

Oregon State Bar
Meeting of the Board of Governors
September 17-18, 2003
Open Meeting Minutes

For ease of future research efforts for the minutes, the minutes are written to reflect information as it appears on the agenda. Items in the minutes were not necessarily considered by the Board in the order in which they appear below.

The meeting of the Oregon State Bar Board of Governors was called to order Wednesday, September 17, 2003, at 2:00 p.m. by President Charles Williamson and adjourned at 4:40 p.m. Board members present were Frank Hilton, Mark Comstock, Jon Hill, Ronald Bryant, Bette Worcester, Lisa LeSage, William Carter, David Hytowitz (2:40 p.m.), Charles Williamson, Nena Cook, Dennis Rawlinson, Mary McCauley Burrows, Gerry Gaydos, Lauren Paulson and James Brown. Staff present was Karen Garst, George Riemer, Jeff Sapiro, Bob Oleson, Susan Grabe and Teresa Wenzel.

The Board meeting was reconvened Thursday, September 18, 2003, at 9:00 a.m. by President Charles Williamson and adjourned at 10:30 a.m. Members present were Frank Hilton, Mark Comstock, David Hytowitz, James Brown, Lisa LeSage, Charles Williamson, Lauren Paulson, Bette Worcester, Jon Hill, Dennis Rawlinson, Ronald Bryant, Nena Cook, Mary McCauley Burrows, Williams Carter and Gerry Gaydos. Staff present was Karen Garst, George Riemer, Susan Grabe, Karen Lee and Teresa Wenzel. In addition, present from the Professional Liability Fund were Ira Zarov, Tom Cave, Robert Nunn (9:45 a.m. by phone) and Al Bannon.

1. Report of Officers

A. Report of the President

1. Report on Meeting with Chief Justice

Mr. Williamson highlighted the recent meeting with the Chief Justice explaining the final legislative action on the budget and the discussion about further cuts, if the income tax surcharge is repealed by the voters.

2. Draft Agenda for Board, SPRB and Supreme Court Meeting on September 26, 2003

There will be a special meeting of the Board of Governors, the State Professional Responsibility Board and the Supreme Court on September 26, 2003, to discuss issues of mutual interest, including recent changes to the disciplinary system and the House of Delegates' action on the changes to the disciplinary rules. Board members had no revisions to the printed agenda for the meeting.

The Board members who will serve on a joint committee with the Board of Bar Examiners to review the reciprocity admission rule will be Nena Cook, Frank Hilton, and David Hytowitz.

3. BOG Representation for Out-of-State Lawyers

Mr. Williamson stated he had been asked by out-of-state delegates to the House of Delegates to consider creating a seat on the Board for out-of-state members. Currently, only active members within Oregon vote for board members from their region. The Board agreed to refer this issue to the Policy and Governance Committee for its consideration. This change, if recommended, would require a statutory change.

4. National Conference of Bar Presidents

Mr. Williamson gave a presentation on court funding at the National Conference of Bar Presidents in San Francisco in August. It appeared that Oregon had the worst funding problems going into this legislative session, particularly because of the cuts toward the end of the biennium. In his opinion, however, Oregon fared the best in terms of final outcome.

B. Report of the President-Elect

1. PLF Liaison Report

Because Mr. Carter was unable to attend the recent Professional Liability Fund Board of Directors meeting, Ron Bryant, who went in his stead, gave the PLF report. Mr. Bryant reported most matters considered at the meeting would be discussed with the Board on September 18, 2003, when the PLF gives its report. He stated that the 2004 budget will be subject to Board approval and there is a recommendation to maintain the current 2003 PLF assessment amount for 2004.

2. National Conference of Bar Presidents Annual Meeting

Mr. Carter continued his report by discussing his attendance at the Casemaker™ Consortium meeting held in conjunction with the NCBP meeting in San Francisco. The idea arose about creating a premium site attached to the individual bar's Casemaker™ site that would allow expansion for additional material that would need to be paid for by the bar member. Mr. Carter asked the ad hoc committee, which is reviewing online CLE Publications and forms, to consider this concept. A recent survey in Ohio showed that 49% of members use Casemaker™ as their primary legal research tool. 92% expressed satisfaction with the product. At the NCBP meeting, Mr. Carter attended a session on law student debt and learned that escalating loan amounts continue to be a barrier to public service jobs for new admittees. In 2002, the average loan debt for a graduating law student was \$60,000. The average public interest job paid \$36,000 per year. The meeting, held with representatives from state bars, covered many topics including professionalism, diversity, judicial independence, state judicial selection, legal services and court funding. Oregon was noted once again for its PLF

malpractice coverage and the work of the Oregon Attorney Assistance Program. Mr. Carter also attended a session on bar leadership.

3. Meeting of Northwest Bars in Boise, Idaho on October 23, 2003

Mr. Carter reminded BOG members of the meeting of Northwest Bar Associations to be held October 23, 2003, in Idaho. Mr. Carter, George Riemer and Karen Garst will attend the meeting, where one of the topics will be reciprocity.

2. Report of Executive Director

A. Ms. Garst

Karen Garst thanked the Board for the special leave she took this summer. She stated it was a very relaxing and renewing experience. She thanked the entire bar staff for doing such an admirable job while she was gone, especially Mr. Riemer and Ms. Wenzel. Ms. Garst reported the Client Assistance Office had begun accepting inquiries on August 1, 2003, and it is now handling all initial inquiries or complaints regarding attorney conduct at the Bar. The CAO will be fully staffed soon with three full-time attorneys and two support staff. Many matters have already been resolved to the satisfaction of both client and bar member. The Casemaker™ launch date is set for September 24, 2003, and Mr. Carter's idea for mouse pads has been implemented. These contain key search directions for using Casemaker™. Ms. Garst will contact strategic planner Toni Doolen and set up an October meeting with her, Ms. Garst and the fourth year class to discuss the Board's strategic planning session scheduled for November 2003.

B. Mr. Riemer

1. Oregon State Bar's Participation in National Council of Lawyer Disciplinary Boards, Inc.

George Riemer, Acting Executive Director during the summer, reported on the formation of a new group called the National Council of Lawyer Disciplinary Boards. The proposal calls for annual meetings of staff and bar members who serve and assist the trial panels in state bar discipline systems. Texas has agreed to set up a non-profit corporation and provide some support to the organization. Mr. Riemer has been asked to be the treasurer. Expenses for one staff and one bar member to attend would probably be about \$2,000 per year. This amount can be accommodated within existing resources.

ACTION: Mr. Hytowitz moved and Mr. Bryant seconded the motion to have the Oregon State Bar join the National Council of Lawyer Disciplinary Boards, to allow Mr. Riemer to serve as treasurer and to cover the expenses of staff and bar members chosen to attend. The motion passed unanimously.

3. House of Delegates Meeting

A. Discussion of Final Details

1. Agenda

Staff outlined some additional errata in the rules resolution. In addition, the board exhibit 1.8(h)(4) is proposed to be changed from the “bar’s disciplinary authority” to the “Oregon State Bar,” and 5.5(e) and (f) are proposed to be added to provide language regarding temporary practice by foreign lawyers. The latter changes are based on a model rule adopted by the American Bar Association in 2002.

2. Parliamentary Procedure

The Board discussed, at length, the process for dealing with the resolutions on the HOD agenda. The decision was made to have Mr. Williamson, as chair, do the following: First, he would ask the body to accept moving the resolution dealing with lawyer-legislators directly before the resolution regarding the model rules. In regard to the discussion of the rules themselves, the Board decided to outline a process whereby the chair would state that amendments to rules would be taken up in the order of the number of the rule they address and a motion to postpone indefinitely would not be in order until all amendments had been acted upon and the main motion, as amended, was before the body. Any HOD member could appeal the chair’s decision.

ACTION: Mr. Bryant moved and Ms. Worcester seconded a motion to adopt the errata sheet and the two additional changes noted above as BOG amendments to the rules resolution. The motion passed unanimously.

B. Memo on Transitioning Between Old CPR and New RPC

ACTION: Mr. Rawlinson moved and Mr. Bryant seconded that the Board propose that the House of Delegates adopt a transition provision as a part of the rules resolution with one change to the proposal made by staff. The change would leave the implementation date blank. The Supreme Court will need to add the date when and if it adopts the new rules. The motion passed unanimously.

4. Rules and Ethics Opinions

A. Amendments to the Fee Arbitration Rules

Changes were proposed to the Fee Arbitration Rules due to the establishment of the Client Assistance Office and to update the rules in several other respects. One of the principal changes is to increase the threshold for the use of three-member arbitration panels to disputes involving \$5,000 or more.

ACTION: Mr. Bryan moved and Mr. Comstock seconded a motion to approve the change proposed by staff. The motion passed unanimously.

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

A. Policy & Governance Committee [Mr. Brown]

1. Approval of Revisions to Board of Governors Policies

Jim Brown, chair of the Policy and Governance Committee, introduced the final version of the Committee's revision of the Bar's Bylaws and Policies. The purpose of the revision is to consolidate the Bar's administrative regulations and eliminate duplication between the existing Bylaws and Policies. Mr. Riemer pointed out that the revision could be called bylaws or policies in light of two different statutory provisions giving the Board the power to adopt bylaws and rules for the operation of the Bar. After considering the statutes, the consensus of the Board was to adopt the revision as new Bar Bylaws.

ACTION: Mr. Brown made the motion, on behalf of the Committee, to change the word policy to bylaw throughout the document and to make other conforming changes. The motion passed unanimously.

ACTION: Mr. Brown made the motion, on behalf of the Committee, to adopt the final wording of the new bylaws with the understanding there may be additional typographical errors that will be corrected prior to production. The new bylaws will go into effect on November 1, 2003. The motion passed unanimously.

2. Constitutional Law Section's Amicus Brief on Mootness

ACTION: Mr. Brown made a motion, on behalf of the Committee, to adopt the amicus brief that had been circulated earlier to the Board on the issue of mootness in the case of *Yancy v. Shatzer/City of Portland*. The Board approved this request by consensus during the last week of August 25, 2003. This ratification will officially document the action taken by the Board. The motion was unanimously approved by the Board.

3. Letter to Discipline Survey Respondents and Article for the Bar Bulletin on Survey Results

During the summer, both volunteer bar counsel and defense counsel were polled regarding their perceptions and experience with the Bar's disciplinary process and the staff of the Disciplinary Counsel's Office. The Policy and Governance Committee compiled and reviewed the results at two summer meetings.

ACTION: Mr. Brown moved the Committee's recommendation to have the Board accept the results and to insert the article regarding the survey into the *Bar Bulletin*. The results were seen by the Board as positive. The article was amended to include a statement to the effect that the "Board would continue to monitor and evaluate" the disciplinary

system. Other minor editorial changes were addressed. The Committee's motion was passed unanimously and Mr. Sapiro was thanked for the work of his Department.

4. Proposed Change to Rules of Procedure Regarding Local Professional Responsibility Committees

The proposed changes to the Rules of Procedure will require LPRCs to investigate cases only and not attempt to either analyze the facts of the case nor to apply specific disciplinary rules to the case. In addition, each case will be assigned to one LPRC member that has stated he/she is available to investigate the case. This member may consult the entire LPRC regarding the case. Strict timelines will be applied. If the case is not returned to the Bar in 60 days, the SPRB may grant one extension of 30 days. Otherwise, the case must be returned to the Bar with any information that has been completed. There will no longer be public members on the LPRCs with these changes. However, public members will be retained on the SPRB and the Disciplinary Board. The Committee made one change since this exhibit was previously viewed by the Board. It added the sentence "Thereafter, if the investigation is not complete, the LPRC shall refer the matter back to Disciplinary Counsel for completion" to Rule 2.3(a)(2)(c). Staff was asked to send the memo to the LPRC members explaining the changes at the same time the letter to the Supreme Court requesting approval of these rules is sent. The SPRB had reviewed these changes and had no changes to propose.

ACTION: Mr. Brown introduced the Committee's motion to adopt the proposed changes that affect the role of the LPRCs within the Bar's disciplinary system. The motion passed unanimously.

B. Public Affairs Committee

1. 72nd Legislative Assembly Aftermath

The PAC will meet at 9:30 a.m. on Friday, September 26, 2003, to discuss the limitations on the Bar's participation in the income tax surcharge referral and a draft strategy to educate the public on this issue. Among the issues that will occupy the time of the Public Affairs Committee and the Board during the interim are court efficiency and an examination of the juvenile code by the Oregon Law Commission. Representative Rob Patridge has contacted the Bar regarding the End of Life Coalition. This group is seeking to change the health care directive currently in place and the durable power of attorney. He will be informed that the Bar would be happy to have this issue studied by its sections but it cannot endorse the proposal at this time. The current law was delicately crafted among many parties. Former Justice Fadeley is also pursuing his concern about HB 2341 regarding public contracting and changes to the legal remedies portion of the bill which eliminates reference to the Administrative Procedures Act and creates its own process and procedures. The Board will study this in the interim as well. There appears to be some

confusion over whether Legislative Counsel's Office will continue to publish the Oregon Revised Statutes. West Publishing Company has approached them. (It was later learned that LCO will continue to publish the ORS.)

2. General update on legislative session.

Mr. Carter, PAC Chair, discussed the final results of the recent legislative session. There is likely to be a referral to the voters of the \$800 million income tax surcharge the legislature passed in the waning days of the session. A disappropriation bill also passed that would implement the cuts necessary to achieve a balanced budget if the possible referral nullifies the surcharge. In terms of bar bills and law improvement legislation, many positive results were achieved. The Bar Act was amended to allow no election in uncontested races, no Client Security Fund charge for 50 year members, approval of electronic voting and the elimination of the automatic Supreme Court review of suspensions of over six months. This latter change had already been approved by the Supreme Court. Funding for legal aid was increased through the efforts of a broad coalition including the Bar. Mr. Carter referred board members to a list of the status of law improvement legislation the majority of which was passed into law. Mr. Carter also noted many bills the Bar opposed, such as Senate confirmation of judges and election of Supreme Court judges by district, were not passed into law. A bill to create an interim task force to study court facilities and funding failed.

3. Oregon Judicial Department Funding

The Judicial Department is already working on scenarios of cuts should they need to be made. In addition, the bill to increase funding for the Judicial Department through a temporary filing fee surcharge passed. The Bar had worked hard to support the courts on this bill.

4. House of Delegates Resolution Honoring Lawyer Legislators

Mr. Carter stated that he had been approached by one lawyer-legislator who was upset the resolution printed in the agenda did not honor all lawyer-legislators for their work. The PAC met and discussed this issue at its interim meeting.

ACTION: Mr. Carter presented the Committee's recommendation that the Board modify the current resolution to include all lawyer-legislators. The Committee recommendation passed unanimously. A replacement resolution was presented to and approved by the House of Delegates on Saturday, September 20, 2003.

5. Bob Oleson

Mr. Oleson was presented with a plaque for his 24 years of service at the Bar as Public Relations Director. The Board expressed its appreciation for his

leadership in guiding the Bar's Governmental Relations program for so many years.

C. Access to Justice

1. Report on Oregon Access to Justice Endowment Fund

The recommendation of the Committee is that funding for the Endowment for 2004 be \$30,000. The Budget and Finance Committee had met prior to the board meeting and reviewed and approved this proposal and the proposal for continued funding of the Campaign for Equal Justice.

ACTION: Lisa LeSage introduced the Committee's motion to approve the plan for 2004-2006, with the understanding funding beyond 2004 would have to be reviewed each year based upon a report from the Fund. The motion passed unanimously

2. Continued Funding of Campaign for Equal Justice

ACTION: Ms. LeSage introduced the Committee's motion to approve the CEJ's request for \$20,000 in 2004. The same review process for subsequent years will be in place for this grant as with the Endowment Fund. The motion passed unanimously

David Hytowitz thanked Ms. LeSage for the major effort she undertook to analyze the efforts of the Endowment Fund and the CEJ's grant over the past three years and the proposal for the next three years.

D. Public Member Selection Committee

1. Public Member Selection Committee Recommendation

Dr. Edmundson, both the Dean of the Graduate School of Education and a Professor at Portland State University, was recommended as the Board's new public member by the Committee.

ACTION: Mr. Hill presented the Committee's recommendation to appoint Dr. Phyllis Edmundson as the new public member of the BOG for a four-year term beginning January 1, 2004. The motion passed unanimously

6. Consent Agenda

ACTION: Mr. Bryant moved and Mr. Hill seconded the motion to approve the Consent Agenda, which included approval of the BOG Minutes of August 1 and 15, 2003, and appointment recommendations of the Appointments Committee for the Council on Court Procedures, the public member to the Unlawful Practice of Law Committee, the secretary to the CPA Joint Committee and the recommendations to Judge Haggerty for appointments to the positions of lawyer representatives to the Ninth Circuit Judicial Conference. The motion passed unanimously

Work Session

7. Presentation of OSB CLE Seminars

Karen Lee, Manager of the CLE Seminars Department, gave a presentation of the services provided by the department. She emphasized the three goals of the department: To educate bar members on a range of topics, to use a variety of mechanisms to provide this education and to be self-sustaining based upon the revenues garnered through the department's programs and products. The Bar has just introduced new audio CDs in addition to tape recordings.

8. Professional Liability Fund

A. PLF Update

Ira Zarov, PLF CEO, stated the PLF's recent negotiations for reinsurance coverage should not result in a rate increase. They are also considering increasing the reinsurance coverage to \$10 million. All reinsurance is currently fairly expensive. Mr. Zarov attended the recent National Association of Bar Related Insurance Companies in British Columbia. The PLF continues to hear praise about its Oregon Attorney Assistance Program. Such a program simply does not exist anywhere else. The PLF recently offered its biennial Defense Panel Workshop, which went well.

1. Report on D&O and E&O Renewal

Mr. Zarov also informed the Board of Governors the carrier for the PLF's Directors and Officers Insurance policy would not insure the BOG in addition to the PLF BOD. Mr. Riemer clarified that what is necessary is the PLF D and O insurance policy specify the covered entity as the "Oregon State Bar," not simply the PLF. Mr. Zarov assured the BOG the OSB would be covered. However, any actions of the BOG itself would not. Mr. Williamson asked Mr. Zarov to send Mr. Riemer a copy of the policy.

B. Approval of 2004 Budget and Assessment

Mr. Nunn introduced Tom Cave, the PLF's Chief Financial Officer, to explain the PLF Board of Directors' deliberation concerning the assessment for 2004. Mr. Cave explained that 80% of the assessment is used in claims costs. Thus, consulting actuaries to look at trends and give an estimate of potential claims costs is very important in determining the assessment. The PLF BOD recommends the 2004 assessment remain at the 2003 rate of \$2,600. The PLF BOD believes, after consultation with its advisors regarding investment returns, this is a conservative approach. After consulting with the Bar's Executive Director, the PLF has included a 3% salary pool. A question was raised regarding any consideration to increase the base coverage of \$300,000. This might be considered if and when the assessment needs to be raised.

ACTION: Mr. Rawlinson moved and Mr. Bryant seconded the motion to approve the 2004 PLF assessment of \$2,600 and the budget for 2004. The motion passed unanimously.

1. Approval of Various Policy Changes Made by the PLF Board of Directors
 - a. PLF Policy 1.250 – Mission Statement and Goals (Rewrite)

The PLF Board of Directors recently reviewed the PLF Mission Statement and proposed several changes. The changes reflect the view that the focus of the PLF is to the Primary Program. Secondary goals include a sound financial condition, full funding of claim reserves, role of the BOD, relationship with the BOG and bar staff and the active communication with Oregon attorneys.

ACTION: Mr. Rawlinson moved and Mr. Bryant seconded the motion to approve the changes proposed. The motion passed unanimously.

- b. PLF Policy 2.250(G) – Travel, Expense and Reimbursement Policy (Domestic Partner Language)

The PLF BOD proposed a change to PLF Policy 2.250(G) that clarifies allowable reimbursements for spouses are also available to domestic partners. This change is proposed to reflect general OSB policies. Ms. Garst clarified the OSB policy on diversity incorporates this concept and domestic partners are covered in current OSB reimbursement policies.

ACTION: Ms. LeSage moved and Ms. Burrows seconded the motion to approve the change. The motion passed unanimously.

- c. PLF Policy 3.150(C) – Patent Exemption

Consistent with the Board of Directors and the Board of Governors' decision to allow the purchase of primary coverage by patent attorneys, the Board of Directors proposed making PLF coverage mandatory for patent attorneys. This proposal affects PLF Policy 3.150 (C).

ACTION: Ms. Cooke moved and Ms. LeSage seconded the motion to make the coverage mandatory for patent attorneys. The motion passed unanimously.

- d. PLF Policies 3.500 and 3.550 – Special Underwriting Assessment (SUA) Issues

The PLF Board of Directors proposed increasing the safe-harbor before which a SUA is assessed from \$25,000 to \$75,000. This involves a change in PLF Policies 3.500 and 3.550.

ACTION: Mr. Bryant moved and Mr. Comstock seconded the motion to approve the changes. The motion passed unanimously.

- e. PLF Policy 6.150(B)(1) and (2) – PLF-PPMAC (CEO/OAAP Changes)

The PLF BOD proposed changes to job titles of certain personnel working with the OAAP. These changes reflect additional training and administrative considerations. Issues of confidential information are also addressed in these changes as well as an administrative change to the Practice Management Assistance Program that reflects current practices. Changes involve PLF Policy 6.150 (B) (1) and (2) and 6.200 (G), (H), and (I), and 6.250 (E).

ACTION: Mr. Comstock moved and Ms. Worcester seconded the motion to approve all changes as recommended. The motion passed unanimously.

- f. PLF Policy 6.200 – OAAP (Attorney Counselor Title Change)

The PLF BOD proposed changes to job titles of certain personnel working with the OAAP. These changes reflect additional training and administrative considerations. Issues of confidential information are also addressed in these changes, as well as an administrative change to the Practice Management Assistance Program that reflects current practices. Changes involve PLF Policy 6.150 (B) (1) and (2) and 6.200 (G), (H), and (I), and 6.250 (E).

ACTION: Mr. Comstock moved and Ms. Worcester seconded the motion to approve all changes as recommended. The motion passed unanimously.

- g. PLF Policy 6.250(E) – PMAP (Language Revision – Adding “or normal cost” for Program Participants)

The PLF BOD proposed changes to job titles of certain personnel working with the OAAP. These changes reflect additional training and administrative considerations. Issues of confidential information are also addressed in these changes, as well as an administrative change to the Practice Management Assistance Program that reflects current practices. Changes involve PLF Policy 6.150 (B) (1) and (2) and 6.200 (G), (H), and (I), and 6.250 (E).

ACTION: Mr. Comstock moved and Ms. Worcester seconded the motion to approve all changes as recommended. The motion passed unanimously.

- h. PLF Policy 7.700(L) – Excess Program(Removal of Investment Earnings)

Currently the PLF Excess Program allows an investment earnings credit. The PLF BOD voted to recommend to the BOG discontinuation of this credit. The change involves PLF Policy 7.700 (L).

ACTION: Mr. Hytowitz moved and Mr. Rawlinson seconded the motion to approve the change. The motion passed unanimously.