

Oregon State Bar
Meeting of the Board of Governors
November 16, 2002
Open Session Minutes

The Board meeting was called to order Saturday, November 16, 2002 at 12:30 p.m. by President Angel Lopez and adjourned at 4:28 p.m. Members of the Board of Governors participating were John Tyner, Bette Worcester, William Carter, Ronald Bryant, Charles Williamson, Lisa LeSage, Frank Hilton, Nena Cook, David Hytowitz, Bruce Anderson, Gerry Gaydos, James Brown, Mary McCauley Burrows, Angel Lopez, and Sarah Rinehart. Staff participating was Karen Garst, George Riemer, Ira Zarov (PLF), and Teresa Bowen. New Board of Governors members present were Dr. John Enbom, Dennis Rawlinson, Mark Comstock, and Lauren Paulson. Others participating were Robert Nunn (PLF), Christine Meadows, Steve Walters, and Heather Van Meter.

1. Report of Officers

A. Report of the President

1. Meeting with Chief Justice Carson

The meeting with Chief Justice Carson included discussion of the recent court closures and the impact of cuts to the Indigent Defense budget. It appears that the Indigent Defense budget will be exhausted by April 1, 2003. While there is \$10 million earmarked in the Emergency Board for indigent defense, it may not be there when needed. The impact of possible failure of the income tax surcharge measure in January will cause even deeper cuts to the Judicial Department budget.

2. County Bar Association Visits – Clackamas County and Marion County

Mr. Lopez reported that the visits with bar associations in Clackamas and Marion counties went very well.

3. Regional HOD Visits

The regional HOD visits were not very well attended, but the conversations should aid the discussion at the HOD meeting.

4. Miscellaneous

Mr. Lopez reported on the establishment of a new task force to address the concerns of the Legal Services Corporation regarding consolidation of legal services offices throughout the state. He will ask Steve Walters from Portland to chair the task force. Mr. Walters chaired a previous task force on legal services and has a great deal of expertise in this area.

B. Report of the President-Elect

1. Retreat Planning

Mr. Williamson reported on the upcoming retreat to be facilitated by Steven Hacker. Mr. Hacker assisted the BOG and the PLF Board of Directors two years ago.

2. NCBP Meeting in Washington, D.C.

Mr. Williamson reported that the National Conference of Bar Presidents meeting in Washington he attended was informative. The bar's CFO Rod Wegener received the National Association of Bar Executives president's award for his work on behalf of that organization.

3. State Revenue Issue

Mr. Williamson stated that it is important to inform bar members of the state's fiscal crisis and its impact on the Judicial Department budget. He was disappointed that the court open houses did not fully explain the impact of current and future cuts.

4. Preparation for Eastern Oregon Visits

Mr. Williamson and Mr. Riemer are preparing to visit the bar associations in Eastern Oregon October 15 – 18, 2002.

5. Miscellaneous

Open Houses will be held on October 23, 2002, for legal aid. BOG members are asked to sign up to speak briefly at each office.

C. Report of the Executive Director

1. Letter from James Jordan

Ms. Garst discussed a letter received from bar member James Jordan indicating his desire to eliminate the bar exam. After a brief discussion, the board asked that a letter be sent to him stating that the board was not interested in pursuing this idea and that the four public members stated very strongly that the bar exam was an essential component of the public protection function of the bar.

2. Miscellaneous

Ms. Garst reported on a visit from Mr. Hayano representing a legal reform council in Japan. He was particularly interested in our system of appointment of public members to various committees and boards of the bar.

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

A. Client Security Fund

1. CSF Claims Recommended for Payment

a. *Witzel v Harris* – No. 99-55 (\$15,000)

The board discussed the client's appeal of the denial of the claim in *Witzel v. Harris* and further discussed the recommendation of the CSF Committee that the claim be denied. Concern was raised that disciplinary counsel's office was quoted as stating that what the accused had done for the client was of no value. This differed from the committee's research. Questions were raised as to whether the lawyer substituted to represent the client had been spoken to and whether a trial notebook prepared by Harris had been reviewed.

Action: Mr. Carter moved and Ms. Burrows seconded a motion to table action on the claim and refer the matter back to the committee. The motion failed (5, yes [Brown, Burrows, Carter, Gaydos, Lopez]; 10, no).

Action: Mr. Hytowitz moved and Mr. Anderson seconded to deny the claim. The motion passed (yes, 14; no, 1 [Carter]).

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

A. Policy & Governance Committee

1. Approve Appellate Practice Section Donation Request

Mr. Brown stated that the committee recommended to the board approval of the request of the Appellate Practice Section to donate \$500 to the Oregon Public Affairs Network. This latter group is engaged in a project to televise proceedings at the legislature in Salem.

Action: The board approved the committee recommendation allowing the section to make the donation by unanimous vote.

2. Changes to Standard Bylaws to Clarify a Suspended Member's Rights to Participate in Section Activity

The Board decided at its May 31 – June 1, 2002, meeting that a suspended member could join a section of the bar but could not serve on the Executive Committee of that section. The proposed change to the bar and section bylaws clarifies a suspended member's rights. This item was on the August 2-3, 2002, Board of Governors meeting as a first meeting notice.

Action: The board approved the committee's recommendation by a unanimous vote.

3. Recommendation on Expungement/Retention to HOD

The Board of Governors, at its August 21, 2002, meeting decided to take no position on the expungement proposal of the Disciplinary System Task Force, but decided to continue its discussion at the September 6, 2002, Policy and Governance Committee meeting. At that meeting, the Policy and Governance Committee decided to recommend to the board taking a position against the expungement proposal, no position on an alternative, but to present to the HOD an alternative retention proposal drafted by George Riemer.

Action: Mr. Hytowitz moved and Ms. Rinehart seconded a motion to substitute the committee motion and to recommend the alternative retention policy as outlined in a memo drafted by George Riemer that would simply have the effect of getting rid of dismissed complaints after five years. The motion failed (6, yes [Burrows, Cook, Hytowitz, Lopez, Rinehart, Worcester]; 9, no)

There ensued a lengthy discussion regarding the responsibility of board members at the House of Delegates meeting vis-a-vis board actions. Some of the board members stated that if the board takes a position on an issue, each board member must support that position at the HOD. Some stated that if an individual board member differed with the board position, he/she should not speak out against the board position at the HOD meeting, but could vote his/her conscience at the HOD. Finally, some board members felt that they were free to voice their opinion at the HOD whether the board had taken a position or not. All board members agreed that if the board took no position on an issue before the HOD, they were free to speak and vote as they wished.

Action: Mr. Bryant moved and Mr. Anderson seconded a motion to amend the main motion to allow board members to address the issue even if they were opposed to the recommendation. The proposed amendment was later withdrawn.

Action: Ms. Burrows moved to table the motion. The motion to table failed.

Action: Ms. Burrows moved and Mr. Carter seconded a motion to take no position on the expungement issue thereby enabling each board member to speak at the HOD meeting as he/she wished. The motion carried (yes, 12; no, 2 [LeSage, Williamson]).

4. Business Law Section Endorsement of ClayTablet Products

The committee recommended that the Business Law Section be allowed to enter into a contract with ClayTablet Products. The section will receive a royalty for each section member who purchases the vendor's products and purchasers will receive a 20% discount from ClayTablets. The discussion that followed the motion to approve included the concern that this product of on-line business forms that are updated frequently would impact the sale of the forms offered by the CLE Publications Department in its Advising Oregon Business volumes. These latter publications are only updated every 3-4 years. It was noted, however, that the Clay Tablet forms do not have the advice attached to them that is present in the AOB volumes. The board also wanted to make it clear in the contract that neither the section nor the bar was "endorsing" the product.

Action: Mr. Hill moved and Mr. Gaydos seconded a motion to amend the committee recommendation to require notice to section members that the section would receive a royalty from their purchase of the product. That amendment passed unanimously.

Action: The main motion including the amendment passed unanimously.

B. Budget & Finance Committee

1. Proposal to Refinance OSB Mortgage

David Hytowitz stated that the committee recommended to the full board that the OSB mortgage on the Bar Center not be refinanced at this time. He explained that because of the pre-payment penalty, the refinance did not seem to be worth the effort. No action was taken on this matter.

C. Public Affairs Committee

1. Status of 5th Special Session and Budget Developments

Mr. Tyner updated the board on recent legislative developments. The Governor has until October 30, 2002, to veto any bills passed by the fifth special legislative session. He has given notice that he might veto three bills including a bill to eliminate Oregon's estate tax by aligning it with the federal tax code. Ron Bailey, chair of the Estate Planning Section, had asked the PAC to allow the committee to urge the Governor to not veto the bill. The PAC responded that Bailey's committee could make technical/law improvement comments, but not urge a veto.

2. Update on Legislative Races and November Election

A recent initiative proposal was submitted to the Secretary of State. It would allow recall of appellate court judges more than one at a time. The PAC decided

not to challenge the ballot title. The Administrative Law Section sponsored a candidates' forum that addressed the independence of the judiciary. The bar's LegalLinks program taped the event to be broadcast on cable TV.

3. Miscellaneous

Court Open Houses were held in Clackamas, Washington, Jackson, and Multnomah counties. The board discussed whether the presentations involved enough discussions about the current budget cuts to the courts' budgets and the potential for more cuts should the income tax surcharge measure not pass in January, 2003.

D. Public Member Selection Committee

1. Report to Board

2. Public Member Selection Committee Recommendations

Action: The board unanimously adopted the committee's recommendation that Dr. John A. Enbom, a retired physician from Corvallis, be appointed as public member to the BOG for a four-year term beginning January 1, 2003.

E. Recruitment Committee

1. Progress on Recruiting Volunteers for Discipline System and Committees

Mr. Williamson discussed the committee's recent efforts to recruit BOG and HOD candidates, as well as volunteers for the disciplinary system. He encouraged all board members to actively recruit bar members to serve on various bar committees and other entities.

4. **Professional Liability Fund**

A. General Update

Mr. Zarov presented an update on the PLF. He stated that there were recently three different claims audit (both on base coverage and excess) which all showed positive results. The reports indicated that claims processing is handled well and the case by case results were impressive. The reports also emphasized the excellent repair program of the PLF and the good work of the OAAP. They indicated that the changes in how the reserves are set should be considered by the PLF Board. The PLF Board is looking at their recommendations.

Mr. Zarov attended a National Association of Bar Related Insurance Companies convention and moderated a panel regarding mandatory malpractice insurance. While 12 states are looking at mandatory insurance, Mr. Zarov was not confident that any would be

successful in adopting it. Mr. Zarov will be attending a meeting in London next week to discuss reinsurance treaties. The treaties determine excess rates. One reinsurer has already indicated it wants a 75% rate increase. Mr. Williamson wrote to the Governor's commission on medical malpractice urging the committee to look at the PLF operation.

B. Changes to Coverage Plan

1. Approve Changes to Exclusion d.(2) and Exclusion u.

Action: The board voted to approve two changes to the Coverage Plan as recommended by the PLF Board of Directors. The first change amended the Plan's exclusion for any liabilities voluntarily assumed by Covered Parties and the second changed coverage for the sanctions imposed on covered portions (Exclusion d. (2) and Exclusion u.). On the first change, Mr. Hill made the motion and Ms. Rinehart seconded. The motion passed unanimously and on the second change, Ms. Burrows made the motion, Mr. Gaydos seconded it, and it passed unanimously.

C. Changes to Underwriting Rules

1. Approve New Underwriting Policy 7.250-7.350

The PLF BOD policies on underwriting have undergone a substantial change. The primary reason for the change is to reflect changes to the Underwriting Committee and to clarify the underwriting rules. The changes reflect the practices of the Underwriting Committee.

Action: Ms. Rinehart moved and Mr. Gaydos seconded a motion to approve new PLF Policy 7.250-7.350 on underwriting of excess coverage. The motion passed unanimously.

D. Changes to Excess Plan for Firms with Out-of-State Offices

1. Approval of Changes to the PLF – Multi-State Form Claims Made Excess Plan

The PLF recently reviewed its practice of offering "drop-down" coverage to firms that purchase excess coverage from the PLF for firm members who practice in Washington, Idaho, or Washington D.C. branch offices of the firm. The review was to determine whether the PLF was acting in accordance with all regulatory requirements in the foreign states. As a result of that review, the PLF felt that several clarifications to the PLF plan were appropriate.

Action: Ms. Burrows moved and Ms. Rinehart seconded a motion to approve changes to the PLF Multi-State Excess Plan. The motion passed unanimously.

E. Approval of PLF 2003 Budget and Assessment

1. Approval of the 2003 PLF Budget and Assessment of \$2,600

The increase recommended by the actuary is due to a loss in reserve amounts due to a drop in investment income and to higher than predicted claims severity in 1999 and 2000. In addition, the frequency of claims for 2002 also appears to be higher than anticipated.

Action: Mr. Williamson moved and Ms. Worcester seconded a motion to approve, as recommended by the PLF Board of Directors, an increase in the PLF assessment from \$2,200 to \$2,600 effective January 1, 2003. The motion passed unanimously.

5. **Appearances/Special Issues**

A. David F. Berger, OLF President

David Berger, OLF President, gave the board an update on OLF activities. The foundation is experiencing a loss in revenue and thus in grants made due to dropping market interest rates on IOLTA accounts. The OLF has continued to work with banks to get interest rates raised. U. S. Bank raised its rates after dropping them severely, thus raising OLF's revenue from \$14,000 per month to \$26,000. Previously, \$40,000 was the amount generated by IOLTA accounts at U. S. Bank. The OLF made a more severe cut to grants for non-legal services programs. \$900,000 in grants was made in 2002. The OLF had to dip into its reserve account to stave off more severe cuts. The OLF expects a decision from the United States Supreme Court in the Phillips case challenging the constitutionality of the IOLTA program by June, 2003.

B. HOD Agenda

1. Board Responsibility

The board discussed taking action on resolutions proposed by delegates.

2. Regional HOD Meetings

3. Delegate Resolutions

a. Requests the BOG to Seek a Legislative Amendment Making Child Abuse Reporting a One-Time Mandatory Continuing Legal Education (MCLE)

- b. Requests the BOG to Seek a Legislative Amendment making Child Abuse Reporting a One-Time Mandatory Continuing Legal Education (MCLE) Requirement for Out-of-State Members

Action: Mr. Williamson moved and Mr. Gaydos seconded a motion to oppose both delegate resolutions seeking to make a change to the child abuse reporting MCLE requirements. Board members voiced concerns that there were higher priorities in the bar's legislative program than seeking this change and that neither the legislature nor the public would view this request favorably, given recent media attention to the issue. The motion passed unanimously.

- c. Urges Supreme Court to Allow for Electronic Filing Projects

Action: Mr. Anderson moved and Mr. Williamson seconded a motion to take no position on the electronic filing resolution. The board did not feel it had enough information to take a position on the specifics outlined in the resolution. The motion was approved unanimously.

- d. Requests the BOG to Ask the Oregon Supreme Court to Make "Diversity" a One-Time Mandatory Continuing Legal Education (MCLE) Requirement for All Members

- e. Requests the BOG to Ask the Oregon Supreme Court to Make "Diversity" a One-Time Mandatory Continuing Legal Education (MCLE) Requirement for Out-of-State Members

The board discussed several positions regarding the proposed resolutions that would make the MCLE diversity requirement either one-time only for all bar members or for out-of-state members. Board members expressed both support and opposition to the original requirement.

Action: Mr. Williamson moved and Ms. Worcester seconded a motion to oppose both delegate resolutions concerning diversity. The motion failed (yes, 7 [Burrows, Carter, LeSage, Lopez, Tyner, Williamson, Worcester]; no, 9 [Anderson, Brown, Bryant, Cook, Gaydos, Hill, Hilton, Hytowitz, Rinehart]).

The board discussed the fact that if it took no position on the delegate resolutions, the individual board members would be able to state their positions as they chose.

Action: Mr. Williamson moved and Mr. Hill seconded a motion to take "No Position" on the two resolutions. The motion failed (8, yes [Burrows, Carter, Gaydos, LeSage, Rinehart, Tyner, Williamson, Worcester]; no, 8 [Anderson, Brown, Bryant, Cook, Hill, Hilton, Hytowitz, Lopez]). No further motions were made.

6. Consent Agenda

Action: Ms. Burrows moved and Ms. Rinehart seconded a motion to adopt the consent agenda. The motion passed unanimously.

The minutes from April 5-6, 2002; May 21, 2002; May 31-June 1, 2002; August 2-3, 2002; August 21, 2002; and August 27, 2002 were approved.

The following appointments were approved - to the Ninth Circuit Judicial Conference: Southern Oregon - Bernard Moore, David Orf, and Karla Knieps; Central Oregon - John Berge, Brian MacRitchie, and Alycia Sukora. Also approved was a recommendation to the Supreme Court for Region 6 Disciplinary Board Member Irene Bustillos Tayler whose term expires 12-31-02 and who will be reappointment to a three-year term thereafter.

The Client Security Claims in *Ceh v. Barrett*; *Kuzik v. Wangen*; and *Snodgrass v. Guthrie* were approved.

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

Mr. Williamson reminded the board that the bar is always looking for good people to serve on the HOD, BOG, and in sections and on committees. He encouraged the board members to let Member Services or the appropriate BOG committees know of any such people who might be interested in serving.