeting later this month I began looking more closely at the RELU Section’s fund balance and spending habits over the years. I want to make sure I fully understand the section’s goal in providing the feedback you shared below and make sure everyone is on the same page regarding the proposed changes. Currently the section has 1,165 members and charges $30 in membership fees. If the proposed bylaw change is implemented, and based on today’s membership count, the section’s allowable carryover amount would be just shy of $70,000. It’s calculated as 1,165 x $30 x 2 years = $69,900.

I reviewed the section’s December financial reports since 2006 (chart provided below) and see the section has not exceeded the two-year carryover amount during that time period. As you mentioned in your email, the section has continued to reduce its carry over amount. As of December 2018, the section was well under the two-year carryover limit outlined in the proposed changes. You indicated the section’s policy has been to maintain reserves equal to approximately the cost of the summer conference which is roughly $50,000. Based on the calculation above, indicating the two year allowable carryover would be approximately $70,000, does the section continue to have the same concerns with the proposed bylaw amendment?

<table>
<thead>
<tr>
<th>Year</th>
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<tbody>
<tr>
<td>2018</td>
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<td>1225</td>
</tr>
<tr>
<td>2017</td>
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<td>1235</td>
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<tr>
<td>2016</td>
<td>$38,262</td>
<td>1249</td>
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<td>$47,733</td>
<td>1205</td>
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<td>2014</td>
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<td>1230</td>
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<td>1199</td>
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<tr>
<td>2006</td>
<td>$26,194</td>
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</tr>
</tbody>
</table>

The feedback the section provided will be shared with the BOG during their meeting on June 21. I look forward to hearing your thoughts and would be happy to discuss this further if I have misunderstood the section’s position.

Best regards,
Danielle
OREGON STATE BAR
Board of Governors Agenda

Meeting Date: June 21, 2019
From: John Bachofner, Board Development Committee Chair
Re: Appointment recommendations to various bar and bar-affiliated groups

Action Recommended

Approve the Board Development Committee’s recommendations for member and non-member appointments to the following groups.

Background

During the Board Development Committee’s meeting on May 17 the committee selected the following members for appointment consideration.

**Unlawful Practice of Law Committee Recommendations**

The UPL Committee investigates complaints of unlawful practice and recommends prosecution where appropriate. The committee is in need of four new members and BDC recommends Erin Pettigrew (125100), Elliot Field (175993), Martin Jaqua (860528), and Emil Ali (176329) for appointment. If approved, the Board’s recommendations are sent to the Supreme Court for approval.

During the Board Development Committee’s meeting on June 21 the committee selected the following members for appointment consideration.

**Quality of Life Committee Appointments**

Quality of Life Committee members educate lawyers and firms about the benefits of balancing personal life and career obligations. Two new members are needed to fill vacant seats and a new secretary is needed from the existing membership. Brent Smith (065971) and Anne Milligan (111615) are recommended for the member positions. Ellen Pitcher (814454) is recommended as the secretary.

**Uniform Criminal Jury Instructions Committee Appointment**

Uniform Criminal Jury Instruction Committee members develop uniform jury instructions for use in criminal trials. It is important to maintain a balance on this committee and a new prosecutor is needed to maintain the balance. Jenna Plank (053529) is recommended for appointment.

**Commission on Judicial Fitness and Disability Appointment**

The Commission reviews complaints about Oregon state judges and justices of the peace and investigates when the alleged conduct might violate the state’s Code of Judicial Conduct or Article VII (amended), Section 8 of the state constitution. The Commission also investigates complaints referred by the Chief Justice that a judge has a disability which significantly interferes with the judge’s job performance. The Board Development Committee recommends the reappointment of Judy Parker (064618) to serve as a Commission member.
**Ninth Circuit Lawyer Representative Recommendations**

The US District Court requests appointment recommendations from the OSB Board of Governors for lawyer representatives for the 9th Circuit Judicial Conference. The Board Development Committee recommends nominating **Rachel Lee** (102944) for appointment. The BOG’s recommendation will go to the Court for final appointment decision.

**House of Delegates Appointments**

There are several vacancies on the OSB House of Delegates. The Board Development Committee recommends the following appointments:

**Region 1**
Douglas Primmer, Lieutenant, Oregon Department of Corrections

**Region 2**
Apolinar Montero-Sanchez, 181872

**Region 4**
Bryan Penn, paralegal for American Family Mutual Insurance
Brad Kalbaugh, 074335
Michele Peters, 162716

**Region 5**
Gabriel Chase, 142948
Michael Levelle, 903214
Vamshi Reddy, 140560
J. Nicole Rose, 124434

**Region 6**
Zachary Gottlieb, 173608
Emily Matasar, 145368

**Region 7**
Thomas Feely, retired Senior Business Operations Manager for the City of Portland

**Out of State Region**
Paul Bullman, 175985
Scott Edwards, 083132
C. Richard Newsome, 186046
Rick Lundblade, 963460
Thomas Olinski, 941203
Mary Pool, 962407
Bradley Thayer, 161638
Josephine Townsend, 076444

**Council on Court Procedures Appointment**

Based on authority provided by ORS 1.730(1)(d), the BOG is tasked with appointing members of the Council on Court Procedures. The terms of five members are expiring and new members are needed. The Board Development Committee recommends the reappointment of **Kenneth Crowley** (883554) and **Troy Bundy** (942574). The Committee also recommends the appointment of **Tina Stupasky** (873883), **Jeffrey Young** (071829), **Barry Goehler** (044785), and **Chris Piekarski** (000910).
Oregon State Bar Expense Reimbursement Policy

1. General Policy

   a. This policy applies to participation at conferences and meetings or other official Oregon State Bar business as a member of a board, committee, section, division or employee of the bar. See OSB Bylaw Section 7.5. It also applies to bar members who are invited by a board, committee, section
or division to attend a conference or meeting as part of official Oregon State Bar business, if the group agrees to reimburse the invitee’s expenses.

b. Members of the Board of Governors, Board of Bar Examiners, State Professional Responsibility Board, and Disciplinary Board shall be reimbursed for their expenses in accordance with this policy when acting in their official capacities. Expenses of board or committee members or employees shall not be reimbursed when attending meetings or conferences in a non-official capacity of the bar. A member is attending in an official capacity when the individual’s attendance has been preapproved by the board.

c. Expenses of spouses, guests, or family members shall not be reimbursed unless approved by the Board of Governors or as permitted by OSB Bylaw 2.501. Members of bar boards and committees are required to comply with Oregon’s Government Ethics Law, ORS Chapter 244, and may not approve the bar’s reimbursement of expenses for their family or members of their household.

d. Requests for expense reimbursement must be received by the bar not later than 30 days after the expense is incurred. If an expense reimbursement form is not submitted within 30 days after the meeting, it must include justification as to why it was not submitted timely. If this requirement is not met, reimbursement may not be paid.

e. Supporting documentation, e.g. receipt or ticket, is required for all expenses. Credit card statements cannot be accepted in lieu of receipts. Documentation must show details of purchase.

f. If you spend above the limits as outlined in this policy, you will be responsible for paying the difference between the maximum $ amount in this policy and the total cost incurred.

2. Out-of-State Travel

a. Out-of-state travel for board members shall be reimbursed for those persons and meetings set forth in the bar’s annual budget or as otherwise approved by the Board of Governors.

b. Employees must obtain approval of the Chief Executive Officer prior to traveling out of state.

3. Reimbursable Expenses While on Official Bar Business

a. Transportation

   (1) Use of personal automobile shall be reimbursed at the allowable IRS rate.

   (2) Actual cost of coach airfare and seating assignment.

   (3) Actual cost of checking one (1) piece of luggage.

   (4) Actual cost for taxi, bus, or other public transportation.

   (5) Actual cost of car rental at economy car rate when other transportation is not readily available.

   (6) Actual cost of parking (receipt must be attached or note parking was paid through a meter).

b. Lodging
(1) The maximum reimbursed amount for lodging shall not exceed $250.00 per night, excluding taxes and other applicable fees. Notwithstanding this limit, reimbursement for the BOG president, BOG president-elect and bar staff lodging expenses at approved bar-related meetings, events or conferences is allowed at the negotiated group rate for a standard double room.

(2) For events taking place within 5 miles of the OSB Center, locally approved negotiated rate hotels must be used (i.e. The Grande Hotel Tigard and The Crowne Plaza Lake Oswego; contact information at the web posted document URL) shall be used. (contact information at the web posted document URL). For all other events, the $250 per night limit, excluding taxes and applicable fees, shall apply. Failure to follow this requirement may result in your expense reimbursement being denied.

c. Meals

(1) Receipts are required; if one is not available, follow the maximum limits as noted below:

<table>
<thead>
<tr>
<th></th>
<th>In Oregon</th>
<th>Out-of-state</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total per day</td>
<td>$64.00</td>
<td>$74.00</td>
</tr>
<tr>
<td>Breakfast</td>
<td>$15.00</td>
<td>$17.00</td>
</tr>
<tr>
<td>Lunch</td>
<td>$16.00</td>
<td>$18.00</td>
</tr>
<tr>
<td>Dinner</td>
<td>$28.00</td>
<td>$34.00</td>
</tr>
<tr>
<td>Incidentals</td>
<td>$5.00</td>
<td>$5.00</td>
</tr>
</tbody>
</table>

(2) In the event that the meals exceed the maximum limits, detailed receipts must be submitted with an explanation in order to receive reimbursement and must be approved by the Chief Financial Officer or the Chief Executive Officer.

(3) Meals purchased for members of the bar or other persons in the course of official bar business shall be reimbursed at actual cost with submission of detailed receipts, the names of attendees and a description of the business purpose of the event.

(4) Official dinners, meetings or banquets of the Oregon State Bar at which eligible persons are specifically expected to attend shall usually be paid for by the Bar and, if not, shall be eligible for reimbursement.

d. Miscellaneous

(1) Telephone, postage, office expense, registration fees, and other legitimate business expense items shall be reimbursed at actual cost with submission of detailed receipts and explanation of purpose of expense.

(2) Gift and gift card purchases must be accompanied by detailed receipts indicating the business purpose of the gift, and the name of gift recipient(s).

4. Non-reimbursable Expenses While on Official Bar Business

a. Alcoholic beverages
b. Movie rentals on overnight lodging
c. Lodging of members at personally-owned residence, vacation homes or timeshares condos
d. Fees for pets
e. Fees for fitness center, resort usage or special cleaning, unless payment of the fee is required by the hotel as a condition of the stay.

f. Fees for parking or traffic tickets

f. Other expenses personal in nature.

These expenses also are non-reimbursable from section funds.

5. Section Treasurers

a. For those events where total expenses are $1000.00 or more, please attach an event agenda and a signed roster list of attendees as supportive documentation, to the Section check request form.

b. A section treasurer’s personal or firm expense report must be approved by the section chair.

c. For treasurer information, account numbers, forms, and financial reports, go to: www.osbar.org/sections/index.html#tools

NOTE: Receipts are required for all expenses

6. Exceptions to this policy

(1) Any exceptions to this policy, including spending at a lodging rate that exceeds the limits as outlined in this policy, must be approved in advance by the CEO.

Revised: June 2019 (kp)

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Current list of Portland area approved hotel venues with pre-established rates:

A. The Grand Hotel, Bridgeport $119 per night base rate (excluding fees and taxes)

B. The Crown Plaza on Kruse Way, $117 per night base rate (excluding fees and taxes)

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Note: I have taken out previously drafted text disallowing combining of meal per diems. Point 3(c).2 allows that if meals exceed the per diem limits, detailed expenses can be submitted with an explanation and approved by either the CFO or CEO. This would allow that an event or dinner could exceed the dinner per diem of $28 (in state) or $34 (out of state) and if appropriately justified, be approved by the CFO or CEO.

I have elected to not go with a single day per diem (thereby eliminating the meal per diems) as I think the tendency will be to abuse the higher limit and the paid expense on meals will increase significantly.
OREGON STATE BAR
Board of Governors Agenda

Meeting Date: June 21, 2019
Memo Date: May 31, 2019
From: Eric Foster, Public Affairs Committee Chair
Re: Elimination of Preference Polls

Action Recommended
The Public Affairs Committee recommends the BOG amend Section 2.7 of the OSB Bylaws as listed below to eliminate the use of preference polling for circuit court elections, as recommended by the OSB 2018-2020 Diversity Action Plan and the Diversity Section letter.

Background

Currently the Oregon State Bar conducts judicial preference polls only for contested judicial races in Oregon. Through these polls, attorneys are asked to vote to express their view on which of the candidates ought to be selected for various judgeships.

Judicial preference polls are problematic for a number of reasons. Perhaps most importantly, the polls tend to exacerbate rather than address the relative lack of diversity on Oregon’s bench. A review of the results of preference polls conducted since 2012 revealed that women and persons of color running for judgeships in Oregon actually performed worse in OSB preference polls than they did in the elections.

According to the Brennan Center for Justice, white males are overrepresented on state appellate benches by a margin of nearly two-to-one, while almost every other demographic group is underrepresented. This problem appears to have persisted, even while law school populations have been growing more diverse. Addressing the problem, the Brennan Center suggests, involves systemic recruitment efforts that are intended to attract a diverse pool of judicial applicants, not simply passively reviewing candidates.

Preference polls do not help address this problem, and may in fact exacerbate it. The Oregon State Bar’s experience in conducting preference polls is the lawyers who perform best in preference polls are generally those lawyers who are most well known in their community, not necessarily those most qualified for the position. While this dynamic in polling is well known in other quarters, its effect is to reinforce existing power dynamics. The candidates that perform best in OSB preference polls are incumbents generally and white male candidates in particular.

In short, preference polling has a tendency to reinforce the status quo. While in some cases an incumbent judge’s poor performance in a preference poll may be useful evidence of dissatisfaction with that judge’s performance, in the vast majority of occasions sitting judges perform well in the polls. This means the polls tend to provide relatively little benefit in the way of informing the public, while potentially exacerbating the existing lack of diversity on the bench.
Proposed Amendment

Section 2.7 Judicial Selection

Subsection 2.700 General
The Bar plays an important role in state and federal judicial selection by conducting preference polls for contested elections and for circuit court appointments, and by interviewing and evaluating candidates for appellate court appointments. Any poll conducted by the Bar is for informational purposes only and will not constitute an official position of the Bar. Results of evaluations and polls will be made public as soon as practicable to the press, the candidates and the appointing authority.

Subsection 2.701 Statewide and Circuit Court Elections
For statewide and circuit court elections, the Bar will conduct a poll of the members in the affected geographic area in accordance with the election procedures set forth in Article 9 of the Bar’s Bylaws. The ballot will contain all the candidates who will appear on the public election ballot. Each preference poll will contain the following information on each candidate: Name, law firm name (if applicable), principal office address, date admitted to the Bar, professional and community activities, professional history, other pertinent information and a picture. In any general election that includes contested judicial positions, the Bar will conduct a poll only if there was no prior poll in the primary election, there has been a significant reduction in the number of candidates that appeared on the primary election ballot or it appears that the votes were relatively spread out among most of the candidates so that another poll could potentially produce an entirely different result from that of the primary election poll.

Subsection 2.702 Circuit Court Appointments
For circuit court judicial appointments, the Bar will conduct a poll of the members in the affected geographic area in accordance with the election procedures set forth in Article 9 of the Bar’s Bylaws at the request of the Governor of the State of Oregon or the Board. If the Governor’s Office or the Board requests a poll, the ballot must include the name of any eligible member of the Bar who has filed a candidate statement with the Bar by the appropriate deadline. Each preference poll will contain the following information on each candidate: Name, law firm name (if applicable), principal office address, date admitted to the Bar, professional and community activities, professional history, other pertinent information and a picture.

Subsection 2.703 Statewide Judicial Appointments
(a) For judicial appointments to a statewide court, the Board will appoint an Appellate Selection Committee to conduct the Board’s appellate recommendation process. Bar members will be notified of the impending upcoming appointment and will be invited to participate in the appellate recommendation process. If an appellate recommendation process has been concluded within three months preceding the announcement of a new appellate vacancy, the Board may, in its discretion, forego conducting a separate appellate recommendation process and instead resubmit the previous list of highly qualified candidates to the Governor without notification to members.
(b) Prior to commencement of the appellate recommendation process, the Appellate Selection Committee shall establish policies and criteria for conducting its review of candidates for each position, which may include, but is not limited to, review of the written applications; interviews of candidates; reports from judges or hearings officers; reports from members of the legal and general community; reports from references supplied by the candidate; and review of writing samples.

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

(d) In addition to submitting its list of "highly qualified" candidates, the Board will respond to any specific inquiry from the Governor as to whether certain other candidates in the pool meet a "qualified" standard.

(e) Meetings of the Appellate Selection Committee are public meetings except for portions of meetings during which reference reports are presented and discussed. The term "reference reports," for purposes of this section, means information obtained by committee members and staff from persons listed as references by the candidates and information obtained by committee members and staff from other persons knowledgeable about candidates as part of the candidate review process. Discussion of reference reports by the committee and the Board will be in executive session pursuant to ORS 192.660(1)(f).
OREGON STATE BAR
Board of Governors Agenda

Meeting Date: June 21, 2019
Memo Date: May 31, 2019
From: Eric Foster, Public Affairs Committee Chair
Re: Recognition and Enforcement of Tribal Court Judgments, Orders, and Decrees in Oregon State Courts

Action Recommended
The Public Affairs Committee recommends the Board of Governors consider approval of the Indian Law Section’s memo regarding recognition and enforcement of Tribal Court Judgments, Orders, and Decrees in Oregon State Courts for further distribution to the Oregon Supreme Court.

Background

In September 2018, the Oregon Supreme Court referred several questions to the Oregon State Bar’s Indian Law Section for evaluation. These questions pertained to the recognition and enforcement of tribal court orders, judgments, and decrees (hereinafter “tribal court orders”), under Oregon’s current statutory framework. The Court’s overarching question regards whether tribal court orders, as issued by the courts of the federally-recognized tribes residing within Oregon, suffer from gaps in recognition and enforcement in Oregon’s state courts. If so, could Oregon’s Supreme Court promulgate a new source of state law providing something akin to “full faith and credit” for tribal court orders?

QUESTION 1. Does Oregon’s statutory framework, including ORS 18 (Judgments) and ORS 24 (Foreign Judgments), fully address any concerns particular to Oregon courts’ recognition and enforcement of tribal court orders? Are these concerns similar to the concerns addressed by the Minnesota Supreme Court in adopting the amendments to Minnesota General Rule of Practice 10.01-10.02 (now amended as Minn. Gen. R. Prac. 10.01-10.03)?

BRIEF ANSWER 1. Concerns regarding Oregon courts’ recognition and enforcement of tribal court orders are not fully addressed under Oregon’s current statutory framework. These concerns are similar to the concerns addressed by the Minnesota Supreme Court in adopting the amendments to Minnesota General Rule of Practice 10.01-10.02. Thus, it makes sense to examine Oregon’s statutes as compared to Minn. Gen. R. Prac. 10.01-10.03.

QUESTION 2. If gaps exist that are not addressed under Oregon’s current statutory framework, what are those precise gaps? For example, do Oregon’s statutes have the same effect as Rule 10.01, but then gaps as to Rule 10.02 or 10.03? Or do Oregon’s statutes have gaps even as to Rule 10.01?

BRIEF ANSWER 2. No single Oregon rule or statute has been adopted that requires either mandatory recognition or enforcement for tribal court orders or allows discretionary recognition or enforcement of tribal court orders. Gaps exist under Oregon law that have the same effect as the gaps prior to enactment, and subsequent amendment, of Minn. Gen. R. Prac. 10.01, and enactment of 10.02 (newly
amended as 10.03). The Court should consider whether Oregon’s gaps could be addressed by a new source of law, given the gaps between Oregon’s current rules and statutes and the presumed effect of a rule or statute such as Minn. Gen. R. Prac. 10.01 and 10.03. Gaps in Oregon regarding civil commitments are less deleterious under the law because of the robust nature of ORS 426.

**QUESTION 3.** As a matter of Oregon policy, could these gaps be addressed by a new source of law similar to Minn. Gen. R. Prac. 10.01, 10.02, or 10.03? If so, what source of law would be the most suitable – a rule (e.g., ORCP or UTCR) or a statute? What content would be most appropriate for a recommended rule or statute?

**BRIEF ANSWER 3.** Adopting a new source of law that resolves these gaps with content able to withstand legal challenges reflects Oregon’s high degree of respect for tribal sovereignty and is consistent with Oregon’s public policy of supporting tribal nations. Any rule or statute adopted should reflect this policy of respect for tribal sovereignty and further perpetuate Oregon’s government-to-government relationship with tribal governments within Oregon state boundaries. A statute could encompass these principles. However, the ORCP and UTCR serve mainly to instruct legal practitioners and the state judiciary on Oregon’s adopted court procedures. Thus, a court rule is an appropriate mechanism that both legal practitioners and judges can apply consistently, not only to the patchwork of statutes pertaining to tribal court in existence, but to tribal court orders, judgments, and decrees not found in legislative provisions. Other states, including Arizona, Michigan, New York, North Dakota, Oklahoma, and Washington have opted for rules over statutes in addition to Minnesota.

After considering the rules adopted in Minnesota, Washington, and Arizona, the Indian Law Section recommends that the Council on Court Procedures promulgate and adopt a new Oregon Rule of Civil Procedure with language similar to Minn. Gen. R. Prac. 10.01 and 10.03; and that a new chapter be added to the Uniform Trial Court Rules that provides clear procedural guidance to Oregon courts, with amendments to UTCR Chapters 5 and 7, as appropriate.
OREGON STATE BAR
Board of Governors Agenda

Meeting Date:       June 21, 2019
Memo Date:         May 31, 2019
From:              Eric Foster, Public Affairs Committee Chair
Re:                OSB Support of Constitutionally Adequate Indigent Defense Representation

Action Recommended
The Public Affairs Committee recommends the Board of Governors fully support legislative efforts to ensure a constitutionally adequate level of funding for indigent defense services, including addressing deficiencies in the system identified in the Sixth Amendment Center report.

Background

In January of 2019 the Sixth Amendment Center released a report that identified numerous deficiencies in the provision of indigent defense services in Oregon. Among the problems identified in the report were excessive caseloads held by many attorneys, lack of sufficient oversight and financial accountability, and a compensation model that pays on a case credit basis.

In response to this report, the Public Defense Service Commission proposed the introduction of what became HB 3145. This bill would radically restructure public defense services in Oregon.

Many of the details of the proposal are still being debated and are ultimately policy decisions that will need to be worked out by the other branches of government. The OSB has repeatedly come out in favor of fully funding indigent defense services, and ensuring that that indigent defendants receive representation that is constitutionally sufficient. These are the goals that HB 3145 is intended to address.
OREGON STATE BAR
Board of Governors Agenda

Meeting Date:  June 21, 2019
From:  Amber Hollister, General Counsel
Re:  Legal Ethics Committee Recommendation
     To Amend RPC 7.2 regarding Nominal Gifts from Lawyers

Action Recommended

The Legal Ethics Committee recommends that the board vote to approve an amendment to Oregon Rule of Professional Conduct 7.2, to allow lawyers to give nominal gifts to persons who recommend their services under certain circumstances, and place the proposed amendment on the 2019 House of Delegates Agenda.

Background

At its June 8, 2019 meeting, the Legal Ethics Committee voted to recommend that the Court amend ORPC 7.2, based on a recent amendment to ABA Model Rule 7.21, to add a new subsection (b)(4) that allows lawyers to give nominal gifts to persons who recommend their services in limited circumstances.

As amended, the rule would provide:

RULE 7.2 ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

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

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

2 pay the usual charges of a legal service plan or a lawyer referral service;

[and]

3 pay for a law practice in accordance with Rule 1.17[.]; and

4 give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(c) Any communication made pursuant to this rule shall include the name and contact information of at least one lawyer or law firm responsible for its content.

The Committee recommends that the board approve this proposed amendment and place it on the 2019 HOD agenda. If approved by the HOD, the proposed change would then be reviewed by the Supreme Court. ORS 9.490(1).

The Committee recommends the proposed change because the amendment would conform to the ethics advice already provided to members in current OSB Formal Ethics Op No 2005-73 (Revised 2016), available at https://www.osbar.org/_docs/ethics/2005-73.pdf, which explains:

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


Further, the proposed amendment would keep Oregon in line with the majority rule on this issue and reduce potential confusion among lawyers.

Should the Court ultimately adopt the rule change, the Committee would pursue an update to OSB Formal Ethics Op No 2005-73 (Revised 2016) to reflect the change, and incorporate additional guidance on the meaning of what constitutes a “nominal gift”. For instance, Comment [4] to ABA Model Rule 7.2, explains that the new rule

“permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer’s services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.”

In sum, the Committee submits that the proposed rule change would further clarify lawyers’ ethical obligations and should be approved.