

Oregon State Bar
Meeting of the Board of Governors
November 15, 2003
Open Session 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 Saturday, November 15, 2003, at 10:30 a.m. by President Charles Williamson and adjourned at 4:00 p.m. Board members present were William Carter, Dennis Rawlinson, Ronald Bryant, Mary McCauley Burrows, Gerry Gaydos, Nena Cook, Charles Williamson, Lisa LeSage, Jack Enbom, David Hytowitz, James Brown, Mark Comstock, Bette Worcester, Frank Hilton and Lauren Paulson. OSB staff present was Karen Garst, George Riemer, Rod Wegener, Susan Grabe and Teresa Wenzel. New Board of Governors members present were Albert Menashe and Phyllis Edmundson. Professional Liability Fund representatives present were Ira Zarov (10:30 a.m. – 1:15 pm.) Ronald Palmer (10:30 a.m. – 12:00 p.m.) and Robert Nunn (11:15 a.m. – 4:00 p.m.).

1. Work Session

Susan Grabe, OSB Public Affairs Director, outlined the department's two main functions: Working with the Board to develop public policy and working with the sections and the Board on law improvement issues. The Board's Public Affairs Committee serves as the oversight body for both of these areas. *Keller v. State Bar of California* limits the issues a mandatory bar can promote using member fees to issues such as regulating the legal profession and improving the quality of legal services. Oregon election law also limits the activities of the Bar and bar staff in initiatives and political campaigns. The Bar's legislative guidelines also limit legislative and policy activities to regulation/discipline of lawyers; judicial system issues; availability of legal services; regulation of attorney trust accounts and education; ethics; and the competence of the profession. If a bar group requests to take a position on legislation, the Public Affairs Committee may adopt it as a state bar position, designate it as a section/committee position or deny the request. Oregon State Bar Priorities for 2003 were access to justice (civil and indigent defense), justice system issues (funding for judges, court system and court facilities), and law improvement program issues.

2. New Board of Governors Member

New Board of Governors members Albert Menashe and Phyllis Edmundson took the oath of office. Their terms will start January 1, 2004.

3. Report of Officers

A. Report of the President

1. Report on Meeting with Chief Justice

a. Minutes of Meeting the Chief Justice

Mr. Williamson reported that the Chief Justice presented an idea to monitor the truthfulness of the statements made by candidates in judicial campaigns. He asked Mr. Riemer to determine if the Bar could participate in such a program and what liability there would be if the Bar partnered with other groups such as the Oregon League of Women Voters and the law schools in doing so.

2. Indian Law and Professionalism on Bar Exam

Mr. Williamson discussed the issue of working with the Board of Bar Examiners to explore the addition of questions on the bar exam regarding Indian Law and the Statement of Professionalism. There were no objections to his pursuing this discussion. Mr. Williamson, accompanied by Justice Peterson, will meet with the Board of Bar Examiners on December 5, 2003.

3. Lane and Linn County Bar Visits

Mr. Williamson attended the Linn County Bar Association meeting and an editorial visit with newspaper editor Hasso Herring in Albany.

4. Judge Investitures and Meetings

Mr. Williamson spoke at the recent PLF "Learning the Ropes" CLE and at Justice Kistler's investiture.

5. Military Panel

The Bar, the Attorney General and the Chief Justice held a press conference on December 10, 2003, to launch a volunteer panel of lawyers to assist families of deployed military personnel.

6. Study of the Death Penalty

The ABA asked Oregon to assist in a study regarding the death penalty. Mr. Williamson has asked the Criminal Law Section, the Multnomah Bar Association and the Public Defense Services Commission for their aid in this regard.

7. Meeting with the Supreme Court Concerning LPRCs

Accompanied by Jeff Sapiro and Karen Garst, Mr. Williamson attended a meeting with the Supreme Court to discuss proposed changes to the Rules of Procedure regarding LPRCs. Several Multnomah County LPRC members, including a public member, appeared to oppose the rule changes. The Supreme Court reversed their approval of the rules made in October and will hear the matter again on December 2, 2003. Mr. Williamson also indicated the Court may come back with changes it wants to be made to the proposed new Rules of Professional Conduct. There may be a need for a special House of Delegates meeting early in 2004.

8. Futures Committee

Mr. Williamson discussed the work of the Futures Committee. The Board decided to ask John Bridges, chair of the committee, to appear before the Board in January. The Board will decide at that time whether to continue or sunset the committee.

B. Report of the President-Elect

1. PLF Liaison Report

Mr. Carter spoke about a recent PLF Board meeting and endorsed the PLF Board of Directors' choice of new Board of Directors member Robert Cannon.

2. Eastern Oregon Local Bar Visits

Mr. Carter discussed the recent trip made by Mr. Bryant, Ms. Garst, and him to local bar associations and local newspapers in Eastern Oregon. He stated that the newspapers were receptive to the plight of the Judicial Department budget but that they thought the income tax surcharge would be overwhelmingly defeated in their communities.

3. Meeting in Boise, Idaho

Mr. Riemer, Ms. Garst and Mr. Carter attended a meeting in Boise, Idaho regarding reciprocity and other common issues facing northwest bar associations. Representatives attended from Oregon, Washington, Idaho, Utah, Montana and British Columbia. The Canadian Bar Association is holding its annual meeting in 2005 in British Columbia. Mr. Carter indicated he would like to get 80-100 bar members from Oregon to attend. The sponsors will develop CLEs of interest to U.S. lawyers.

4. Correspondence from William Brandt and Mark Griffin

Mr. Carter reported that each board member had received a request from Mr. Brandt and Mr. Griffin asking the board to petition the Supreme Court to vacate their disciplinary suspensions in *In re Brandt/Griffin*, based on their belief that the proceedings had been tainted by prosecutorial misconduct. It was noted that the State Professional Responsibility Board recently dismissed allegations made by Mr. Brandt and Mr. Griffin against volunteer Bar Counsel Peter Chamberlain. The Board discussed the materials submitted, including the LPRC report in the Chamberlain matter.

ACTION: Mr. Carter moved and Mr. Rawlinson seconded the motion that Mr. Carter send a letter to Messrs. Brandt and Griffin stating that the Board declined their request.

ACTION: Mr. Paulson moved and Mr. Enbom seconded a motion to table the previous motion. The motion failed (yes, 2 [Paulson, Enbom]; no, 13).

ACTION: The main motion passed (yes, 13; no, 2 [Paulson, Enbom])

C. Report of Board Member Ronald Bryant

Mr. Bryant reported on his meeting with the Federation of Law Societies of Canada and the Law Society of British Columbia. Mr. Riemer made a presentation at the meeting on multi-jurisdictional practice. In Canada, they refer to MJP as “mobility.” One of the proposed new Oregon Rules of Professional Conduct allows temporary practice by foreign lawyers in Oregon under certain circumstances. Mr. Bryant and Mr. Riemer were invited to come back to discuss the Oregon State Bar’s fee arbitration program and other issues of mutual interest with the Law Society of British Columbia. Mr. Riemer reported that a British Columbia lawyer stole \$76 million from various clients. The Law Society waived its Client Security Fund limits in order to pay back the money. Lawyers in the Law Society, which is a mandatory organization, will each be paying \$600 per year for several years to erase the debt. A national mobility agreement exists in six Canadian provinces, which allows MJP for a period of 100 days. In order to obtain permanent licensure in another province, a Canadian lawyer need only apply to another participating province. Passage of a bar examination is not required.

D. Report of the Executive Director

1. Bar Leader Conference

Ms. Garst reminded the Board of the Bar Leader Conference to be held January 30, 2004, at the Greenwood Inn in Beaverton. Several board members will be presenting information to the bar leaders and all board members are expected to attend.

2. Future Facilities Planning

Ms. Garst outlined her concerns about attention to the future facilities needs of the Oregon State Bar. She suggested a board committee begin to explore future needs. Mr. Bryant suggested the Bar purchase land for a future building because land prices are continually rising. It was suggested that the Bar work closely with the PLF Board of Directors on any future facilities planning.

3. Status of BOG Action Items

Ms. Garst drew the Board's attention to the BOG Action Items spreadsheet included in the agenda. She will continue to update the information as projects move forward.

4. Rules and Ethics Opinions

A. Proposed Formal Ethics Opinion (01-04R)

The proposed opinion deals with former client conflicts in criminal defense practice. The request to address the issue came out of the Indigent Defense Task Force in response to concerns that conflict issues were requiring defense providers to decline significant numbers of cases. The Task Force asked the Bar to consider whether there should be a special rule excluding defense firm lawyers from the vicarious disqualification ("firm unit" rule) limitations of DR 5-105(G). The Legal Ethics Committee recommended the approval of the Proposed Formal Ethics Opinion (01-04R). The Committee concluded a separate rule was not appropriate and the current rules apply. Board members voiced concerns that if this does not fully address the concerns raised by the criminal defense providers, they will attempt to "solve" the problem via legislation. Ms. LeSage suggested the Committee look for a specific solution in order to avoid such a situation from developing. Mr. Gaydos suggested the Committee visit with Mr. Hennings on this topic. Mr. Gaydos said he would coordinate a response with the assistance of Mr. Riemer and Ms. Stevens.

ACTION: Mr. Comstock moved and Ms. Burrows seconded the motion to approve the proposed ethics opinion. The motion passed unanimously.

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

A. Policy & Governance Committee

1. Election Date/Active Members on Bar Committees

The Policy and Governance Committee recommended two changes to the Bar Bylaws. The first is a change to Bar Bylaw 9. A renumbered Section 1 would specify the dates for the election of the Board of Governors, the OSB House of

Delegates and OSB Delegates to the ABA House of Delegates. The second stipulates in Bar Bylaw 14.4 all members of standing committees must be active members of the Bar.

ACTION: The committee motion to approve the changes passed unanimously.

2. Approve 2004 Committee Charges

The Policy and Governance Committee recommended to the Board the approval of all committee charges for 2004. There are few changes and all have been reviewed by staff, committee chairs and the Policy and Governance Committee.

ACTION: The committee motion to approve the 2004 committee charges passed unanimously.

3. MCLE Committee

a. Changes to MCLE Rules and Regulations

Mr. Brown introduced the recommendations of the Policy and Governance Committee regarding a series of changes to the MCLE Rules and Regulations. Rule changes must be approved by the Oregon Supreme Court. Regulation changes are approved by the Board of Governors only. The most significant changes reorganize the requirements by membership category and separate the ethics (and child abuse) requirement from the diversity requirement. This was intended to make the requirements easier to understand. Other changes include revision to the language on out-of-state compliance and teaching credits plus several housekeeping changes. In addition to the written exhibit, the Committee is recommending that the titles be **active members** (3.2); out-of-state **members** (3.5) and active pro bono and active emeritus **members** (3.6). The Committee also recommended to the Board to change Regulation 6.100 (Carry Over Credit) to allow diversity credits earned in excess of the reporting period requirement to be carried over as diversity credits. This is to ease the confusion members have had with the starting date of the new requirement. Carry over will also be allowed in future reporting periods, subject to the carry over limit set forth in the rules.

ACTION: The Committee motion, recommending rule changes to the Supreme Court and approving the changes to the regulations, was approved unanimously.

4. Volunteer Disciplinary Defense Panel Recruitment

The Policy and Governance Committee recommended approval of the letter to be sent to bar members to encourage them to volunteer for this service.

ACTION: The committee motion to approve the letter to bar members encouraging service on the Defense Panel, was approved unanimously.

5. Change to Bar Rules of Procedure Regarding LPRCs

Mr. Brown introduced a proposed revision to the changes the Board previously approved to the Bar Rules of Procedure regarding Local Professional Responsibility Committees. The Supreme Court had approved the changes requested by the Board at its public meeting in October. However, shortly afterward the Multnomah County LPRC contacted the Chief Justice stating it did not support the changes. The Supreme Court, at its November 12, 2003 meeting, rescinded its previous action. It then heard public testimony from the Multnomah LPRC and the Bar. Its primary concern was the elimination of the public members on LPRCs and the short timelines for completion of investigations. The Policy and Governance Committee is now recommending two changes to the previously proposed rule changes in the hopes the Court will approve the new rules. The first involves allowing each LPRC to decide if it wants to include a public member on the committee. The language is permissive. Second, the first deadline for the report from the LPRC back to Disciplinary Counsel is 90 days with one possible 60-day extension.

ACTION: The committee motion to change the Rules of Procedures as set forth above and to resubmit the proposal to the Supreme Court was approved unanimously.

6. Sunset of LPRC Rule Changes

The committee then discussed the desire of the Chief Justice for a three-year sunset to the LPRC rule changes in case they do not prove to be effective. The consensus of the Board was that a sunset provision was acceptable, if the Court felt such a provision was necessary.

ACTION: Ms. Burrows moved and Mr. Rawlinson seconded the motion to communicate to the Court that the Board would not object to a sunset provision. The motion passed unanimously.

B. Public Affairs Committee

1. BOG Resolution in Support of Income Tax Referendum

Nena Cook presented the recommendation of the Public Affairs Committee to endorse a resolution in support of the income tax increase. The Committee considered the likelihood that petitioners will gather enough signatures to place the income tax surcharge, passed by the 2003 Legislature, on the ballot in February. If the income tax surcharge is repealed, the Judicial Department will

lose \$13-19 million for court operations and the Public Defense Services Commission will lose \$9 to \$13 million. The “be it resolved” portion of the resolution states “The Board of Governors of the Oregon State Bar favors enactment of Initiative Measure 30 and all members of the Oregon State Bar are urged to communicate to their clients, families, staff members and others the devastating effect the failure to enact this measure would have on the justice system of the State of Oregon.”

ACTION: The committee motion to adopt the resolution in support of the income tax increase was approved unanimously.

2. 2003 OSB Legislative Scorecard

Bill Carter, Public Affairs Committee Chair, referred the Board to the Legislative Scorecard that indicated how the Bar’s bills and stands on legislation fared during the most recent session.

C. Budget & Finance Committee

1. 2004 Oregon State Bar Budget

The 2004 Budget recommended by the committee is the same one that was reviewed by the Committee in October. It includes a reserve for PERS payments in the event the courts overturn recently passed legislation. It caps the operating reserve at \$500,000 and caps the contingency line-item at \$50,000. There is also included a \$50,000 appropriation for access projects in partnership with the Campaign for Equal Justice and the Oregon Law Foundation (federal legislative issues and the endowment fund). Currently a fee increase is projected for 2008. The Bar recently received notice the state issued General Obligation Bonds to refinance a portion of the PERS unfunded liability and PERS reduced the rate for “state” employers, which includes bar employees, to 4.71%. The 2004 budget does not incorporate the lower rate. If the lower rate is confirmed, the additional savings will be added the the PERS reserve.

ACTION: The committee motion to approve the 2004 Budget was approved unanimously.

2. Audit of the Oregon State Bar’s Financial Statements

The Secretary of State is now permitting the Bar to contract for its own audit with a private auditor. The Budget and Finance Committee is slated to interview potential auditors on December 6. The audit must be done at least once every two years. Whether the Bar should increase that minimum to every year will be decided later. The Committee recommends that the Board give authority to the Committee to select an auditor.

ACTION: The committee motion to give authority to the Committee to select an auditor was approved unanimously.

3. Casemaker™ Library Issues

The Committee reported that the launch of Casemaker™ has gone smoothly with almost 3,000 members having logged on. Several sections have expressed an interest in adding content of specific interest to the section and are willing to fund the content from the section's budget. The Committee recommended that issues as additional content be referred to the new Member Services Committee whose formation was discussed during the strategic planning retreat.

ACTION: Mr. Hytowitz moved and Mr. Bryant seconded the motion to create a Member Services Committee of the Board and to assign it the oversight of the Casemaker™ program. The Awards Committee will be a responsibility of the Member Services Committee in the future. The motion passed unanimously.

4. Legislative Fiscal Office Study of the Judicial Department

Mr. Hytowitz reported the Legislative Fiscal Office had approached Susan Grabe with the idea that the Bar might help fund an outside study of the operations of the Judicial Department. The Board discussed the issue and decided it was not appropriate for the Bar to fund such a project and no funds were available to do so in any case.

ACTION: The committee motion not to fund an outside study of the operations of the Judicial Department was approved unanimously.

ACTION: Mr. Carter moved and Mr. Bryant seconded a motion to create a board committee on the Judiciary that will include the responsibilities of Judicial Selection and some of the task of Bar Works. The motion passed unanimously.

D. Access to Justice

Ms. LeSage introduced the Committee's recommendation to designate the Military Assistance Panel an OSB certified pro bono program of the type eligible for special PLF coverage. The PLF provides umbrella coverage to otherwise uninsured volunteers with OSB certified pro bono programs that serve low-income Clients. Because the Military Assistance Panel is not limited to low-income clients, it does not qualify for the PLF coverage under existing OSB or PLF policies. The Committee recommends a new subsection to Bylaw 13.201 (a) allowing certification of "a non-profit or bar-sponsored program whose purpose is to provide free legal services to an underserved population with special legal needs."

ACTION: Mr. Enbom moved and Mr. Rawlinson seconded the motion to waive the one meeting notice requirement for approval of this bylaw change, as well as the previous bylaw change approved under the Policy and Governance Committee. The motion passed unanimously.

ACTION: The committee motion to approve the change to Bylaw 13.201 was approved unanimously.

E. Election of President-elect

Nena Cook and Gerry Gaydos made presentations to the Board regarding their candidacy for president-elect of the Bar. Board members present were given a written ballot to record their vote. After votes were counted and certified by the President and Executive Director, Mr. Williamson announced Ms. Cook had been elected.

ACTION: Voting for Ms. Cook were Ms. LeSage, Mr. Williamson, Mr. Comstock, Ms. Worcester, Ms. Cook, Mr. Brown, Mr. Hytowitz, Mr. Hilton and Mr. Enbom. Voting for Mr. Gaydos were Mr. Bryant, Mr. Rawlinson, Mr. Gaydos, Mr. Paulson, Mr. Carter, and Ms. Burrows.

F. Executive Director Evaluation Special Committee

Executive Session

1. Executive Session Pursuant to ORS 192.660(1)(i)- Executive Director Performance Review

The Board held an Executive Session to review the performance of the Executive Director.

Open Session

2. Executive Director Contract and Salary Review

The Executive Director Evaluation Subcommittee recommended Karen Garst's two year contract be extended through December 31, 2005, and her salary be increased by 3% effective January 1, 2004.

ACTION: The committee motion to approve Ms. Garst's contract extension and salary increase was approved unanimously.

6. Professional Liability Fund

A. Update PLF

CEO Ira Zarov informed the Board the PLF was functioning well. The Special Issues Committee had met on an issue and the process worked well.

1. Meetings with Reinsurers

Mr. Zarov met with the reinsurers. Generally, they do not have a lot of flexibility, but there will be no rate increase next year.

2. Report on “Learning the Ropes”

90-100 new lawyers attended the PLF’s “Learning the Ropes” seminar.

3. Case Statistics

Case statistics stand at about 800 cases this year, which is less than the 840 projected by the actuary. Because each case is estimated at \$16,000, that may result in a \$500,000 savings. However, over the last three to four months, there have been several large cases, which may result in an increased severity of cases in 2003. The PLF board is going to conduct a study on whether the current limit of \$300,000 should be increased. Mr. Zarov clarified the “clash” issue raised by a board member. The coverage limit of \$300,000 applies to one related case whether there are multiple lawyers or firms or both sides of the representation involved.

4. Financial Report

Bob Nunn gave the financial report for the PLF. Currently, the PLF is \$2.5 million ahead of the budget. They have received an increase in \$1 million in revenue due mostly to an increase in investment income over projected figures and a \$1.5 million decrease in expenditures coming from a \$1.3 million decrease in the claims budget. The operating expenses are under budget, which is usually the case. They are trying to build up their capital reserves. Mr. Nunn shared a handout regarding the diversity of the PLF’s investment portfolio. The investments are performing at or near benchmarks. The recently acquired hedge funds and real estate investments are performing as expected. The Fund’s investments are exclusively in mutual funds or pooled funds and none of the mutual funds they invest in are those with problems shown in recent news reports. Most are institutional funds that are not available to individuals.

- a. Approve Excess Rates for 2004

ACTION: Mr. Rawlinson moved and Mr. Comstock seconded the motion to approve 2004 excess rates for excess coverage from \$700,000 to \$4.7 million (PLF Policy 7.700 (A)). The rates are the same as in 2003. The motion passed unanimously.

- b. Approve Expansion of PLF Excess Coverage to \$10,000,000

ACTION: Ms. Burrows moved and Ms. LeSage seconded the motion to allow PLF to offer a total of \$9.7 million in excess coverage. This is an increase of \$5 million of excess coverage above the current coverage (PLF Policy 7.700 (P)). The motion passed unanimously.

- c. Approve 2004 Primary Coverage Plan and Excess Coverage Plan

ACTION: Ms. Burrows moved and Mr. Hytowitz seconded the motion to approve PLF Policy changes in 7.350(3) and PLF Policy 7.700 (C), (E), (K)(2)(g) and (M). The changes allow the PLF to approve applicants for excess coverage despite the fact they may not have met the standards set out in PLF Policy 7.300. The changes in 7.700 allow underwriting for firms with non-Oregon lawyers, among other minor revisions. The motion passed unanimously.

ACTION: Ms. Worcester moved and Ms. Cook seconded the motion to approve the proposed changes to the coverage plans. There are no substantive changes. These changes are made periodically to respond to changes in the practice of law within the state, changes in substantive law, or are made to clarify current provisions. The motion passed unanimously.

5. Thank You

Mr. Nunn and Mr. Zarov thanked the BOG liaisons to the PLF who are leaving the Board: Mary McCauley Burrows and Charlie Williamson.

7. Consent Agenda

ACTION: Mr. Comstock moved and Mr. Enbom seconded the motion to approve the consent agenda including the minutes from the September 17-18, 2003, meeting; the approval of a donation to the Peacemakers' Conference by the Alternative Dispute Resolution Section and the appointment of a Disciplinary Board Region 6 chair. The Appointments Committee recommendations were approved as written with the following changes:

Duane Bosworth will be Vice-chair of the Bar, Press, Broadcasters Council.
Kathryn Brooke replaces Kathleen Johnson on the Client Security Fund.
Judge Garr is appointed to serve as a judge liaison to the Federal Practice and Procedure Committee.
Linda Clingan will not serve on the Legal Services Committee.

Ann Postlewaite is a member and not chair of the Quality of Life Committee.
Candice Weatherby replaces Ruth Spetter as a new member of the Multnomah
County LPRC.

The motion passed unanimously.

8. Good of the Order

None