

**Oregon State Bar**  
**Meeting of the Board of Governors**  
April 2-3, 2004  
**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 Friday, April 2, 2004, at 11:30 a.m. by President William Carter, adjourned at 12:00 p.m., reconvened at 1:00 p.m., and adjourned for the day at 5:00 p.m. Board members present were Lauren Paulson, Jon Hill, Gerry Gaydos, Ronald Bryant, Albert Menashe, Frank Hilton, Mark Comstock, Phyllis Edmundson, William Carter, John Enbom, Nena Cook, Linda Eyeran, Marva Fabien, Bette Worcester, and Dennis Rawlinson. Staff present was Karen Garst, George Riemer, Susan Grabe, and Teresa Wenzel. Also present from 1:00 p.m. – 5:00 p.m. were Ira Zarov and Robert Cannon of the PLF.

The meeting of the Oregon State Bar Board of Governors was reconvened Saturday, April 3, 2004, at 9:00 a.m. by President William Carter and adjourned at 10:15 a.m. Board members present were Marva Fabien, Bette Worcester, Dennis Rawlinson, John Enbom, Lauren Paulson, Jon Hill, Albert Menashe, Gerry Gaydos, Ronald Bryant, Frank Hilton, Mark Comstock, Phyllis Edmundson, William Carter, and Linda Eyeran. Staff present was Karen Garst, George Riemer, and Teresa Wenzel.

**1. Work Session**

**A. General Counsel's Office**

George Riemer, General Counsel and Deputy Director, gave an overview of the programs for which he is responsible. He indicated one of the reasons the number of fee arbitration cases is so low is lawyers often decline to arbitrate fee disputes. In the past, the board has considered making the program mandatory, but has decided not to do so. MCLE has proved to be a source of revenue as upwards of 200 lawyers pay late fees because they do not file by the deadline. The department is instituting a transcript reporting system. Providers will indicate who attended their programs so the bar can give members an indication of what programs the bar already has on record prior to the end of their reporting period. General Counsel's Office has not seen a large demand for written ethics advice pursuant to the new disciplinary rule. No one has yet attempted to use the defense in a disciplinary case.

## B. Issues Affecting the Future of the Legal Profession

George Riemer outlined several recent developments at the federal level that have significant implications for lawyers.

The *Sarbanes-Oxley Act* requires a lawyer, who represents a publicly traded company, to disclose information regarding illegal activity to supervisors, including the board of directors if necessary. The Securities and Exchange Commission has discussed mandating lawyer disclosures to the SEC if the publicly traded company involved did not address the lawyer's concerns. However, most state bar ethics rules require lawyers to maintain client confidences and secrets and do not mandate disclosures to protect third parties. Controversy may arise if the SEC adopts rules requiring lawyers to make disclosures outside the corporation while state bar ethics rules require them to maintain client confidences and secrets.

The *Gramm Leach Bliley Act* requires financial institutions to distribute to customers their procedures for protecting customer information. There has been disagreement whether the law was intended to cover lawyers. The American Bar Association sued the Federal Trade Commission on this issue and a trial court is poised to issue its opinion shortly. The FTC previously agreed to a temporary injunction against enforcement of the act against lawyers.

The case of *U.S. v. OSB* showed a desire on the part of the U.S. Department of Justice to have federal law pre-empt Oregon's ethics rules regarding lawyer honesty. There could be further impingements on state law with interpretations of various new pieces of national security legislation.

In order to ostensibly rein in abusive class action suits, Congress has been working on a *Class Action Fairness Act* that will send many class action lawsuits to federal court.

The 10<sup>th</sup> Amendment to the *United States Constitution*, wherein powers not delegated to the federal government are reserved to the states, should support arguments in favor of continuing the state regulation of lawyers.

In England, law societies are coming under attack for running lax disciplinary systems. A government commission has been appointed to look at nationalizing the regulation of lawyers. In addition, they are looking at lifting restrictions on non-lawyer entities, e.g., banks and insurance companies, providing legal services in addition to their other products and services. The commission is also considering allowing non-lawyers to acquire ownership interests in law firms.

In Australia, lawyers can move across state borders with increasing ease in order to practice law. In a nationalization move, the federal government is looking at allowing lawyers to practice anywhere in the country without additional licensure

requirements after being first admitted in at least one state or territory. In Canada, six out of thirteen provinces and territories allow lawyers from reciprocating jurisdictions to practice on a temporary basis for up to six months within obtaining any additional authorization from the law society in that jurisdictions.

There are areas of practice such as family law where these trends will likely have little effect, but in business and especially corporate law, they will have a huge impact. Entities such as the Washington Legal Foundation are already taking the battle to the states. In one effort, they are targeting contingency fee agreements based on needed tort reform.

The bar has an opportunity to be ahead of the curve and be proactive on many of these issues. We can propose, at the state level, more appropriate and balanced alternatives. However, lawyers are perceived by many to be too expensive and groups like the U.S. Chamber of Commerce are claiming many states' legal systems encourage frivolous lawsuits and are bad for business. In New Jersey, there is a legislative move to have lawyers pay \$75 dollars a year to help pay for doctors' malpractice insurance.

## 2. Report of Officers

Mr. Carter welcomed everyone to Jackson County.

### A. Report of the President

#### 1. Meeting with Chief Justice Carson

Mr. Carter reported on the discussions with the Chief Justice regarding the proposed Oregon Rules of Professional Conduct modeled on the ABA Model Rules as recently revised. Since that meeting, Justice Durham has indicated the Court's position on all the proposed new rules. The Chief Justice also indicated he does not support a question on the bar exam dealing with Indian Law nor a separate question on the Professionalism Statement. Mr. Carter met with representatives of the Board of Bar Examiners, the law schools, and the Chief Justice to discuss the above issues in March. The BBX was somewhat receptive to covering the issue of professionalism if it was woven into another ethics type question.

#### 2. County Bar Visits – Douglas County

The recent meeting with the Douglas County Bar Association was accompanied by a visit to the local legal services office. Mr. Carter commented on how much they are able to achieve with so little revenue.

3. OCLEAB Meeting on Indian Law and Professionalism Statement

The Chief Justice indicated he does not support a question on the bar exam dealing with Indian Law nor a separate question on the Professionalism Statement.

4. NCBP 2004 Midyear Meeting – San Antonio

Bill Carter, Nena Cook, Rod Wegener, George Riemer, Susan Grabe, and Karen Garst attended the recent ABA mid-year meeting in San Antonio and learned the State Bar of Texas had joined Casemaker™. Workshops dealt with bar leadership, the judiciary, electronic filing, and the desire of several states to have a PLF type malpractice program.

5. Western States Bar Conference – Scottsdale

Lisa LeSage, George Riemer, Marva Fabien, and Bette Worcester went to the Western States Bar Conference along with Mr. Carter in March. Mr. Carter indicated it was a great opportunity to get new ideas. Colorado limits discovery to one session in cases pleading damages of \$100,000 or less. Some states are requiring mandatory reporting by lawyers to clients of the lack of malpractice coverage, but lawyers are finding ways around this by obtaining policies with minimal coverage. States are reaching out to government lawyers, grappling with diversity, and exploring video conferencing.

B. Report of the President-elect

1. Bar Leadership Institute, Chicago

Ms. Cook and Ms. Garst attended the Bar Leadership Institute in Chicago in March.

2. Multnomah County Courthouse

Ms. Cook attended meetings regarding the Multnomah County Courthouse and Gerry Gaydos, Public Affairs Committee chair, worked on a letter to the Multnomah County Commission in support of their efforts to build a new courthouse.

3. Update on Recent Activities

Ms. Cook indicated several recent meetings she had attended since the last board meeting: Oregon Women Lawyers Executive Committee (recruitment for BOG and HOD members), Professionalism Commission (discussion of award criteria), PLF Board of Directors meeting, Oregon New Lawyers Division Pro Bono Challenge (66,000 total pro bono hours statewide), OWLS

Award Dinner; meetings with CLE Seminars staff (more women and minority speakers); staff at the Governor's Office (judicial selection criteria); ABA Mid-year Meeting; and Western States Bar Conference.

C. Report of the Executive Director

1. Columbia County Legal Aid

Ms. Garst commented on positive efforts to assure the Columbia Legal Services program is in compliance with Legal Services Program standards.

2. Walters II Task Force/Legal Services Corporation

Ms. Garst informed the board of the June deadline for the Walters II Task Force to respond to the Legal Services Corporation requirement to consolidate all state programs into one entity.

3. BOG Retreat at Salishan – November 2005

After discussion, it was decided the November board retreat will be held at Salishan.

4. BOG Liaisons Attending Section/Committee Meetings

Ms. Garst acknowledged the board members' recent attendance at many section and committee meetings and the positive effects it had on the membership.

5. 2003 Program Measures Evaluation

Ms. Garst gave an overview of the 2003 Program Measures to the board.

6. Miscellaneous

Ms. Garst informed the board Georgia recently joined the Casemaker™ Consortium.

D. Oregon New Lawyers Division

1. ONLD Report

None presented.

### 3. Professional Liability Fund

#### A. 2003 Claims Experience

The annual evaluations of the handling of claims by lawyers who were defended by the PLF were very good.

#### B. Practice Management and OAAP

The Oregon Attorney Assistance Program and the Practice Management Program saw a substantial increase in activity in 2003 even though there was a staff reduction in the PM program. It is uncertain why there was an increase.

#### C. Financial Report

Bob Cannon, member of the PLF Board of Directors, gave a financial report indicating that while claims were high in the last six months of 2003, the fund was in good shape. Because of the recommendation of the actuary, the board adjusted the computation for the average claim cost upwards from \$16,500 to \$17,000. This includes both claim and indemnity costs. The investment returns for the last quarter were quite good and none of the mutual fund investments is in the funds under scrutiny by the Securities and Exchange Commission's investigation of PIMCO and Columbia Mutual Fund companies. The excess policy is fully insured.

#### D. Changes to PLF Policy 3.300 – Installment Payment

Mr. Zarov introduced proposed changes to PLF Policy 3.300 and 3.350 clarifying default dates for the installment plan. These changes are necessary because of the recent Oregon Supreme Court opinion in *In re Leisure*.

**Action:** Mr. Bryant moved, Mr. Gaydos seconded, and the board unanimously passed a motion to make the changes to PLF Policy 3.300 and 3.350 as proposed by the PLF.

#### E. Miscellaneous

CEO Ira Zarov indicated there would be a 2.4% cost to the fund if credit cards were accepted for payments by bar members. However, the PLF board will consider this issue again in the near future. The board is rewriting the coverage plan and revising the PLF's policies. Both of these will come to the Board of Governors in the future. PLF has begun to invite local bar presidents to PLF Board of Directors dinners in order to reach out to them and talk about the PLF coverage plan. The PLF assessment may increase in 2005. The board is also considering increasing policy limits or the expense amounts at the same time.

#### 4. Closed Session Agenda

##### A. Reinstatements (Judicial proceeding pursuant to ORS 192.690(1) – separate packet)

The board met in closed session to consider various reinstatements and legal matters.

##### B. Litigation and Advice of Counsel (Executive Session pursuant to ORS 192.660(1)(f) and (h) - separate packet)

In open session, the board passed a motion to send a letter to Kirk Hall indicating it had considered his concerns about the constitutionality of the Supreme Court's *pro hac vice* fee. While the board appreciated his input, it would take no further action in the matter.

**Action:** Mr. Rawlinson moved and Mr. Comstock seconded a motion to write a letter to Mr. Hall indicating the board would take no further action in the matter. The motion passed (yes, 13; no, 1 [Lauren Paulson]; absent, 2 [Lisa LeSage, Nena Cook])

In open session, the board passed a motion to participate in the state's refinancing of its unfunded actuarial liability to PERS based on the bar's PERS salary figures. The letter to PERS should indicate the bar is not a state agency. The motion also contained a provision to ask the board's Budget and Finance Committee to explore retirement plan options for the bar's employees.

**Action:** Mr. Rawlinson moved and Mr. Enbom seconded a motion to authorize staff to commit the bar to participate in the state's PERS UAL refinancing, but to stipulate in a letter accompanying payment that the bar is not a state agency and to assign retirement plan options exploration to the Budget and Finance Committee. The motion passed (yes, 13; abstain, 1 [Linda Eyerman]; absent, 2 [Lisa LeSage, Nena Cook])

#### 5. Rules and Ethics Opinions

##### A. Legal Ethics Opinion

###### 1. Proposed Formal Opinion No. 204-175

Mr. Riemer introduced the revision of this opinion by the Legal Ethics Committee. The opinion deals with lawyer membership in business referral clubs. Ms. Cook proposed the deletion of the word "implied." Mr. Riemer clarified that the prohibition of membership was when there was a *quid pro quo* requirement for referrals between members of the club.

**Action:** Ms. Cook moved, Mr. Comstock seconded, and the board unanimously passed a motion to accept Proposed Formal Opinion No. 204-175 with the deletion of "an express or implied" in paragraph 3. The paragraph will read as follows:

Business development is a fact of life for modern professionals and the disciplinary rules do not prohibit participation in groups at which lawyers can network and learn about business opportunities. There are many civic groups that limit membership to one person in an occupation or profession and which facilitate networking. Participation in such groups is not prohibited by the disciplinary rules unless the making of referrals is a condition of membership and continued participation. Moreover, substance must rule over form and a lawyer cannot join a group such as Association on the premise that the rules are suspended for lawyers if, in fact, the referral requirements are a condition of membership.

## 2. Action of Supreme Court on Proposed Rules of Professional Conduct

The board reviewed the most recent comments from the Supreme Court concerning the Proposed Rules of Professional Conduct. The board was in agreement that the House of Delegates should be asked to approve the rules as a package to avoid another series of amendments and discussions with the Supreme Court. It is unlikely the Supreme Court will want to negotiate any further changes to the proposed rules. Mr. Riemer characterized the rules as over 90% of what was originally proposed by the HOD to the Supreme Court. Bette Worcester suggested working with the HOD members whose changes were not accepted by the Court. Mr. Carter indicated he would contact them.

**Action:** Mr. Bryant moved and Mr. Rawlinson seconded a motion to formulate the revised rules under ORS 9.490(1). The motion passed (yes, 14; no, 1 [Lauren Paulson]; absent, 1 [Lisa LeSage])

**Action:** Mr. Bryant moved, Mr. Rawlinson seconded, and the board unanimously passed a motion to have the HOD consider the revised rules at the first called meeting of the year or, absent a special meeting, to place the rules on the agenda of the regular 2004 HOD meeting, currently set for October 16, 2004.

## 6. OSB Committees, Sections, Councils, Divisions and Task Forces

### A. MCLE Committee

#### 1. MCLE Regulations Changes

The board considered minor changes to the MCLE regulations to conform to the rules adopted by the Oregon Supreme Court on February 20, 2004.

**Action:** Ms. Cook moved, Mr. Rawlinson seconded, and the board unanimously passed a motion to adopt the proposed changes to the MCLE regulations.

2. MCLE Accreditation (Review of MCLE Committee Decision)

The MCLE Committee brought to the board for its consideration an appeal by Stephen R. Moore of its decision to not allow approval of one hour of self-study credit in conjunction with a two-hour live CLE program.

**Action:** Mr. Rawlinson moved, Mr. Bryant seconded, and the board unanimously passed a motion to affirm the MCLE Committee's denial of Stephen R. Moore's request regarding self-study.

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

A. Public Affairs Committee

1. Candidate Filings and Judicial Races

There are very few lawyer legislators running to replace those lost from the last legislative session.

2. Appellate Structure Workgroup Report

Edwin Harnden, Chair of the Appellate Process Review Committee of the Appellate Law Section, presented to the board a draft report of the group. The workgroup was appointed at the suggestion of former State Representative Max Williams. A recent *Oregonian* editorial criticized the efficiency of the Supreme Court and the appellate process in general. The group decided early on not to deal with political issues even though they might impact the appellate system and its workload such as the death penalty; judicial election procedures; location of the courts; independence of the judiciary; and a vision for the "best court." The group did discover the Judicial Department has significantly fewer resources than other states. There was a suggestion to have the National Council of State Courts conduct a formal efficiency study, but that would probably be prohibitive in cost and time. In addition, a national recommendation may not be practical. Mr. Harnden asked board members to send their comments regarding the draft report to Mr. Gaydos by April 9, 2004, when the Public Affairs Committee will meet to discuss the report. The final draft should be ready by April 16, 2004. The report will be discussed with the Chief Justice and Chief Judge Diets of the Court of Appeals before it comes back to the Board of Governors for further consideration at its June board meeting. On April 22, 2004, the Oregon Law Institute will hold a CLE on appellate practice and attendees will hear from some of the members of the workgroup and the Chief Justice.

3. Law Improvement Package

Mr. Gaydos introduced the committee's report by discussing recent developments. The Texas legislature has passed legislation requiring all attorneys to pay \$65 annually to fund civil legal services and indigent defense. Law improvement proposals are coming in to the bar and there may be some disagreement over the Uniform Trust Code and a funding source for the Council on Court Procedures. There are funding concerns for this biennium for the Public Defense Services Commission. Proposed initiatives include at least two regarding tort reform.

B. Member Services Committee

1. Updates from the Recruitment, Annual Meeting and Awards Subcommittees

The chairs of the subcommittees reported on their specific issues. Mr. Rawlinson indicated the Recruitment Subcommittee had secured candidates for each House of Delegates region including candidates numbering about twice the number of vacancies in Region 5. The subcommittee will now work on recruitment to the Board of Governors. Ms. Worcester reported on the progress of the talent show for the Annual Meeting in Portland in October, 2004. She indicated it was coming along well. Mark Comstock, chair of the Awards Subcommittee, reported the brochure has been mailed and nominations are starting to come in.

2. Update on Video Conferencing

Mr. Carter discussed the items on the board's agenda from the committee. He discussed the recent preview of a video conferencing network in which the Educational Service Districts, the State System of Higher Education, and the community colleges participated. Mr. Comstock, Mr. Hill, Ms. Garst, and he thought the preview showed great possibilities for use for special HOD meetings, board committee meetings, and other events. There will be additional tests and discussion of legal and financial issues prior to final action on the concept.

3. Feasibility Report on Online CLE Publications

Mr. Carter commented on the excellent staff report that outlined the assumptions of this project and the potential cost. He stated it would be a real boon to solo practitioners, many of whom have not purchased very many CLE books. He indicated that if there was no board opposition, staff would prepare a short concept paper and solicit input from bar members through a variety of means with the board reviewing research at its August meeting. He said it would probably be in the form of a board recommendation to the

HOD for a membership referendum as the cost is likely to be around \$70 per member annually.

4. Task Force on Electronic Filing

Mr. Carter indicated the HOD had passed a resolution to devise an electronic filing system for the state's courts in cooperation with the Oregon Judicial Department. The Chief Justice has indicated he would participate in the process via his staff. Mr. Comstock has agreed to chair the task force. Ms. Garst has secured the services of Richard Vandiver, a retired OJD employee, who is willing to staff the task force. Mr. Carter asked for authority for Mr. Comstock and he to appoint members to the task force according to the structure outlined in the board exhibit. There was some discussion of appointing someone from the federal courts; however, staff indicated they could be called to discuss the federal court's system. The task force will return shortly with a budget for its work. This request for funding will first go to the board's Budget and Finance Committee.

**Action:** The committee motion to form a task force as appointed by Mr. Carter and Mr. Comstock passed unanimously.

5. Location of Annual Meeting

Mr. Carter explained there were two options for the Annual Meeting in 2005 – Seaside or Portland. He distributed a sheet listing the pros and cons of each location. Unfortunately, the Portland Annual Meeting in 2004 will not be completed in time for results to be used to set the location in 2005. Given that, the board members expressed a preference for keeping the meeting in Seaside.

**Action:** The committee motion to hold the Annual Meeting in Seaside in 2005 passed unanimously.

C. Policy & Governance Committee

1. Casemaker™ – Section Specific Material

Ms. Cook indicated staff had solicited input from all of the sections and she had attended a recent meeting of the executive committee of the Labor and Employment Section, Mr. Gaydos attended a recent meeting of the executive committee of the Workers Compensation Section and a recent meeting of the executive committee of the Real Estate and Land Use Section. All three of these sections have already identified and agreed to pay for section specific resources to be added to Casemaker™. The issue is whether this material should be made available solely to section members or to the entire bar. All

three sections mentioned above, as well as other sections responding to the request, indicated the material should be made available to the entire bar.

**Action:** The committee motion to have such material made available to the entire bar passed unanimously.

2. Affirmative Action Program Sunsets in 2006

Ms. Cook referred to the board exhibit outlining the recommendation to designate a subcommittee of the Affirmative Action Committee to be approved by the board to bring back a recommendation to the full board regarding the 2006 sunset of the program.

**Action:** The committee motion to designate a subcommittee of the Affirmative Action Committee to study the sunset issue passed unanimously.

3. BOG Member Involvement in Judicial Campaigns

The board discussed slight changes to the proposed amendment of Bar Bylaw 2.103, prohibiting board members from public involvement in judicial campaigns. The principal change was to add a reference to judicial appointments to clarify the scope of the rule. The amendments would allow board members to be personally involved in judicial campaigns and appointments so long as they made no mention of their positions on the board or otherwise connected their endorsement to the Oregon State Bar.

**Action:** Ms. Cook moved, Mr. Enbom seconded, and the board unanimously passed a motion to waive the one meeting notice requirement in Article 26 of the Bar's Bylaws to consider the amendment of Bar Bylaw 2.103 at this meeting.

**Action:** Ms. Cook moved, Mr. Bryant seconded, and the board unanimously approved a motion to change Bar Bylaw 2.103, as recommended by Mr. Riemer, with the addition of the words "and appointments." The new language will read:

The members of the board must refrain from public involvement in judicial campaigns and appointments that in any way identifies them as members of the board, officers of the bar, or otherwise representing the Oregon State Bar.

4. Change to Bar Bylaw 6.6

Ms. Cook indicated this was a housekeeping change to bring the date of the waiver request in line with the date membership fees are due. Staff clarified there would be no late fees assessed the bar member if the waiver request was denied.

**Action:** Mr. Comstock moved, Mr. Enbom seconded, and the board unanimously approved a motion to waive the one meeting notice requirement in Article 26 of the Bar's Bylaws to consider the amendment of Bar Bylaw 6.6 at this meeting.

**Action:** The committee motion to adopt the change to Bar Bylaw 6.6 passed unanimously.

5. Approval of Workers' Compensation Board Attorney Fee Schedule and Proposed Rule

Ms. Cook outlined the statutory requirement that the Board of Governors approve changes to Workers Compensation Rules regarding attorney fees. Changes requiring retainer agreements to be printed in English and optionally in another language have been presented to the board for its approval.

**Action:** The committee motion to approve the change passed unanimously.

D. Judiciary Committee

1. Judicial Appointment Process

Ron Bryant indicated the committee had finally concluded discussions with the Governor's legal counsel regarding a revised process when a circuit court judicial vacancy occurs that requires an appointment by the Governor. Governor Kulongoski had indicated a year ago he wanted to have the local bar association involved in the process and he did not like bar polls.

**Action:** The committee motion to approve the new process passed unanimously.

E. Public Member Selection

1. Appointment of New Board of Governors Public Member

Mr. Carter indicated Ms. Worcester was interested in being appointed as a public member to a second term on the Board of Governors. After Ms. Worcester stated her interest, she left the room. Several board members commented on the fact Ms. Worcester was an excellent public member and should be reappointed. Mr. Riemer indicated there was precedent for such a reappointment.

**Action:** Mr. Comstock moved, Mr. Rawlinson seconded, and the board unanimously passed a motion to reappoint Ms. Worcester to another four-year term beginning January 1, 2005.

8. **Consent Agenda**

**Action:** Mr. Bryant moved, Mr. Rawlinson seconded, and the board unanimously approved a motion to approve the Consent Agenda, including the January minutes as amended to indicate Mr. Menashe was present. His name had been left off by oversight.

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

During the “Good of the Order,” Mr. Hill indicated a desire to study those bar members who have a large number of complaints, whether these have been dismissed or not. Mr. Carter indicated Mr. Riemer was undertaking such a study of nine bar members who had more than 50 disciplinary complaints filed against them. Mr. Riemer will identify behaviors that have led to the large number of complaints and possible remedial action the board could take.