

Oregon State Bar
Meeting of the Board of Governors
April 5-6, 2002
Work Session

In a work session from 1:00 p.m. to 1:30 p.m., George Riemer, OSB General Counsel, updated the board on the activities to date of the Disciplinary System Task Force. The September 2001 House of Delegates passed a resolution to create the task force. The task force is chaired by Dennis Karnopp from Bend. Since its inception, the task force has sent a survey to every bar member, held four meetings, arranged a series of discussions with local bars, collected data on the current system, and inquired of other states about discipline programs such as diversion, consumer assistance, and alternative dispute resolution. Issues that have surfaced include the delay present at most levels, expungement of “frivolous” complaints, a consumer assistance program or ombudsman program to deal with problems that do not rise to the level of an ethics complaint, diversion of minor violations, any bias within the system, possible changes in the standard of review by the Supreme Court, and disciplinary rule simplification.

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Open Session Minutes

The Open Session was called to order at 1:40 p.m. by President Angel Lopez and adjourned at 4:50 p.m., April 5, 2002. Board members participating in person were Bruce Anderson, William Carter, Nena Cook, Frank Hilton, Charles Williamson, Angel Lopez, Gerry Gaydos, Jon Hill, and Mary McCauley Burrows. Board members participating via telephone conference were David Hytowitz and James Brown. Staff members participating were Karen Garst, George Riemer, Bob Oleson, and Teresa Bowen. Representatives from the PLF participating were Ira Zarov and Ronald Palmer.

1. Report of Officers

A. Report of the President

1. Meeting with Chief Justice Carson

Mr. Lopez presented information concerning the recent meeting with the Chief Justice, which included discussion of the special sessions of the legislature. When complete, these sessions will result in significant cuts to the Judicial Department budget. During the first special session, the legislature proposed a \$30 million cut to the Department’s \$406 million budget (6.6%). At the end of the second special session, the cut was 7.4%. Presiding judges are presenting plans to the State Court Administrator that may include selected (one day a week) court closures, layoffs, other reductions, increased court fees, as well as “pay-as-you-go” legal fees which could include costs to the participants of court recorders, clerks, and perhaps even costs for the use of the courtroom. The reduction in the judicial budget virtually eliminates all gains previously made to increase access to justice. There has been

discussion of a pay parity study between the district attorneys and indigent defense providers. The Chief Justice indicated the new Public Defense Services Commission might be a good group to conduct this study.

2. ABA Meetings

Mr. Lopez was part of a panel on minorities and bar leadership at the ABA Mid-year meeting and on a panel on economic implications of diversity at the ABA Law Practice Management Section meeting. Mr. Lopez represented Oregon by attending the ABA House of Delegates in place of the current delegate, Mark Johnson, who was unable to attend, because he was out of the country. The delegates approved new model ethics rules. They also passed by a close margin a resolution to not limit the rights, civil or military, of accused in military tribunals.

3. Western States Bar Conference

Mr. Lopez was on a panel on future issues at the Western States Bar Conference. He also met with other bar presidents and they discussed issues including annual meetings, UPL enforcement, and aligning character and fitness qualifications for bars and law schools.

4. Miscellaneous

Mr. Lopez invited all board members to the swearing-in ceremony for new admittees to be held at Willamette University in Salem on April 19, 2002. Mr. Lopez made a presentation at Jefferson High School regarding the U.S. Constitution based on a program designed by U. S. Supreme Court Justice Kennedy. It was very well received by the students.

B. Report of the President-Elect

1. Bar Leadership Institute

Mr. Williamson reported on his recent attendance at the ABA's Bar Leadership Conference and the Western States Bar Conference. He met ABA President-Elect A. P. Carlton and was informed about a new ABA program that discusses the role of lawyers in a democratic society.

2. Miscellaneous

Mr. Williamson attended a Multnomah Bar Association meeting that dealt with the issue of the Multnomah County Courthouse and whether to remodel it or purchase land in downtown Portland to replace it.

C. Report of the Executive Director

1. National Ad Pulled

Ms. Garst described the actions taken recently to have a national ad pulled that implied that judges in the United States take bribes. Judge Ellen Rosenblum worked with the ABA President to influence the federal agency responsible for the ad.

2. Safe Harbor Concept

Ms. Garst discussed the issue of multi-jurisdictional practice and the concept of a “safe harbor” for lawyers performing tasks such as depositions in states where they are not licensed. The board decided to invite the Idaho, Utah, and Washington bars to study this issue with the OSB and to have the four state bars explore a possible common ethics code.

3. Staff Recommendations/Input at Board Meetings/Committee Process

Ms. Garst led a short discussion regarding staff input at committee and board meetings. She stated that in general staff will make recommendations to the board’s committees and the committees will then forward their recommendations to the full board. General Counsel’s advice would be shared with the entire board. While there were differing viewpoints, it appeared that most board members would like committee chairs, in reporting on their committee’s actions, to indicate if there were different viewpoints expressed, either from staff or other committee members.

4. Legal Services Corporation Request

Action: Mr. Williamson moved, Ms. Burrows seconded, and the board unanimously approved, in response to the letters from the LSC to the LSC funded programs in Oregon, the motion that the board assign the analysis of the delivery of legal services to the low-income community in Oregon to the OSB Legal Services Department and include the stakeholders in the analysis process. Barbara Hergert, Director of the OSB Legal Services Program, will staff the assignment.

5. OSB Job Evaluation System

Ms. Garst provided information on the OSB's job evaluation system and pay schedule for 2002.

6. Miscellaneous

The board will have a work session on program measures at the May 31, 2002 board meeting. Ms. Garst asked for volunteers to assist Ed Harnden with the 2003 National Legal Aid Directors Association to be held in Portland. Charlie Williamson volunteered.

2. Oregon New Lawyers Division

3. Appearances/Special

A. Utah's Request to Join Northwest Reciprocity Group

Mr. Riemer gave background information on Utah's decision not to be involved in the prior reciprocity agreement process. Utah has now reconsidered being a part of the Northwest reciprocal admissions process and the board reviewed a request from Utah to join it. The Utah State Bar's proposed rule requires applicants to submit evidence of passage of the MPRE. The original three state bars had considered this requirement and had decided not to include it when they passed the rules for reciprocal admission.

Action: Mr. Williamson moved to request that Utah modify its proposed reciprocal admissions rules to align with that of Oregon, Washington, and Idaho by asking Utah to remove its requirement that attorneys pass the MPRE with the understanding that the board will support the addition of Utah into its rules with that change. After discussion, Mr. Williamson amended his motion to include review of the proposed rule with the forgoing modification by the BBX. Mr. Gaydos seconded the amended motion and the board passed the motion unanimously.

4. OSB Committees, Sections, Councils, Divisions and Task Forces

A. Legal Ethics

1. Proposed Formal Opinion - 01-02R

Action: Ms. Burrows moved, Mr. Carter seconded, and the board unanimously approved the adoption of proposed formal *Ethics Opinion* 2002-167, regarding the duties of a lawyer/mediator when one party attempts to defraud the other.

2. Proposed Formal Opinion – 01-08R

Action: Mr. Hytowitz moved, Mr. Carter seconded, and the board approved (10 yes; 1 no [Ms. Burrows]) the adoption of proposed *Ethics Opinion 2002-168* regarding ethical issues of attorney-owned lawyer referral services.

B. Client Security Fund

1. CSF Rule Amendment

Action: Ms. Burrows moved, Mr. Anderson seconded, and the board unanimously approved the changes, as set forth below, to the CSF Rules that would disallow claims covered by other states' funds, create a six-year limitation period on claims; and allow for reimbursement of claimants' expenses to obtain judgments against defalcating lawyers.

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

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

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

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

A. Policy & Governance Committee

During discussion concerning the revisions to Policy 11.800(A), Mr. Williamson stated for the record that he did not agree with the staff analysis presented and felt that even under the new policy, past HOD resolutions such as the resolution regarding Ballot Measure 40 would be permissible.

1. *Keller* Policy Revision

Action: The board unanimously approved the following revisions to the BOG *Keller* Policy (BOG Policy 11.800(A)) as recommended by the Policy & Governance Committee regarding the scope of activities the bar can engage in based upon recommendations of both the Policy & Governance Committee and the Public Affairs Committee.

Board of Governors Policy 11.800

(A) Oregon State Bar legislative or policy activities shall be limited to those reasonably related to any of the following subjects:

1. The regulation and discipline of attorneys;
2. The improvement of the functioning of the courts, judicial independence, fairness, efficacy and efficiency;
3. The availability of legal services to society;
4. The regulation of attorney trust accounts;
5. The education, ethics, competence, integrity and regulation ~~as a body,~~ of the legal profession;
- ~~6. Other activities where:~~
 - ~~a. The issue is recognized as being of great public interest;~~
 - ~~b. Lawyers are specially suited by their training and experience to evaluate and explain the issue; and~~
 - ~~c. The subject affects the rights of those most likely to come into contact with the judicial system.~~
6. The provision of law improvement assistance to elected and appointed government officials;
7. Issues involving the structure and organization of federal, state and local courts in or affecting Oregon;
8. Issues involving the rules of practice, procedure and evidence in federal, state or local courts in or affecting Oregon; or
9. Issues involving the duties and functions of judges and lawyers in federal, state and local courts in or affecting Oregon.

2. Waiver of CSF Assessment for 50-year Members

Action: The board unanimously approved seeking legislation to eliminate the CSF assessment for 50-year members who currently pay no membership fees.

B. Public Affairs Committee

1. General Political Update

The committee reported on issues including the status of the state budget deficit, its impact on the Judicial Department budget, that the Government Relations Department will include a new Public Affairs Specialist, and the progress of the grassroots efforts. Board members are encouraged to contact their legislators because the cuts in the Judicial Department budget will be severe. There is a third special session planned for this summer.

2. Review Candidate Races

The committee shared a list of lawyer-legislator candidates.

3. UPL/OLTA/RELU Proposed Legislation

The committee notified the board that the UPL Committee was recommending an amendment to ORS 9.166 clarifying what title and escrow companies may do in closing real estate transactions without running afoul of UPL prohibitions.

C. Recruitment Committee

1. Changes to Bar Act Regarding Bar Elections

The board discussed proposed changes to the Bar Act to delete the requirement than an election (BOG and OSB HOD) be held when a contest does not exist.

Action: The board unanimously approved the following changes to the Bar Act regarding elections as recommended by the committee to delete the requirement than an election (BOG and OSB HOD) be held when a contest does not exist.

9.040 Election of governors vacancies. (1) the election of governors shall be held annually on a date set by the board of governors. Nomination shall be by petition signed by at least 10 members entitled to vote for such nominee. When a contest exists, election shall be by ballot. Nominating petitions shall be filed with the executive director of the bar at least 30 days before the election. When a contest exists, the executive director shall mail ballots, containing the nominations for the office of governor in each region, to every eligible active member in such region. Ballots must be returned in person or by mail to the executive director on or before the day of the election in order to be counted. The executive director shall canvass the votes and record the results thereof. In a region in which only one position is to be filled, the candidate receiving the highest vote shall be declared elected. If a region has more than one position to be filled, the candidate with the most votes received shall then be declared elected, the candidate with the next highest number of votes received shall then be declared elected, and so on until all positions are filled. The balloting shall be preserved. When a contest does not exist, the board will determine whether an election will be held. If an election

is not held, the sole candidate, or candidates if more than one position is open, shall be deemed elected on the date set by the board of governors.

9.152 Election of delegates. (1) the election of delegates to the house of delegates shall be held annually on a date set by the board of governors. Except as provided in subsection (2) of this section, nominations shall be made by petition signed by at least 10 members of the Oregon State Bar entitled to vote for a delegate in the election. When a contest exists, the election shall be by ballot. Nominating petition must be filed with the executive director of the state bar at least 30 days before the election. When a contest exists, the executive director shall mail ballots containing the nominations for the office of delegate in each region to every active member in the region. Ballots may be delivered in person or by mail to the executive director, but must be received by the executive director on or before the day of the election. The executive director, with any assistants that the executive director may designate, shall canvass the votes and record the results of the election. The candidate, or candidates if there is more than one open position, receiving the highest number of votes in each region for the position or positions being filled shall be declared elected. Balloting shall be conducted in a manner that ensures that only active members of the bar can vote and that the secrecy of the ballots shall be preserved. When a contest does not exist, the board will determine whether an election will be held. If an election is not held, the sole candidate, or candidates if more than one position is open, shall be deemed elected on the date set by the board of governors.

2. Filings for OSB HOD and ABA HOD

There are contested races in all regions except 4 and 6. The deadline for the Board of Governors nominations is May 15, 2002. There was discussion of other possible BOG candidates. Four members are also competing for two seats in the ABA House of Delegates.

D. Access to Justice Committee

1. Update on Access to Justice Conference in Welches, March 1, 2002

The committee reported on the successful Access to Justice Conference held March 1-2, 2002, in Welches. Specific recommendations from the conference will be presented at a later date.

2. Miscellaneous

Mr. Williamson reported on the activities of the Lindauer Group to secure additional funds for legal aid and the proposed Legal Aid Open Houses to be held in the fall of 2002. He recommended that there be a series of meetings between the judges, prospective legislators, and the media concerning access to justice issues.

E. Executive Director Evaluation Committee

1. 2002 Performance Standards for Executive Director

Action: The board unanimously approved the 2002 Performance Standards for the executive director as recommended by the Executive Director Evaluation Committee.

6. Professional Liability Fund

A. General Update

Mr. Zarov provided a brief report on the PLF. The Fund has not seen an increase in the severity of claims, but the number of claims is higher. Thus, defense costs are also rising; however, the highest hourly attorney fee is \$140.00. The PLF has retained the services of an attorney to advise whether a corporate shield mechanism could be put in place so that PLF and OSB assets would be separate for purposes of any judgment against either entity. Several PLF staff members are participating in Justice Peterson's Understanding Racism class. Several other states are considering making malpractice insurance coverage mandatory.

B. PLF Policy 6.200(G)

Action: Mr. Williamson moved, Ms. Burrows seconded, and the board unanimously approved the following changes that the PLF recommended to Policy 6.200(G):

(5) if in recovery, have at least five years of recovery from alcohol or chemical dependency. OAAP Program Attorneys shall attain CEAP (Certified Employee Assistance Professional), CADC (Certified Alcoholic Drug Counselor), or other comparable counseling credential within four years of employment and shall maintain the certification or credential in addition to other appropriate continuing education.

7. Other Issues

A. Business Law Section

1. Supporting Ballot Measure 10

Mr. Riemer presented the Business Law Section's request to distribute information to its members concerning Ballot Measure 10. After discussion regarding the *Keller* implications of such activity, the board directed Mr. Riemer to contact the section and clarify that they could produce an explanatory article for distribution to its membership by email, but could not endorse the measure or contribute money to assure its passage.

B. Reciprocal Admissions Rule

1. Mr. Riemer raised the issue of forming a study group with the Idaho, Utah, and Washington state bars to review the disciplinary rules in the states. The board noted that the work of the subcommittee of the OSB Legal Ethics Committee that is already studying the new ABA ethics rules needs to be coordinated with such a study. Mr. Lopez will send a letter to the other states proposing such a study group.

C. Participation of Suspended Members in Section Activities

1. Mr. Riemer raised an issue regarding whether a suspended member could join a section. Mr. Riemer will do further research on the matter and brief the Policy & Governance Committee on this issue. The individual making the inquiry may appear before the committee if he so chooses.

D. Appointment of OLF Members to the OLF Board

1. Mr. Hilton raised the issue of a letter from the Oregon Law Foundation regarding how the BOG would appoint the bar representative to the OLF Board. The board reiterated that it would be pleased to review recommendations from the OLF but reserved the right to appoint someone other than the OLF's nominees.

7. Closed Session Agenda

8. Consent Agenda

Action: Mr. Hytowitz moved, Mr. Hill seconded, and the board unanimously approved the Consent Agenda, which included approval of a Securities Section law student scholarship; approval of an amendment to the bylaws of the Computer & Internet Law Section to admit only certain categories of associate members; merger of the Public Service & Information, and Referral Committee into a new Public Services Advisory Committee; and appointments to the Disciplinary Board, the UPL Committee, the Client Security Fund Committee, the Public Service Advisory Committee, and the Quality of Life Committee; which were submitted by the Appointments Committee.

9. Default Agenda

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

None