

**Oregon State Bar
Oregon State Bar
Special Meeting of the Board of Governors
Open Session Agenda Minutes
August 27, 2020**

President Liani Reeves called the open session meeting to order at 1:12 p.m. on August 27, 2020. The meeting adjourned at 4:26 p.m. Members present from the Board of Governors were Colin Andries, Adrian Brown, Jenny Cooke, Kate Denning, Eric Foster, Kamron Graham, John Grant, Bik-Na Han, Eddie Medina, Rob Milesnick, Michael Rondeau, Joe Piucci, Kyra Rohner, and David Wade. Not present was Ryan Hunt. PLF Staff Member present was Madeline Campbell. Staff present were Cassandra Dyke, Helen Hierschbiel, Amber Hollister, Mike Williams, Susan Grabe, Kay Pulju, and Dani Edwards.

1. Call to Order

President Reeves called the meeting to order.

2. BOG Appointment and Removal

President Reeves opened a discussion on proposed legislative options to change governance structure of the Oregon State Bar.

Ms. Reeves noted that at prior meetings, the Policy & Governance Committee and BOG had considered a number of approaches to regulatory change. [Exhibit B] On May 22, 2020 the BOG voted to direct Legislative Counsel's Office to draft amendments to the Bar Act to modify the Board member appointment and removal process, which is reflected as option 1 in Exhibit B. The legislative concept, as currently drafted, would replace the current Board member election process with Supreme Court appointment. The current draft would also eliminate the current recall process and instead allow the Supreme Court to remove Board members based on bylaws that would be enacted by the BOG. Also at the May 22, 2020 meeting, the Public Affairs Committee recommended, and the BOG agreed to, Bar Act amendments that would require Supreme Court approval of the OSB Bylaws.

The matter is before the board today to provide an opportunity for further discussion after receipt of the Legislative Counsel's Office draft and determine how to proceed.

Removal Authority

CEO Helen Hierschbiel provided additional background information contained in her memo. [Exhibit A]

Board Member **John Grant** asked whether board members would be comfortable with changing the legislative proposal to match recently adopted OSB Bylaw 2.108 related to censure and suspension of board members.

Board member **David Wade** said he was uncomfortable with the BOG being the sole body with power to remove a BOG member. His preference was to give the Supreme Court the authority to keep the process more professional and not personal.

Board member **Rob Milesnick** noted that while he agrees with the sentiment, he worries about the practicality—how would we communicate the conduct to the Supreme Court and what would the process for removal be?

Mr. Wade responded that the Supreme Court might want to have hearing for removal.

Board member **Kate Denning** expressed concerns the Supreme Court involvement would make it difficult to remove a BOG member quickly, if that was necessary.

Immediate past president **Chris Costantino** also wants the ability to be nimble, while ensuring a fair process. She thinks this can be achieved with a process for BOG removal reflected in the bylaws.

Board member **Eddie Medina** agrees with Ms. Costantino and suggests that the bylaws could also provide for an appeal process to the Supreme Court.

Board member **Joseph Hesbrook** asked whether the Supreme Court would defer to those members nominated through the election, or whether the Court would pursue an independent process to determine BOG appointment.

President Reeves responded that the Chief Justice stated that if the Court makes the appointment, it would not merely rubber stamp the nominations presented by the election; it would be an independent decision of the Court.

Board member **Adrian Brown** noted that one of the biggest criticisms is that we are a group of lawyers governing lawyers. By contrast, members of the Supreme Court are elected officials and therefore accountable to the public. We are here to serve the public. With respect to the details of the process for removal, the bylaws would have to be amended, and there is time to do that.

Board member **Jenny Cooke**: OSB Bylaws could not give the right of appeal to the Supreme Court as Court review is separately set forth in the statutes.

Ms. Hirschbiel pointed out another option, which would be to give both the BOG and Court removal authority.

Board member **Colin Andries** says he is on the fence about this, but is not in favor of allowing both the BOG and Court removal authority. Instead, we should pick one or the other. Is there any other entity for which the Supreme Court has removal authority?

Ms. Hirschbiel shared that the Commission on Judicial Fitness and Disability gives removal authority to the appointing authority, and the Court does appoint some Commission members. The California State Bar is similar.

General Counsel **Amber Hollister** added that the Supreme Court has the power to appoint and remove members of the Disciplinary Board and the State Professional Responsibility Board, and the process is reflected in the rules for those entities. She is not convinced that we can decouple appointment and removal. In other words, appointing authority typically goes hand in hand with removal authority.

Mr. Milesnick noted that we are not the only board with a duty to the public. To maintain lawyer self-regulation, the BOG should have the authority to remove and the appeal process is a good idea.

Ms. Reeves noted that other regulatory boards are made up of a mix of people appointed by the Governor and other public figures.

Mr. Rondeau asked what individual liability a BOG member would have for failing to act properly?

Ms. Reeves responded that board members can have individual liability if they fail to fulfill fiduciary obligations. Also, if board members fail to protect an employee from harassment, there could be personal liability, although board members are indemnified if acting within the scope of their responsibility as a member of the BOG.

MOTION: To allow Board of Governors to remove board members with a 2/3rd majority of the Board not of quorum of the board. Eric Foster moved and Michael Rondeau seconded.

Mr. Wade stated he thinks it is a bad idea to have lawyers governing lawyers. The Supreme Court should have the authority to appoint and remove BOG members.

Ms. Reeves stated that she is in favor of the Supreme Court having the authority to appoint and remove BOG members.

Ms. Brown asked whether it is a problem for appointment and removal to be determined by separate entities.

Ms. Hollister responded that she has not come across a situation where the appointing authority does not also have the removal authority.

Ms. Han suggested a removal process by vote of a majority of lawyers voting in the region.

Ms. Hirschbiel notes that the current recall process is as Ms. Han describes. There are a number of concerns with the recall process, particularly when trying to address BOG member liability. First, the electorate will not necessarily understand the liability issues or why it is important for the member to be removed. Second, the recall process is very public, which makes it difficult to use for addressing more sensitive issues for removal.

Mr. Wade observed that if the BOG tries to remove a board member for cause, the board member will likely threaten to sue. If that happens, the BOG will likely back down and not follow through with removal, even if the threat to sue is frivolous. For those who think that is unlikely, consider what happened last year. So, Mr. Wade is against the BOG removal process.

Ms. Hierschbiel noted that because you cannot split the powers of appointment and removal, a vote that gives the BOG removal power, and not the Court, would foreclose the option of appointment by the Supreme Court.

MOTION: Mr. Foster asked to withdraw his motion. **Mr. Rondeau** consented to withdrawal of the motion.

Supreme Court Approval of OSB Bylaws

Board Member Joe Piucci said he is looking for clarity on what we are hoping to accomplish with this proposed legislative amendment.

Executive Session pursuant to ORS 192.660(2)(f) and (h)

Liani Reeves, OSB Bar President, announced at 2:19 p.m. that the Board of Governors will now meet in executive session pursuant to ORS 192.660(2)(f), which allows the Board to meet in executive session to consider information or records that are exempted by law from public inspection. The Board of Governors will consider a written attorney-client communication that is exempted from public inspection by ORS 192.355(9)(a).

The Board of Governors will also meet in executive session pursuant to ORS 192.660(2)(h), to consult with its General Counsel concerning the legal rights and duties of a public body with regard to current litigation or litigation likely to be filed.

ANYONE WHO IS NOT A BOG OR STAFF MEMBER will not be allowed into the closed session.

Ms. Reeves announced at 3:22 p.m. that we will now go back into open session.

Mr. Piucci expressed concern that we are giving the Oregon Supreme Court power to control the fate of the bar and that we should not operate simply out of fear of being sued.

Mr. Grant said he thinks we have to weigh risks other than legal risks. He agrees that anti-trust liability potentially presents high risk for the bar. And he thinks we may be getting too far ahead of the membership. He is in favor of slowing the process down, taking some steps to address the issues now, but not acting on all of them today.

Ms. Brown agrees that the bar should not operate based on fear. And the board should understand that it is not just Oregon facing these issues—other bars are as well. We can slow the process down and get more input to provide for a fairer process. In the end, however, we will not have consensus among bar members and we need to use our good judgment and advice of counsel to make a decision that is in the public interest.

Ms. Cooke asked why are we in such a big hurry that we are not consulting the members?

Mr. Foster noted that when the board consults with members and members provide negative feedback, the board tends not to act, allowing the membership to govern. As a board, we have the obligation to govern and determine what is in the best interest in the organization. Mr. Foster said he likes the bar and it is under attack right now. Even recently, the OTLA has threatened to sue over the way the bar is operating the lawyer referral service pro bono panels.

Mr. Wade says that if we don't do it now, then we have to wait two years for the next legislative cycle. All the litigation is going to come to fruition in the next two years. We trust the Supreme Court to appoint and remove the BBX, DB, SPRB and UPL; we trust them to change the rules of professional conduct. Why don't we trust them to appoint the BOG?

Ms. Denning said the Supreme Court is not representative of Oregon in the way that either the BOG regions or congressional districts are.

Ms. Graham says she feels split. She feels a strong fiduciary obligation to the institution, but at the same time remains uncomfortable with appointment by the Court.

Ms. Rohner believes there has to be another path. The Supreme Court is not representative of the public. For example, what about Legislators or the Governor appointing some members? She does not want pending litigation to force our hand.

Ms. Brown observed that the election process would stay in the current proposal and the results would be presented to the Supreme Court. Further, a very small percentage of bar members actually vote, so the current structure is not representative either. Maybe we should be focused on increasing the number of people voting.

Ms. Cooke suggested that if the Supreme Court is not actually making the decision on who is appointed then she doesn't think that the benefits would prevail.

Mr. Grant noted that this issue is listed as a discussion item on the agenda and we do not have to vote on it at this meeting. We could give BOG members some time to think about it.

Ms. Hirschbiel confirmed that this meeting was set for discussion only, and we have time to discuss and make a final decision at the September meeting. We do have to decide by the end of September, however, because LC's office wants any edits to the draft by the first week in October.

Ms. Brown likes the idea of giving BOG members time to think about it, and fears that the conversation will start all over again with no difference.

Ms. Han asked how board members feel about sending out an email to the constituents to get their thoughts? She said it would be helpful for her in coming to a decision. She wants to know what the members think.

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 corporation¹ – 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.”

¹ 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.²

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:

²² 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.

Ms. Hierschbiel said that staff can send out a communication to bar members to seek their feedback. She recommends that we also seek feedback from members of the public, since they are stakeholders as well.

Ms. Brown said that members usually don't read blast emails, and we have already sent out communications on this.

Ms. Cooke opined that the communications sent were not very transparent.

Mr. Piucci agreed that the bar notices were not fully descriptive of the proposed changes. Members have contacted him and said this is not a good idea. He also expressed concerns about the process used—not having enough time to digest and understand all the reasons for the proposal. He appreciates holding this meeting and having an opportunity for a more robust discussion.

Ms. Reeves suggested that we wait until the September meeting to vote. Each member will have one more opportunity to comment, and then a decision needs to be made.

Mr. Medina thinks that is a great approach. He asked how should board members address suggested tweaks to the language.

Ms. Hierschbiel said that LC ultimately gets to decide the language of the legislation, but if a board member wants to make a suggestion or voice a concern about the language, that can be included in a motion and, if passed, will be shared with LC.

Ms. Rohner would like to discuss the possibility of the BOG being appointed by public bodies other than just the Supreme Court—like the legislature and governor—if the goal is to provide greater public accountability and still provide for a more representative body.

Ms. Brown asked what is wrong with the proposed process for election and then appointment?

Mr. Piucci responded that the election would have no binding effect and would exist only to placate the membership; the Supreme Court would have all the authority.

Ms. Reeves suggested that we conclude the meeting today. She will convene the crisis communication team to discuss how to solicit feedback from stakeholders.

Meeting concluded at 4:26