



Liani Reeves announced that the Board would first consider the Policy & Governance Committee motion to pursue changes to the Bar Act relating to election and removal of BOG members as outlined in Option 1 and opened the motion up for discussion.

Committee members who voted against the proposal expressed numerous concerns. One member believes the proposal threatens lawyer's self-regulation and provides no real benefit. Another feels we have not explored enough alternatives and believes there may be better ways to accomplish the object of public accountability and service. For example, we could require Court appointment of public members only and add more public members to the board. There was general dis-ease about giving the Supreme Court so much power over the BOG members, and the impact that would have on the board discussion and decision-making. Members from rural communities noted the distrust that lawyers and others from rural communities have of government institutions located in the valley. This proposal will exacerbate that distrust. Several members wanted more time to talk and think about the proposal because it is such a big decision.

Those in favor of the proposal noted that closer alignment with the Court has numerous advantages. There has always been confusion among board members about who they serve. Because they are elected, they think they serve bar members. But the bar's mission and purpose have always been public protection and service. Changing the governance structure in this way will make board member accountability to the public clearer. The proposal does not eliminate self-governance; the Supreme Court Justices are lawyers and bar members. Finally, to the extent that people think there may be other, better solutions, voting in favor of this proposal allows the board to explore those options. Option 1 preserves the bar's ability to seek legislative changes to the governance structure in the 2021 session. We can discuss this further once we get a draft back from legislative counsel's office.

**Motion:** Policy & Governance Committee recommended pursuing Bar Act changes outlined in option 1. Adrian Brown, Eric Foster, Kamron Graham, John Grant, Joseph Hesbrook, Eddie Medina, Traci Rossi, Michael Rondeau, and David Wade voted in favor. Colin Andries, Jenny Cooke, Kate Denning, Bik-Na Han, Ryan Hunt, Rob Milesnick, Joe Piucci, and Kyra Rohner voted against. The motion passed 9-8.

Liani Reeves made a public acknowledgment and thanks to the Pro Bono Counsel that has been involved in the Gruber/Crowe litigation. Eliza Dozono, who recently went in-house to CLEAResult, Taylor Richman of Miller Nash, Steven Wilker of Tonkon Torp, Mick Gillette of Schwabe, Williamson & Wyatt, and Meg Houlihan of Stoll Berne. They have donated many hours of their time and have very competently represented the bar in these difficult cases.

**OREGON STATE BAR**  
**Board of Governors Agenda**

---

**Meeting Date:** May 22, 2020  
**Memo Date:** May 6, 2020  
**From:** Eric Foster, OSB Public Affairs Chair  
**Re:** Proposed 2021 Oregon State Bar Legislative Concepts

---

**Action Recommended**

BOG should consider PAC's recommendation to adopt the law improvement proposals and BOG priority proposals as part the 2021 law improvement package. The bar would then submit the package to Legislative Counsel's office for bill drafting.

**Background**

In regular long sessions, every other year, the Oregon State Bar submits proposed legislation as part of the Law Improvement Program to the Oregon State Legislature for passage. On April 27, 2020, the Public Affairs Committee hosted the bar's Legislative Forum. This year seven bar groups and the board of governors submitted eleven law improvement proposals for consideration by the Board of Governors to be included as part of the 2021 law improvement program.

Law improvement concepts are proposed legislation that clarifies statutory ambiguities, removes unnecessary procedural requirements, modifies unforeseen glitches in previous legislation, or otherwise improves the practice of law. Policy changes are also included in the bar package of legislation when the bar deems them appropriate. In order for public affairs committee to consider a legislative concept at the Legislative Forum, it must be approved by a majority of the executive committee (we encourage executive committees to be representative of the diverse views on the section). The bar's guidelines and policies encourage participants to be mindful of differing viewpoints in the practice area.

The Public Affairs Committee and General Counsel reviewed the proposals to ensure that they meet the criteria established by both the Oregon State Bar bylaws and the U.S. Supreme Court case, *Keller v. State of California*, 499 US 1, 111 S.Ct 2228 (1990).<sup>1</sup>

**What is the Keller Rule?**

In 1990, the United States Supreme Court ruled in *Keller v. State Bar of California*, 499 US 1, 111 SCt 2228 (1990) that an integrated (mandatory) bar's use of compulsory dues to finance political and ideological activities violates the 1st Amendment rights of dissenting members when such expenditures are not germane to the bar's purpose, which the court identified as regulating the legal profession and improving the quality of legal services.

---

<sup>1</sup> For more information on the Oregon State Bar bylaws and the *Keller* case, please visit [http://www.osbar.org/leadership/bog/bog\\_resources.html](http://www.osbar.org/leadership/bog/bog_resources.html).

*Keller* does not prohibit integrated bars from using member dues to advance political or ideological positions that are not germane to the bar's purpose; however, it requires that dissenting members receive a refund of the portion of dues attributable to the non-germane activity.

If the BOG approves the Law Improvement Program package, there are still several opportunities for the board to review a legislative concept before filing. The bar does not submit legislative concepts to the legislature until the fall of 2020. Throughout this process, the board can ask questions, review the process and proposals, and, if necessary, delete a concept from the package at any point.

PAC has reviewed the below list of legislative proposals from bar groups. If approved by the board, PAC on behalf of the bar will submit these legislative concepts to Legislative Counsel's office to be drafted, introduced through the Judiciary Committee, and pre-session filed for the 2021 legislative session. The bar's Public Affairs Department will continue to monitor these bills and address any concerns.

#### **Oregon State Bar Omnibus Bar Act**

- **Board Bylaws.** Subjects OSB Bylaws to review by the Supreme Court.
- **Board Member Removal.** Oregon Supreme Court may remove members of the Board of Governors for good cause (to be defined in Bar Bylaws). Also provides that the court will appoint board members after the CEO provides results of the election of board members by region.
- **Client Security Fund.** Clarifies that ORS 9.657 Client Security Fund immunity applies to both claims and awards, rather than just awards.
- **Court Facilitators.** Amends ORS 9.160 to clarify that court staff and court volunteers working in a court-sponsored program are not engaged in the practice of law (which will increase access to the court system and facilitate greater procedural fairness).
- **Custodianship.** Amends ORS 9.715 to allow any attorney to file the petition to allow the court to appoint an attorney other than the bar to serve as custodian of a lawyer trust account if the bar declines to do so. Further, the proposal would create a new statute clarifying that during probate of a deceased lawyer's estate, the court has jurisdiction to determine to whom property in the lawyer trust account belongs.
- **Electronic Voting.** Amends ORS 9.142 and allows HOD members to vote electronically and have their votes published after the meeting.
- **Limited License.** Oregon Supreme Court to have the authority to allow for limited licenses and the creation of associate bar membership.
- **Unlawful Practice of Law.** Under ORS 9.160 – 9.166, the Oregon State Bar has the responsibility to accept, review, and file suit for injunctive relief if someone is practicing law without a license. The bar now lacks sufficient enforcement mechanisms. This proposal

would allow the Oregon Attorney General to also investigate unlawful practice of law claims.

#### **Consumer Law Section**

**1) Inclusion of pro bono/access to justice factors for prevailing party fee applications.**

Requires courts to include pro bono and access to justice factors when determining the amount of attorney fees to award to a prevailing party who was represented pro bono, including legal service organizations. Amends ORS 20.075.

#### **Council on Court Procedures**

**2) Suits Against Deceased Persons.** Allows a personal representative to be substituted for a deceased person as the real party in interest if defendant dies within 60 days of an action being filed.

#### **Debtor-Creditor Section**

**3) Cross-referencing eviction statutes with ORS 18.946** (statute related to possession following judicial execution sales). In 2009 the OSB Debtor-Creditor Section proposed and passed SB 241. The bill clarified that eviction actions could be maintained by purchasers following certain foreclosure remedies. A cross reference to ORS 18.946 was not included in the original bill which has led to problems in applying the statute including a Court of Appeals case, *New York Mellon v. Lash*, 301 OR App 658 (2020). The proposal would amend ORS 18.946.

#### **Estate Planning and Administration Section (3 bills)**

**4) Merge three concepts into one Estate Planning and Administration bill.**

- Automatic revocation of power-of-attorney upon divorce - Creates an automatic revocation of power-of-attorney upon divorce. Adds a new statute.
- Extends liability protection for tenants by the entirety with revocable trusts. Adopts a provision which extends liability protection for tenants by the entirety if a married couple transfers such real estate to a revocable trust. Modifies ORS 93.180.
- Finalizes asset transfer to a revocable trust when transfer is incomplete. Allows a petition to be filed requesting a court order authorizing the transfer of assets from the settler's name to the revocable trust when there is evidence of intent that the assets were intended to be held in the trust. Adds a new provision (possibly to ORS 130.245).

**5) Will Retention Bill.** Reduces the will retention timeline from 40 to 20 years and allows wills to be retained in digital format. Modifies ORS 112.815 and 112.820.

**6) QTIP elections.** Maintains separate state and federal QTIP elections for state and federal tax purposes. Clarifies the statutory language to ensure that use of separate state and federal

Qualified Terminal Interest Property (QTIP) elections to avoid double taxation. Modifies ORS 118.005, 118.010(3 and 10), OAR 150-118-000.

***Indian Law Section***

**7) Full Faith and Credit.** Provides for state court enforcement of tribal orders and judgments.

***Military & Veterans Section***

**8) Merge veterans' preference concepts into one Military and Veterans bill.**

- Expands period of time during which the veterans preference in public hiring statute is applicable to include periods immediately prior to discharge.
- Amends ORS 408.230(2) to make “preference point” synonymous with “percentage point.” This will remove the current ambiguity and ensure that every veteran or disabled veteran receives the same level of preference regardless of the employer’s hiring process or scoring scale. This will also make the application of the preference easier for public employers.

***Nonprofit Law Section***

**9) Use of email to take action without a meeting.** Clarifies SB 360 (2019) to allow for the use of email for both members and directors to take action without a meeting, using email or some other electronic tool, and without unanimous consent. Allows for movement of nonprofit into Oregon.

**Other Legislation Submitted for Consideration**

**10) Attorney Fee Shifting limited to some prevailing parties (Consumer Law Section).** Limits attorney fees to prevailing plaintiffs in landlord-tenant, unlawful debt collection, and lemon laws for recreational vehicles. Would amend ORS 90.255, ORS 646.641, and ORS 646A.412.

# OREGON STATE BAR

## Board of Governors Agenda

---

**Meeting Date:** May 22, 2020  
**From:** Helen M Hirschbiel, CEO  
**Re:** BOG Member Election and Removal

---

### Action Recommended

Decide whether to pursue changes to the Bar Act related to election and removal of board members.

### Background

The Oregon State Bar (OSB) is a public corporation and an instrumentality of the Judicial Department of the State of Oregon. The OSB Board of Governors (BOG) governs the state bar and must “at all times direct its power to serve the public interest by:

- (a) Regulating the legal profession and improving the quality of legal services;
- (b) Supporting the judiciary and improving the administration of justice; and
- (c) Advancing a fair, inclusive and accessible justice system.”

In early 2019, when the Board of Governors resolved to include this mission within the Bar Act, it also decided to undertake a review of the Oregon State Bar governance model to ensure that the bar’s governance structure was aligned with this public service mission.

At present, the fifteen lawyer board members are elected by other lawyers within their regions. The four public board members are appointed by the board. ORS 9.025. In the normal course, board members leave the board when their terms end, they resign or die, or if they no longer qualify to serve, as provided by ORS 9.025(5):

(5) The term of any member of the board of governors terminates on the date of the death or resignation of the member or, if the member of the board is required to be a member of the Oregon State Bar, the term terminates on the date:

- (a) Of the termination of active membership in the Oregon State Bar for any reason;
- (b) When the member discontinues to maintain the principal office of law practice in the region in which it was maintained at the time of the appointment or election of the member; or
- (c) When the member assumes office as a judge of a municipal, state or federal court, or fills a full-time judicial office.

(6) A member of the board of governors is not eligible during the member’s term of office for service pro tempore as a judge of any municipal, state or federal court.

Alternately, they may be removed through a recall process. The removal process for lawyer board members is found in ORS 9.050, which provides:

(1) On petition signed by 25 percent of the members in any region for the recall of any governor elected from that region, the chief executive officer of the Oregon State Bar shall serve notice as soon as possible on the governor informing the governor that the petition has been filed. If the governor does not resign within 10 days after the date the notice is served, the chief executive officer shall distribute ballots to each active member of the bar within the region eligible to vote, submitting the question whether the governor shall be recalled. If a majority of the members voting at the election vote in favor of the recall, the governor is recalled.

(2) On the affirmative vote of two-thirds of the entire membership of the board of governors, the board shall refer the question of the recall of any governor from any region to a vote of the members of that region. The chief executive officer shall serve notice as soon as possible on the governor informing the governor that the board has approved a recall election. If the governor does not resign within 10 days after the notice is served, the chief executive officer shall distribute ballots to each active member of the bar within the region eligible to vote, submitting the question whether the governor shall be recalled. If a majority of the members voting at the election vote in favor of the recall, the governor is recalled.

(3) The board of governors shall approve the ballot and any information submitted to the members in connection with a recall vote.

In the unusual circumstance that the State Professional Responsibility Board authorizes formal charges against a board member, the bylaws provide for suspension and a temporary replacement of the member, as follows:

***Subsection 18.600 Applicability to BOG and SPRB***

The service of members of the Board of Governors and the State Professional Responsibility Board against whom charges of misconduct have been approved for filing by the State Professional Responsibility Board is suspended until the charges filed against them have been resolved. If a member is suspended as a result thereof, the member may not resume service on the board or committee until the member is once again authorized to practice law or as otherwise provided by ORS 9.025(5)(a). Charges of misconduct include those authorized to be filed pursuant to BR 3.4.

\*\*\*

***Section 18.602 Board of Governors Replacement***

Upon the suspension of a member of the Board of Governors pursuant to Bar Bylaw 18.6, the board will promptly notify all members from the affected region. Sixty days after the date of suspension, the board will seek the advice of the members of the House of Delegates from the region whether to appoint a temporary replacement for

the suspended member, and if so, the name of a suggested temporary replacement who is qualified. If a name is suggested, the board will appoint the suggested candidate as the temporary replacement effective at the next regularly scheduled board meeting. The temporary replacement will serve under the same terms and conditions as the suspended member until the suspension is lifted or the term of the board member ends

Removal of public members is set forth in OSB Bylaw 2.302, which provides:

Public members of the Board are subject to removal by the Board upon the following grounds and for the following reasons: A public member no longer meets the initial qualifications for appointment set forth in Subsection 2.300 of the Bar's Bylaws; or a public member commits an act substantially similar to the conduct proscribed by ORS 9.527 or fails to perform the duties of the office. If at least ten members of the Board propose that the public member be removed, the public member is given written notice of the proposed removal, together with the reasons therefore. The written notice must be given at least 15 days before the next regularly scheduled board meeting. Thereafter, on a vote of at least ten members of the Board, the public member is removed and the position is vacated.

In short, the OSB governance model as currently structured, provides accountability to the lawyers of Oregon, not to the public.

### **History of BOG Election and Removal**

The current Board of Governors election and removal provisions are a remnant of the original Bar Act. The original Bar Act, enacted in 1935, provided that Oregon bar members elected their peers to the Board of Governors based on congressional region; board members were subject to recall by a vote of the same region. Of course, in 1935, the bar was a much smaller and informal organization, comprised of a total of 1,735 active members and 107 inactive members in the entire state. Members communicated by snail mail and word of mouth; the bar itself was a close-knit club. Paper ballots were mailed out and returned by mail.

At present, the bar has more than 15,000 active members and over 5,000 inactive members. The legal community is so vast, lawyers in one region of the state may have little contact or knowledge of members in another region. By necessity, the mechanics of election and recall are more complex. Board election occurs through a system of online voting. A relatively small percentage of lawyers participate in each election. Recall procedures are not well-established because there has been no attempt to recall a board member in decades. That fact may not be surprising. In today's legal community, any recall effort would likely require the investment of significant resources in order to communicate with a large number of lawyers who may not have any knowledge of the particular individuals up for recall.

## The Purpose Behind BOG Members' Election by Oregon Lawyers

Given the growth and evolution of the bar over time, one might question whether the 1935 election and recall procedures are still a good match for modern day. In part, the answer to this question depends on whether the purpose and intent of the election and removal process established in 1935 endures today.

The Bar Act's election and removal provisions are not a necessary component of the bar's existence as an instrumentality of judicial department – which it is by virtue of powers delegated to it by the Oregon Supreme Court – or the bar's recognition as a public corporation<sup>1</sup> – which it became in 1965 primarily in order to claim an exemption from property taxes. Instead, it is likely that the Act's election and removal provisions exist in order to ensure the membership's control of the bar itself.

The concept of integrated bars is not new. Beginning in 1914, integrated bars – which comprise both associational and regulatory components -- began to gain favor among the legal community, in part as a tool to ensure the legal profession's self-regulation. In 1921, the American Judicature Society published its Model Bar Act embracing the idea, and in 1924, the State Bar of North Dakota became the nation's first integrated bar. The idea soon took hold; today, thirty-two state bars are integrated bars.

As noted in the Preamble to the ABA Model Rules of Professional Conduct,

“The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. . . . To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated.”

“Self-regulation also helps maintain the legal profession's independence from government domination. . . . The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.”

---

<sup>1</sup> A public corporation is a corporation formed for the public's benefit or for a public purpose. See *State ex rel Eckles v. Woolley*, 302 Or. 37, 48-49, 726 P.2d 918 (1986) (so stating); see also Black's Law Dictionary, 1228 (6th ed 1990) (defining public corporation as a municipality or government corporation "created for the administration of public affairs"). “[T]he concept of a 'public corporation' covers a wide variety of institutions," including municipal corporations. Eckles, 302 Or. at 47. There is no public corporations act analogous to the Oregon Nonprofit Corporations Law, ORS Chapter 65, to determine the rights and obligations of public corporations; instead, each public corporation is separately empowered by statute or governing documents.

The original Bar Act's election and removal procedures are likely a reflection of these principles; however, no legislative history exists to explain why the original Bar Act relied on recall as its primary method of removal.<sup>2</sup>

Historically, the bar's governance structure has not been without critics. As bluntly articulated by Oregon Legislative Research staff in 1977,

"The bar's role as a trade association with state-enforced power to discipline its members is unique. No other profession has a governmental entity set up for its members to regulate themselves that also assumes responsibility to protect their economic interest. The bar is correct when it states that this kind of strong professional organization ... can only exist through an integrated Bar organization.

"All other regulatory agencies, by way of contrast, 'are agencies of the government, not representatives of a guild. Their responsibilities are not to their own occupational groups but to the public.' This is not true for the bar. Its governing officials, the Board of Governors, are neither appointed by nor accountable to any organ of government or the public, and it is not uncommon for well-intended professionals to believe that their interests and those of the public are similar, if not identical."

Despite these harsh criticisms by some stakeholders, the election and removal provisions of the Act have remained unchanged for 85 years.

After a review of legislative history, staff can discover no particular rationale or reason for the current election and removal provisions of the Bar Act, beyond a likely commitment to principles of professional self-governance. Those principles would continue to be served if members were appointed by the Oregon Supreme Court (obviously, comprised of lawyers), or if the board itself (also comprised primarily of lawyers) had the power to remove board members.

Court appointment of the board of governors would shift the board's accountability to the public, through the elected members of the Court, similar to other Court-appointed entities, such as the Commission on Judicial Fitness & Disability and the Council on Court Procedures.

## Other Jurisdictions

A survey of Western states demonstrates that state bars take varying approaches to removal provisions, and may either allow for removal by the appointing authority, by board vote or by recall:

---

<sup>22</sup> Interestingly, the Oregon State Bar Act was enacted one year after the formation of the Washington State Bar Association, and in many ways is similar to that act; however, the modern day Washington State Bar Act, RCW 2.48 et seq., does not contain a similar recall provision, instead, WSBA board member removal and recall is provided for in its bylaws.

Entity	Corporate Form	Removal by Board	Removal by Appointing Authority	Recall
Arizona State Bar	501c	X (Bylaw 6.08, 2/3 vote)		
California State Bar	Public Corporation		X (Supreme Court Governor etc.)	
New Mexico State Bar	501c	X (Bylaws Section 4.2; ¾ vote for cause)		
Utah State Bar	501c	X (Rule 14-205(c); 2/3 vote)		X (Rule 14-205(c))
Washington State Bar Association	Judicial Agency	X (Bylaw IV.A.4, 75% vote not including Governor at issue)		X (Bylaw IV.A.4)

**Options to Consider**

Based on the conversation at the Policy & Governance Committee meeting on April 17, 2020, staff was asked to provide alternatives to the current BOG election and recall process. What follows are two broad options, presented for purposes of discussion. The decision tree provided at the April 17, 2020 BOG meeting provides a more comprehensive picture of the available iterations of these options.

Option #1

Transform the BOG election process into a nomination or recommendation for appointment, made by the Oregon Supreme Court. Eliminate the recall process. The board of governors may recommend removal by the Court for good cause, as provided in the bylaws.

- The Oregon State Bar would conduct an election for seats on the board of governors as currently provided in ORS 9.040. The outcome of the election would become the members’ nomination or recommendation to the Oregon Supreme Court for appointment to the regional board positions.
- The board of governors would make nominations or recommendations to the Court for the appointment of four members of the public.
- If the Supreme Court rejects a nominee, the Court may either request the lawyers in that region to nominate/recommend someone else or appoint someone of its choosing from that region.

- The board of governors could recommend removal by the Court of board members for good cause, as provided in the bylaws.
- *Proposed OSB Bylaw 2.109 BOG Member Removal*

The board of governors may recommend to the Oregon Supreme Court, by a three-quarters/two-thirds vote, that a board member be removed for cause. The board must provide the board member to be removed with advance written notice of the vote. Upon request, the board must also provide the reason for the proposed removal and an opportunity to contest the removal in writing or in person at a meeting of the Board. "Cause" includes, but is not limited to: incapacity to serve; a serious breach of, or repeated failures to meet, the duties outlined in these bylaws, or; conduct or activities that bring discredit to, or may give rise to liability for, the bar.

#### Option #2

Retain the current BOG election process and replace the recall process with removal by the board of governors, as provided in the bylaws.

#### *Proposed OSB Bylaw 2.109 BOG Member Removal*

A board member may be removed for cause by a three-quarters/two-thirds vote of the Board of Governors. The board must provide the board member to be removed with advance written notice of the vote. Upon request, the board must also provide the reason for the proposed removal and an opportunity to contest the removal in writing or in person at a meeting of the Board. "Cause" includes, but is not limited to: incapacity to serve; a serious breach of, or repeated failures to meet, the duties outlined in these bylaws, or; conduct or activities that bring discredit to, or may give rise to liability for, the bar.