

**Oregon State Bar**  
**Meeting of the Board of Governors**  
August 19, 2005  
**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, August 19, 2005, at 10:15 a.m. by President Nena Cook. Board members present were Bette Worcester, Nena Cook, Frank Hilton, Marva Fabien, Mark Comstock, Jon Hill, Carol Skerjanec, Rick Yugler, John Enbom, Tim Gerking, Dennis Rawlinson, Gerry Gaydos, Albert Menashe, and Linda Eyerman. Staff present was Karen Garst, George Riemer, Jeff Sapiro (10:15 a.m. – 11:30 a.m.), Rod Wegener, and Teresa Wenzel. Present from the PLF was Louis Santiago 11:20 a.m. – 11:30 p.m. Also present was Christine Meadows, Oregon New Lawyers Division (12:30 a.m. - 2:00 p.m.).

**1. Closed Session Agenda**

- A. Reinstatements (Judicial proceeding pursuant to ORS 192.690(1) – separate packet)
- B. Litigation and Advice of Counsel (Executive Session pursuant to ORS 192.660(1)(f) and (h) - separate packet)

**2. Report of Officers**

A. Report of the President

- 1. Meeting with Chief Justice Carson on August 11, 2005

Ms. Cook discussed the recent meeting with the Chief Justice. The Oregon Judicial Department received only a 2% reduction in its budget proposal and the legislature authorized four new judges. The Chief Justice accepted an invitation to address the House of Delegates. He would like judges to be involved in the bar's discussion of judicial performance evaluations. Also discussed were *de novo* review of disciplinary cases and the possible replacement of that review with a *certiorari* process.

2. Preparation for HOD Meeting

a. Regional HOD Meetings

There will be regional HOD meetings per the schedule that follows:

Out-of-State	September 19	9:00 a.m.	Conference call
Region 6	September 20	9:00 a.m.	Garrett Hemann et al 1011 Commercial NE #210 Salem, OR
Region 2	September 20	12:00 p.m.	Gaydos Churnside & Balthrop PC 440 E. Broadway, Suite 300 Eugene, OR
Region 4	September 21	9:00 a.m.	Location to be determined
Region 5	September 21	12:00 p.m.	Sussman Shank LLP 1000 S.W. Broadway Suite 1400 Portland, OR
Region 1	September 22	12:00 p.m.	Carol Skerjanec 280 A St. E Vale, OR
Region 3	September 23	12:00 p.m.	Brophy Mills et al 201 W. Main Suite 5 Medford, OR

3. Judge Rosenblum's Investiture

Ms. Cook spoke at a recent CLE and Judge Ellen Rosenblum's investiture.

4. Convocation at University of Oregon

Gerry Gaydos, Ira Zarov, and Ms. Cook addressed a convocation for first year students at the University of Oregon Law School.

5. Clatsop County Bar Visit

Mr. Hilton will speak in Ms. Cook's place at the Clatsop County Bar Association meeting on August 22, 2005.

B. Report of the President-elect

1. November Retreat

Mr. Rawlinson reported on the upcoming board retreat that will be facilitated by Ron Sarazin at Salishan Lodge.

C. Report of the Executive Director

1. Miscellaneous

Ms. Garst directed the board to her written report in the agenda.

D. Oregon New Lawyers Division

Ms. Meadows updated the board on recent activities of ONLD including a high school mentoring program; CLE programs; planning for the ABA Spring 2006 Young Lawyers Division Conference in Portland; and YLD activities at the recent ABA annual meeting.

**3. Professional Liability Fund**

A. Update

Mr. Santiago gave an update on the PLF. He indicated claims drive expenses in terms of severity and frequency. Each new claim is booked at \$17,000 for 2005. This figure is determined by an actuary each year. 2005 frequency is favorable compared to the budget. Severity analysis is available for 2003 and it was worse than budgeted, but 2004 claim severity was less than expected. Investment returns for the first half of 2005 have not been good; some improvement has been seen for the second half of 2005.

B. Report on PLF Defense Panel Training

The PLF had a conference for defense counsel and Mr. Santiago complimented the BOG liaisons on attending the dinner.

C. Fiscal report

In terms of financial statements, Mr. Santiago explained there is a net income of \$570,000 as far in 2005. Revenue is lagging because of investment returns;

however, expenses are down because of positive claims experience. The excess program shows a net loss, which is primarily driven by investment returns.

The PLF Board of Directors feels because of the lower claims frequency, the information received from the actuaries regarding severity, and the positive income statement, it is likely the assessment will not increase in 2006 and thus will stay at \$3,000. At last year's discussion with the Board of Governors there was a request to study alternatives to another assessment increase. PLF staff and board members reviewed a number of alternatives including administrative costs, deductibles, repairs, defense counsel costs, step-rated assessments, costs of other services including OAAP and Law Practice Management Program, etc. Because the primary program is mandatory, there is no option to deny handling claims. The PLF board believes the OAAP and the Law Practice Management Program are crucial to the PLF's efforts. Repair work also keeps down claims costs. Underwriting was also examined. There are attorneys with multiple claims, but the PLF board believes the shared risk pool is better policy. Various groups assert they have fewer claims and therefore should pay lower assessments. There is a reduction for new Oregon lawyers at various rates for three years. There is some thought being given to scaling this program back because lawyers who have experience in other states receive a reduced assessment when the program was intended for brand new lawyers. The 4% contingency in the 2006 budget is also being examined. It has only been used once. This item may be scaled back in 2006. They have planned to allocate 5% to the pool for salary increases for staff in 2006.

Mr. Yugler suggested examining the excess program to see if it could be used by more lawyers. Mr. Santiago said there has been growth in firms using the program. Other carriers are in this market. Mr. Santiago answered Mr. Enbom's question that the 5% salary pool included both cost of living increases and a merit increases. Mr. Menashe asked what it would take to reduce the PLF assessment. Mr. Santiago suggested that it would be unlikely given the financial status of the fund.

D. Approval of Changes to PLF Bylaw Article III, Relating to Removal of Directors

The PLF Board of Directors proposed a change to Article III of the PLF bylaws dealing with the removal of PLF directors. Some changes were made to the proposal that was before the BOG at its last meeting.

**Motion:** Mr. Enbom move, Ms. Worcester seconded, and the board unanimously approved the proposed changes to PLF Bylaw Article III.

#### 4. Rules and Ethics Opinions

##### A. Legal Ethics Opinion

###### 1. Re-issue OSB Formal Ethics Opinions 1991-1 through 2004-175

Mr. Riemer presented information on the project to revise the bar's formal ethics opinions in light of the adoption of the new Rules of Professional Conduct. Sylvia Stevens, Senior Assistant General Counsel, assisted the Legal Ethics Committee on this project and made the necessary changes and produced the final document. Mr. Riemer indicated that if approved, the new opinions will be published on the OSB website and be made available for purchase. Mr. Gaydos indicated he had attended various meetings of the committee during its work on this project and extended his congratulations to the group, Ms. Stevens, and Peter Jarvis for their diligence and excellent work.

**Motion:** Mr. Yugler moved, Mr. Gaydos seconded, and the board approved the proposed changes to the bar's formal ethics opinions (yes, 12; no, 0; absent, 2 [Hilton, Menashe]).

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

##### A. Client Security Fund

###### 1. Request to Reconsider Denied Claim *Warren v. Judy* No. 02-08

Mr. Comstock introduced the recommendation of the CSF Committee to approve this claim.

Mr. Gerking said that in the previous cases, timely appeals had been filed. In this case, there was no appeal. Mr. Riemer expressed his concern that the board was giving the CSF Committee mixed signals, which should outweigh the fact there was no appeal, and the board has full discretion in these matters in any event. Ms. Skerjanec said the CSF Committee has reconsidered its prior decision and therefore no appeal of an adverse decision was technically required.

The board discussed its prior consideration of various claims against Mr. Judy. The board had previously decided to apply a "but for" test. But for the fact that Mr. Judy was a claimant's attorney, the claimant would not have loaned Mr. Judy money. The board discussed whether this claim met that test.

**Motion:** Mr. Comstock moved, Mr. Enbom seconded, and the board unanimously approved the motion to pay this claim.

2. Retain Counsel in Ohio for Two CSF Claims

Mr. Comstock introduced a proposal to retain counsel in Ohio to contest the dischargeability of a CSF judgment in bankruptcy. The anticipated cost would be approximately \$1000.00

**Motion:** Mr. Comstock moved, Mr. Gerking seconded, and the board unanimously approved the retention of Ohio counsel to contest the dischargeability of a CSF judgment in bankruptcy for a fee not to exceed \$1000.00.

B. MCLE Committee

1. MCLE Committee Denial of Credit to the Workers Compensation Section

Ms. Skerjanec introduced the appeal of a denial of MCLE credit for a seminar put on by the Workers Compensation Section. The MCLE Committee and the MCLE Administrator denied the request for the presentation by Mr. Spekman, who is a coach at Willamette University. The section originally requested Elimination of Bias credit, but is now requesting MCLE credit under the personal management provision of the rules. While the session was highly rated, the administrator said it did not fit under the rules. Last year, the section did receive credit for a stress management program. Ms. Worcester said that if this application for credit was accepted, any Tony Robbins seminar or a good sermon on Sunday could be approved. Mr. Enbom agreed with Ms. Worcester.

**Motion:** Ms. Skerjanec moved, Ms. Worcester seconded, and the board unanimously approved the motion to uphold the MCLE Committee's denial of the Workers Compensation Section's request for CLE credit.

C. Federal Practice and Procedure Committee

1. Split of the 9<sup>th</sup> Circuit Court of Appeals

Mr. Riemer introduced the topic of the committee's request that the board oppose the split of the U. S. Ninth Circuit Court of Appeals. The board has taken a position against the split in the past. The committee would like a board vote now because the process is very fluid in Congress. Mr. Rawlinson stated he was not comfortable with the position being advanced because the majority of Oregon's federal judges support a split. Mr. Yugler said taking a position on this issue

was appropriate because it involves the judiciary. The administration of this circuit is not any more difficult than other circuits. The split of the circuit appears to be driven by dissatisfaction with decisions of the court. Ms. Eyerman said the committee has already taken a position and if the board does not support the committee, it would be overruling.

**Motion:** Mr. Yugler moved, Mr. Comstock seconded, and the board approved the motion to oppose the split of 9<sup>th</sup> Circuit (yes, 13; no, 1 [Rawlinson]).

## 6. BOG Committees, Special Committees, Task Forces and Study Groups

### A. Access to Justice Committee

#### 1. Change to Legal Services Program Standards and Guidelines – Presumptive Funding Limit

Ms. Eyerman introduced the proposal of raising the presumptive funding limit found in the Legal Services Program Standards and Guidelines. This deals with the filing fee money, which is distributed to the legal services programs. This year, for the first time, the fees raised more than the limit of presumptive funding contained in the guidelines. Any amount over the presumptive funding would require grants to be submitted. The increase in filing fees in 2003 did not encompass the presumptive funding level discussed in the 1997 legislative session. The Access to Justice Committee opposed the Legal Services Committee's first proposal eliminating the language entirely. Instead, the proposal raises it to a specific amount calculated on the 1997 and 2003 fees. The new level would be \$5.1 million.

**Motion:** The board unanimously approved the committee motion to approve the proposed changes to the standards and guidelines.

#### 2. Loan Repayment Assistance Program Report

The Access to Justice Committee discussed its progress in forming a Loan Repayment Assistance Program (LRAP). The committee desires to expand the definition of access to justice to go beyond civil legal services. The idea of an LRAP for lawyers working in public interest law whether civil or criminal was discussed. The committee heard from representatives of Oregon's three law schools, Senator Kate Brown, and others. The consensus of the committee was to start an LRAP. The issue of stable funding is included in the bar fee proposal approved by the board. The committee has several models for forming the program.

The average debt load for a graduating law student is \$75,000 to \$85,000. A specific proposal will be available in November.

B. Budget and Finance Committee

1. 2006 Executive Summary Budget

The preliminary 2006 Executive Summary Budget was included in the board agenda for informational purposes only.

2. 2006 Member Fee Resolution

The Budget and Finance Committee proposed a \$50 general fee increase for 2006. The factors included a five-year span since 2001 when the fees were last increased by \$50; increased PERS costs militate against waiting until 2007 or 2008 for an increase; and the current deficit in the 2005 budget. The fee would be set at \$50 so another increase would not be necessary for several years. It appears the PLF will not ask for an assessment increase for 2006. Fee increases have been below the CPI and the rate of increase in the membership. The staff increase of 5% over ten years will not be able to be maintained. The 2006 budget includes engaging an actuary to rebut the calculation of the unfunded liability assessment imposed by the state's Department of Administrative Services regarding the bar's cost of the bonding required to pay for PERS debt. Mr. Menashe indicated \$5 of the increase would be dedicated to starting to fund the Loan Repayment Assessment Program (LRAP). He also stated cutting staff and expenses to cover the projected 2006 budget were not feasible. The board will not propose a \$70 fee for Online CLE Publications. In 2006, there will be a proposal to continue the Affirmative Action Program. Ms. Eyerman stated the Access to Justice Committee envisioned the LRAP proposal to build an endowment. Mr. Yugler suggested that the budget contain a \$5 allocation for LRAP until the next fee increase.

**Motion:** The board unanimously approved the committee's recommendation to increase active membership fees for 2006 by \$50 over 2005.

3. Future Bar Center

Mr. Hilton introduced information regarding future bar facilities. He stated the existing building is nearing the end of its service life for the Oregon State Bar. There are only two empty offices with doors on them and they have no windows. It will be hard to attract qualified people to the bar with this situation. At this time, Kruse Way properties are in demand. The bar might have a better chance of selling



the existing property in the near future. The Budget and Finance Committee has visited several buildings. He referred to an exhibit that outlined various criteria for three of the properties visited: Dawson Creek in Hillsboro, 315 SW 5<sup>th</sup> in downtown Portland, and a proposal for a new building in Tigard. The consensus of the committee is to stay at about the same place on I-5.

Because of a recent meeting with Opus Northwest regarding a new building in Tigard, the committee wanted to discuss that option with the full board. The development could be two buildings or one 122,000 square foot building. Opus would be willing to “master lease” one half or so of the larger building. The location and parking are excellent. If something is designed to meet our needs, we will have better use of the same square footage we have now especially in regard to meeting rooms. Mr. Menashe attended the meeting with Opus along with Bette Worcester, Rod Wegener, and Karen Garst. He said that because Opus is a design-build firm, there is no finger pointing between architects and contractors.

The committee has worked on assessing the value of various criteria: location, cost, flexibility, etc. Mr. Menashe explained the advantages of pursuing the full building proposed by Opus Northwest in Tigard. It will be a three-story building. The bar could net about \$7 million from its existing building. Additional funds are available up to about \$500,000 from the mortgage pre-payment fund and possibly the capital improvement fund. This location would work for the PLF because the building would not just be for the bar and the PLF. In other words, there would be multiple tenants. The bar would take 35,000 square feet and with the PLF, the total would be about 60,000 square feet.

The master lease with Opus would secure about an \$18 per square foot price net. \$1.4 million income would be generated for at least ten years from the Opus agreement. The final financial picture would be a net income to the bar versus what the bar is paying currently. In 25 years, the building would be paid for and additional revenue would still be coming in.

The committee would like authorization from the board so the committee can pursue its due diligence regarding this proposal prior to the September 30 board meeting when a letter of intent would need to be approved. The building is located in a high demand area near the new Bridgeport Village. Another advantage is the length of time this proposal would take, which would allow more time for selling our building. PLF would also have time to sublease its space for the

remainder of its lease. Mr. Menashe assured Mr. Santiago the board wants to involve the PLF board at the outset. There is a possibility for co-ownership by PLF. While there will be some members who would oppose this move that concern also existed with the purchase of the existing building, which has substantially increased in value.

Mr. Hilton said the risk of doing nothing is there will not be land in a good location available near I-5 at a future date. Mr. Menashe indicated, after doing a lot of work in reviewing this issue, the existing building could not be feasibly remodeled. Mr. Gaydos expressed confidence in Opus Northwest as they are working on a project in Eugene. Mr. Wegener expressed that the partnership with Opus was crucial to a future facility. Mr. Hilton said the existing building cannot be remodeled for many reasons, but one includes coming into compliance with current parking regulations that would probably not be allowed. This also may affect the sale of the current building.

Mr. Enbom asked how much maintenance costs would need to be expended in the short term. Mr. Wegener said the roof and the HVAC are scheduled to be replaced in two to three years.

Board members expressed their support for going forward with this project with due diligence being done prior to a final decision on September 30, 2005. Mr. Hill wanted to know more about operational costs in the future and any indication the PLF is interested. Mr. Wegener responded that information would be studied prior to the next meeting. Mr. Menashe felt the PLF would be more interested in this proposal than any other the committee has discussed with the PLF, but discussions would need to occur soon. Mr. Santiago felt the PLF board would be willing to discuss this property. Mr. Menashe expressed his interest in discussing an equity position for the PLF. Mr. Yugler expressed his support for the idea. He also pointed out that the \$500,000 the PLF spends on its current lease gains them no equity. Ms. Eyerman expressed her sticker shock of \$20 million in new debt for the proposal given the last proposal made for the Dawson Creek building.

**Motion:** The committee motion to move forward with the consideration of this proposal for further action by the board on September 30, 2005 was unanimously approved.

C. Committee on the Judiciary

1. Proposed revision of Bar Bylaw 2.703 – Statewide Judicial Appointments

Mr. Hill introduced Bar Bylaw 2.703 regarding statewide judicial appointments. On page 154, section 2, line 6, it should read “the Board of Governors’ Committee on the Judiciary.” This is the policy that has been used in the recent appointment to the Court of Appeals, but the committee wanted some time to consider how the process works prior to finalizing the bylaw. The Governor’s Office indicated they would like some written information along with the meeting that the committee chair and vice-chair had with the staff. Mr. Riemer drafted a template for the board’s review. The committee will add to this template upon completion of its review process concerning a particular appointment.

**Motion:** Mr. Comstock moved, Mr. Enbom seconded, and the board unanimously approved the motion to waive the one-meeting notice requirement pursuant to Article 26 of the Bar Bylaws.

**Motion:** The committee motion to amend Bar Bylaw 2.703, including changes to Section 2, line 6, was unanimously approved.

D. Member Services Committee

1. OSB Leadership College

Ms. Cook introduced the committee’s recommendation to establish a new Oregon State Bar Leadership College for 2006. The goals of the college are to recruit, train, and retain emerging leaders for the legal community and the Oregon State Bar. The committee would like to start with staggered three-year terms for the college board.

**Motion:** The board unanimously approved the committee motion to approve the establishment of an OSB Leadership College as proposed by the Member Services Committee.

2. Online CLE Publications

Ms. Cook stated this issue has been studied extensively in 2005 including a survey of members in which there was a low voter turnout. The possibility of a subscription service has also been explored. The committee is recommending a HOD resolution to create a subscription service. Ms. Eyerman stated the beauty of the previous

proposal was to keep the cost low for solo practitioners so they could have what the large law firms have. Now they will have to pay more. Ms. Cook said the cost would still be the cost of two or three books. The Eastern Oregon tour revealed a subscription service would still be viable. Ms. Skerjanec said the board would be ignoring the membership vote if it moved forward with a subscription proposal. Mr. Hill disagreed because this is not a black and white issue. You have to interpret the vote that consisted of only 10% of the membership. 40% who are opposed is substantial. The board needs to stand back and look again at the proposal. Mr. Rawlinson indicated that while he had not had a chance to read the proposed resolution, the House of Delegates did ask for a study and the board has produced a resolution in response thereto. He was concerned that having active members who do not practice law opt out of active dues entirely because of their unwillingness to pay an additional \$70.00 for this service will adversely affect the bar financially. Ms. Eyerman said the board needs to anticipate reaction from the House of Delegates. It is a bit disingenuous to say that the change in the proposal is not because of the large firms. Ms. Worcester said there is a difference between active members paying for a \$50 increase for operations and \$70 for CLE publications online. Mr. Enbom stated that because of the low turnout, the advisory vote is not valid. Mr. Yugler said licensing based on bundling and subscription software are items everyone is getting used to seeing.

**Motion:** The board approved the committee motion to present a resolution to the 2005 House of Delegates regarding subscription/licensing for Online CLE Publications (yes, 13; no, 1 [Skerjanec]). Mr. Yugler will present the resolution to the House of Delegates.

3. Tent Show

Mr. Rawlinson updated the board on the Tent Show, which will be held November 4, 2005. The Supreme Court will not participate this year, but the Court of Appeals will. Table recruiting has begun in the Portland area. There is a letter coming to each board member regarding recruitment of attendees, table purchasers, and judges. All judges will be given complimentary tickets to the event.

E. Policy and Governance Committee

1. Past-president on Board of Governors

Mr. Comstock introduced the committee motion to allow past-presidents to serve as ex-officio members of the Board of Governors for the year following their presidency. 33 states have some policy utilizing the additional year of service of the past-president. To allow the past-president to vote would require a statutory change. The service of the past-president on the board would allow the board to benefit from this person's experience. The procedure would be optional for Ms. Cook and Mr. Rawlinson.

**Motion:** Mr. Gaydos moved, Mr. Enbom seconded, and the board unanimously approved the motion to waive the one-meeting notice requirement pursuant to Article 26 of the Bar Bylaws.

Mr. Rawlinson noted the e-mail correspondence from Bill Carter, past-president, arguing against the change. Mr. Carter preferred not to appear before the board on this topic over the phone or in-person. He said ex-presidents were available for consultation to the new president and would dilute the authority of the president. It would also have a tendency to dampen innovation and new ideas. Mr. Williamson had expressed to Mr. Rawlinson his opposition to the proposal as well. He said the board process is not broken; therefore, it does not need this fix. He concurred with the points made by Mr. Carter: support from past-presidents is always available; it may hinder someone from serving if they had to do five years, and it would make the BOG a board run by committee.

Mr. Hill served as a CEO of a board having non-voting advisory members. He said it was dysfunctional. The role of past-president is not functional. Ms. Eyerman thought it was a good idea from her experience with the Oregon Trial Lawyers Association. She said it brings continuity to the organization. Once someone is no longer president, they disappear and their ideas are dropped. However, not having the past-president vote seems unfair. Mr. Yugler said his experience with OTLA was similar to Ms. Eyerman's. Also, giving the past-president a vote should be considered when the statute is changed the next time around. Ms. Cook appreciated the option of whether she would serve and the proposal would add having the past-president as a resource for not just the president, but the entire board. Mr. Menashe expressed his opposition to the current proposal even though he initially brought the idea forward. Ms. Worcester is concerned there

are other changes to the structure of the bar that would be preferable. Mr. Enbom spoke to Mr. Carter and he believes the proposal should not be a trial balloon. He thinks the person should have a right to vote.

**Motion:** The committee motion to include the past-president on the board in an ex-officio, non-voting capacity failed (yes, 5 [Comstock, Cook, Eyerman, Gaydos, Worcester], no, 9 [Enbom, Fabien, Gerking, Hill, Hilton, Menashe, Rawlinson, Skerjanec, and Yugler]).

2. Changes to Oregon Rules of Professional Conduct Regarding IOLTA

Mr. Comstock introduced the proposal to changes the rules as recommended by the Oregon Law Foundation board and OSB staff.

**Motion:** The committee motion to formulate the proposed changes to RPC 1.15-1 to 1.15-2 for presentation to the OSB House of Delegates and Oregon Supreme Court was unanimously approved.

3. Disciplinary Sanctions on Bar's Website

Mr. Comstock indicated the proposal would place reprimands, suspensions, and disbarments on the bar's website within the membership directory. Ms. Garst pointed out that while MCLE and financial suspension records will not be maintained on the site, a lawyer's status in such cases would be indicated "Suspended – Administrative." Mr. Gerking asked if there was a time limit to listings; the answer was when a member is deceased. Mr. Yugler asked if the disciplinary record could be a link; not actually listed under each member's name. The board agreed with that modification.

**Motion:** The board unanimously approved the committee motion to put disciplinary sanctions on the bar's website with the proviso that the disciplinary sanctions are a link rather than appearing every time a record is called up.

4. Non-discrimination for MCLE Accreditation

The committee voted unanimously, following a complaint by the ACLU about a seminar requiring an oath stating each attendant would agree with the concept of the Triune God, to recommend that the board adopt proposed MCLE Rule 5.1(f). The committee discussed, but voted not to rescind any MCLE credits for a seminar that had already been approved. The ACLU sent a letter requesting consideration of an enforcement mechanism. The committee rejected that idea for the time being. Mr. Comstock said the issue had only arisen once since the inception of the MCLE program and an

enforcement mechanism is premature. The language regarding applicable state and federal law was intended to allow the military, as an example, to restrict attendance at its programs to military personnel.

**Motion:** The board unanimously approved the committee motion to adopt MCLE Rule 5.1(f) as set forth on page 196 of the board's agenda.

5. Military Ads in the Bulletin

Mr. Comstock indicated the committee had reversed its recommendation to consider at this time a change to Article 10 until further study is done. The study will be completed and a final decision made at the September 30, 2005 board meeting. One of the issues proposed to be studied further involves whether a Bona Fide Occupational Qualification is or is not lawful discrimination. Ms. Cook said she opposed postponing consideration of the proposal. She said the board needed to make a decision on this issue now. Mr. Yugler concurred. He believes there are other ways to amend the bylaw.

**Motion:** Mr. Hilton moved, Mr. Gaydos seconded, and the board passed a motion to waive the one- meeting notice requirement pursuant to Article 26 of the Bar Bylaws so that the proposed amendment of Article 10 could be considered at this meeting (yes, 13; no, 1 [Comstock]).

The committee felt the motion as presented was a compromise to allow the military to advertise in the *Bar Bulletin*. There is a statutory requirement that Oregon JAG officers be members of the Oregon State Bar and the bar should allow employment ads in the *Bulletin* for these positions under the circumstances. Mr. Riemer submitted a memo to the board stating the proposed amendment might violate Article I, Section 20 of the Oregon State Constitution to the extent the bar would be allowing one type of employer to discriminate against homosexuals in employment while precluding other employers from doing the same. He thought the board should consider exempting bona fide occupational qualifications from the scope of the bylaw, if the board wished to recognize the military's "Don't Ask, Don't Tell" policy and allow similar "BFOQs" for other employers. Mr. Comstock felt the language of the exception granted the military needed to be broader. Ms. Cook stated she was the one "no" vote in the committee against the proposed language. She said the proposal would "gut" the bar's diversity policy that has been in place for 15 years. She noted Mr. Riemer's legal opinion that indicated the adoption of the proposed amendment could expose the bar to litigation. In addition, Ms. Garst's memo outlines the history of the original language. Ms. Cook also

noted that there were two HOD resolutions that would rescind the change the committee has presented to the board. She felt the board needed to be a leader and oppose this proposal now. In addition, the Statement of Professionalism says lawyers should avoid all forms of discrimination. Ms. Skerjanec read a statement into the record (enclosed with these minutes). She apologized to Mr. Yugler for not supporting the position he previously took in this matter. She decided not to speak to a newspaper about this issue because she wanted to support the board. She said she supported the gay and lesbian members of the bar, but believed the bar should let the military advertise. The mission of the bar is to respect the rule of law. We were being asked not to respect the rule of law because we did not agree with it. Diversity includes everyone including the military's policy regarding "Don't Ask, Don't Tell" and women in combat zones. The bar should not impede the military in advertising. Ms. Fabien said that if individuals had not personally been told they could not do something because of who they were, she was not sure they would know how discrimination really feels. So many times in the course of history, it was legal to discriminate. There are some things that are right and some things that are not right. She said she had been treated differently because of things she could not change. She was in the military and she saw first hand how the military treated those who some "suspected" of being gay or lesbian. They continue to do that to this day. It is appalling. She does not believe the policy should be changed because the military has the law on its side. Mr. Yugler indicated he was disappointed the committee voted out an amendment that it did not support.

**Motion:** Mr. Yugler moved, Mr. Rawlinson seconded, to strike the proposed change and instead insert, " , except as permitted by state or federal law." at the end of the last sentence of Article 10. The motion failed (yes, 4 [Hill, Skerjanec, Yugler, Comstock]; no, 10 [Cook, Enbom, Eyerman, Fabien, Gaydos, Gerking, Hilton, Menashe, Rawlinson, and Worcester])

Mr. Yugler said if the bar were voluntary, he would vote differently. The military policy used to prohibit gays in the military. This policy is different. He felt his language would have allowed BFOQs. Mr. Hilton opposed Mr. Yugler's proposal because discrimination against gays and lesbians is, in most cases, lawful. The bar's policy against discrimination based on sexual orientation would be void. That is why keeping the language regarding the military is preferable if the board felt some change to the bylaw had to be made.



Mr. Yugler said the state law requires mandatory retirement for judges; however, that is an exception to discrimination. Ms. Cook said the military policy does not apply to the bar. Mr. Riemer stated governmental entities could have a higher standard than what is in state or federal law. Mr. Gaydos said he appreciated the comments of others. The issue of the rule of law is troubling for him. There are many people whom the bar has not heard from. There will be legislators who will say the bar is not supporting the military. As officers of the court, lawyers are expected to uphold existing laws. Mr. Riemer said this is the board's bylaw; the board can create its own standard. Beyond the requirements of state and federal law, the board can determine the scope of its nondiscrimination policy. Mr. Hilton said the worst policy would be to give the military leave to violate the policy selectively. Ms. Eyerman said she opposes the change because if you make exceptions to a policy, where do you close the door? If we do not want to protect people based on sexual orientation that item should be deleted. Mr. Comstock said the original problem was whether the bar should print an ad by the military. The proposed language addresses that issue. It also includes the military in the debate. It is like a secondary boycott. If someone wants to submit a counter ad, they could point out the issue. He prefers the committee's language. Mr. Gerking said he believes the policy should not be changed. The bar has set a higher standard that has been in effect for 15 years. The vast majority of our members are proud of this policy and we have never had a problem with it until now. He agrees with Ms. Eyerman. Once exceptions are made, the bar will go down a slippery slope.

**Motion:** The committee motion to adopt the language as it appears on page 198 of the agenda failed (yes, 3 [Skerjanec, Yugler, Comstock]; no, 11 [Cook, Enbom, Eyerman, Fabien, Gaydos, Gerking, Hill, Hilton, Menashe, Rawlinson, and Worcester]).

F. Public Affairs Committee

1. General political update

Mr. Gaydos stated the Legislature created four new judgeships and the budget for the Oregon Judicial Department and the Public Defense Services Commission received only a two percent reduction. However, there were no salary increases for judges. Twenty of the bar's twenty-five bills passed including several section bills that were very contentious. The staff did a great job during the session. The Public Affairs Department and the CLE Seminars Department are putting together a day of CLEs regarding 2005 legislation just prior to the

HOD meeting. Mr. Gaydos also mentioned that the CLE Publications Department put forth an excellent effort in preparing together the *Legislation Highlights* book that will to be included in the program materials for the legislative update CLE seminar. Mr. Comstock also submitted comments to the Secretary of State's Office regarding the ballot title for Measure 41 on judicial districts.

G. Public Member Selection Committee

1. Selection of BOG Public Member Finalists for Interviews

Mr. Enbom reported on the committee's review of the applications for public member for the board. Eight people will be interviewed in early September. The committee may ask for a budget to place ads for solicitation of public members.

H. HOD Agenda

1. 2006 Fee Resolution

a. Approve the 2006 Fee Resolution for the HOD Agenda

The board approved the 2006 fee resolution to include a \$50 general fee increase for 2006. (See Budget and Finance Committee in these minutes for more information)

2. 2005 HOD Agenda

a. Approve the agenda for the 2005 HOD Annual Meeting

The board reviewed the resolutions received by 5:00 p.m., August 17, 2005. It adopted the following agenda.

The following are the resolutions that will appear in the 2005 House of Delegates Agenda. The individuals presenting each resolution are also listed:

Fee Resolution

1. 2006 Fee Resolution – Frank Hilton, BOG

Items with Financial Impact

1. MCLE Programs by Local Bar Associations – Danny Lang, HOD

2. Teleconferencing for CLEs – Diane Henkels, HOD

3. Paper Use – Diane Henkels, HOD

Items with Legislative Implications

1. Independent Contractors under ORS 657.040 – Danny Lang, HOD

Other Resolutions

1. In Memoriam – Tim Gerking, BOG
2. Changes to ORPC 1.15-1 and 1.15-2, Mark Comstock, BOG
3. Appreciation to Legislators – Gerry Gaydos, BOG
4. Resolution to Offer Online CLE by Subscription Service – Rick Yugler, BOG
5. Request to UTCR Committee Regarding Rule 7A - Danny Lang, HOD
6. Request to UTCR Committee to Generate Form Pleadings - Danny Lang, HOD
7. Support for Low-Income Legal Services – Sid Lezak, HOD
8. Rescinds Changes Regarding Military Ads – Jon Hummel, HOD (will likely be withdrawn)
9. Rescinds any Changes to Article 10 of the Oregon State Bar Bylaws – Mark Johnson, HOD (will likely be withdrawn)
10. Amends MCLE Rules to Delete Elimination of Bias Requirement – Gary Georgeff, HOD
11. Calls for Membership Vote on Elimination of Bias Requirement in MCLE Rules – Gary Georgeff, HOD

7. *Paulson v. Carter et al.* (U.S. District Court)

**Action:** Mr. Riemer indicated that before the board considered Lauren Paulson’s proposed resolution, he needed to make a conflict disclosure to the board and get direction as to how it wished to proceed regarding the receipt of legal advice from him or other counsel regarding issues and proposals made by Mr. Paulson. Mr. Riemer read a disclosure statement to the board (enclosed with the minutes) and indicated he wished to step out of the room to give the board an opportunity to discuss his disclosure statement and how it wished to proceed.

The board discussed Mr. Riemer's disclosure and unanimously approved authorizing Mr. Riemer to provide the bar with counsel and advice concerning issues and proposals raised by Riemer indicated his desire to disclose his involvement (see attached memo from Mr. Riemer) in *Paulson v. Carter, et al.* Mr. Riemer is one of the defendants and has been bar counsel in the matter in the past. Mr. Riemer asked the board again to make its wishes known concerning his representation of the bar in this matter. The board unanimously agreed it wants Mr. Riemer to continue representing the bar and indicated it feels he is doing an excellent job. Mr. Paulson notwithstanding that Mr. Paulson is suing Mr. Riemer and others in federal court. Ms. Cook and Mr. Rawlinson abstained from voting Riemer updated the board on this matter.

Mr. Riemer returned to the room and was advised the board had authorized him to continue to provide the bar with counsel and advice regarding issues and proposals raised by Mr. Paulson.

The board thereafter went into case in executive session to discuss Mr. Paulson's resolution with Mr. Riemer as general counsel to the bar and in light of the possibility of litigation regarding its decision to include or exclude Mr. Paulson's resolution from the 2005 HOD meeting agenda and to discuss the possibility of litigation regarding Mr. Paulson's allegation of financial self-dealing by Ms. Garst. The board discussed these matters in executive session.

Ms. Cook closed the executive session and the board went back into open session. After discussion, the board unanimously voted not to place Mr. Paulson's resolution on the HOD agenda as Mr. Paulson is suspended from the Board of Governors pursuant to Bar Bylaw 18.600 and is therefore without authority to submit a resolution to the HOD as a member of the Board of Governors (and ex-officio member of the House of Delegates). Ms. Cook and Mr. Rawlinson abstained from voting on this matter.

The board also discussed Mr. Paulson's allegation of financial self-dealing by Ms. Garst. The board by consensus agreed that it should vigorously defend Ms. Garst if this allegation is brought up at the 2005 House of Delegates meeting. Ms. Cook, Mr. Yugler, Ms. Eyerman, and Mr. Menashe volunteered to serve as a special committee to prepare an appropriate response on behalf of the board in defense of Ms. Garst should this allegation be brought before the House of Delegates in October.

## 8. Consent Agenda

**Motion:** Mr. Hill moved, Mr. Enbom seconded, and the board unanimously approved the motion to waive the one-meeting notice requirement pursuant to Article

26 of the Bar Bylaws so as to approve the proposed changes to the bar's bylaws in the consent agenda.

**Motion:** Mr. Hill moved, Ms. Fabien seconded, and the board unanimously approved the motion to approve the Consent Agenda.

**9. Default Agenda**

Ms. Worcester noted her mailing address included in the update to the Board of Governors Handbook should be 2435 Dillow Dr., West Linn, OR 97068. Ms. Wenzel reminded Ms. Worcester that if she changed her mailing address to her home address that address will appear in the bar's database as well as on the bar's website and will be available to the public. Mr. Worcester indicated she understood that.

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

Ms. Cook thanked the board and staff for a productive meeting and for discussing a number of important and in some cases controversial issues in a very respectful, thoughtful, and professional manner.