

Oregon State Bar
Meeting of the Board of Governors
April 20-21, 2007
Open Session Minutes

The meeting was called to order by President Albert Menashe on Friday, April 20, 2007, at 1:40 p.m. at Columbia Edgewater Country Club in Portland. The meeting adjourned at 4:20 p.m.; the board reconvened at 9:00 a.m. on Saturday, April 21, 2007, at the OSB Center in Lake Oswego. Present from the Board of Governors were Robert Vieira (Friday), Gerry Gaydos, Linda Eyeran (Friday), Jon Hill, Robert Newell, Kathleen Evans, Albert Menashe, Tim Gerking, Marva Fabien, Ward Greene, Ann Fisher, Rick Yugler (Friday), Bette Worcester, Robert Lehner (in person on Friday and by phone on Saturday), and Carol Skerjanec. Staff members present were Karen Garst, Sylvia Stevens, Jeff Sapiro (Saturday), Rod Wegener, Susan Grabe, and Teresa Wenzel. Others present were Ronald Bryant, Marilyn Harbur, The Honorable Adrienne Nelson, Tom Cave, all on Friday only, and Paul Levy on Saturday only.

1. Work Session - Jail4Judges Initiative from South Dakota

Mr. Yugler made a presentation on the South Dakota Bar's successful response to the Jail4Judges initiative, which would have eliminated judicial immunity for judges and others, including jurors. Although there was support from 54% of polled voters initially, the South Dakota Bar's educational efforts turned voter sentiment around and the measure failed with an 89% no vote. The bar raised and spent \$1.2 million on the campaign. Freedom Works, the sponsor of the initiative, appears to want to try in Oregon, and it is expected they will limit the measure to judicial immunity only. Mr. Yugler impressed upon the board the need for early action. South Dakota had nearly one full year to educate its voters; in Oregon, the initiative process moves much more quickly and the board will need to monitor initiative filings. The board agreed that the Public Affairs Committee should explore ways to begin an educational outreach program now.

2. Report of Officers

A. Report of the President

1. Meeting with Chief Justice Paul R. De Muniz

Mr. Menashe explained the impact of the Ways & Means Co-Chairs' budget, which provides no increase for judicial salaries. The Chief appreciates the bar's support on this issue; Mr. Menashe believes it has enhanced the bar's relationship with the Court and with the judiciary.

2. Results of Board Member Survey

Most board members are supportive of having more time to discuss issues. Board members will be asked for feedback after each meeting.

3. Other Matters

Mr. Menashe mentioned the various events he attended since the last board meeting, which are listed in the agenda. He also asked board members to use their

influence and that of their firms to encourage the larger banks to increase the IOLTA interest rates. Mr. Newell agreed to spearhead the project and communicate with other large firms. Mr. Greene offered to help and to see if they can get the 25 largest Portland firms to cooperate. Judith Baker will contact Mr. Newell and Mr. Greene.

Mr. Menashe also mentioned the state of Oregon courthouses; he is concerned that unless the state takes ownership of the buildings, it will be difficult to get new buildings or to improve existing ones sufficiently. At the same time, there is no question but that courthouses are very important to the communities in rural Oregon and there would likely be opposition to turning them over to the state. The bar needs to be creative in working on this issue.

On the issue of courthouse security: Mr. Menashe raised the issue of lawyers gaining access through their bar cards. Here too there is local opposition to interference with security issues and it may take some time before all courthouses accept the bar's offer of card-swipe technology. In the meantime, Mr. Menashe has asked the bar to begin the process by issuing new cards with the six-digit bar number that will work in a card-swipe system.

Mr. Menashe also asked the board members for their views on changing our bar admission process to allow graduates of Oregon law schools admission without testing. There is considerable evidence and belief that the MBE is not an effective tool for evaluating the fitness and capability of applicants. Ms. Worcester said from the public's point of view some competency testing should be retained. Board members agreed the question was interesting and should be pursued by a joint group consisting of law school, court, and BBX representatives. The consensus was to review the issue with the Chief Justice before going further.

B. Report of the President-elect

1. OSB Lobby Day

Mr. Yugler thanked Susan Grabe for her contribution to the success of the event. He was able to meet with the Chief Justice and legislative leaders to press the bar's position on issues.

2. Bar Leadership Institute

Several programs dealt with issues faced by the OSB, including how to encourage volunteer participation and communicate with the younger generations of lawyers. Mr. Yugler pointed out that 30% of OSB members have been practicing for 10 years or less and we need to find out how they want to participate in OSB activities.

He made a presentation about our Leadership College and noted we are among the first to do such a program.

3. 2008 Planning

Mr. Yugler asked board members to think in advance of the November retreat about how the new bar center can be used to connect with members. He is thinking of a series of open houses for judges, new lawyers, and other defined groups consisting of a short program followed by a tour of the building and a social event.

C. Report of the Executive Director

1. 2006 Program Measures

Ms. Garst gave a presentation summarizing the activities and accomplishments of the various bar programs in 2006. She explained that “branding” of bar communications is moving forward. She also explained the process for scanning and destroying discipline files.

2. Other

Ms. Garst reported on the ground-breaking for the new building on the coldest day of the year and read the poem Ms. Worcester wrote in commemoration of the event. Ms. Garst noted that the New York bar is exploring the issue of designating lawyers as specialists. She also reminded the board she serves on the Budget Committee for Clackamas Community College and that its new building is costing \$35 per square foot more than the new bar center.

3. Board Members’ Reports

Ms. Eyerman invited board members and their families to her Arch Cape home on Saturday after the June BOG meeting. She suggested booking soon for a room in the area and asked everyone to RSVP to Teresa Wenzel.

Mr. Hill thanked the board for subsidizing his attendance at the Western States Bar Conference and encouraged all board members to attend. He also offered to contact the Roseburg newspaper about putting in an announcement for public members.

Ms. Fisher noted that lots of questions concerning bar governance are posted on the Region 4 list serve and she perceives that many members in the region are suspicious and cynical. She does her best to respond to all inquiries and thanked the staff for giving her the information to do so.

Mr. Newell reported that he had attended meetings of all his assigned groups except the Aviation Section.

Ms. Evans has met with all of her assigned committees and sections. She noted that the Taxation and Elder Law Sections use their list serves to good effect.

Ms. Fabien reported that the law school is trying to develop an appropriate response to the US News’ dropping Willamette Law School to the fourth tier. There is concern that the ranking criteria are not measuring the right things.

Mr. Gerking completed his calls to the Region 2 HOD members to encourage them to contribute to the Campaign for Equal Justice, in compliance with the HOD resolution for 100% participation.

All but two members were receptive to his request. He also attended ABA Law Day in Washington, D.C. with Mr. Menashe and Ms. Grabe, where they supported increased funding for legal services, judicial salaries, and federal loan repayment assistance.

Mr. Lehner attended a meeting of the Criminal Law Section Executive Committee. He also wrote a letter to the Ways & Means Co-chairs in his capacity as Eugene Police Chief supporting additional funding for indigent defense services.

Mr. Vieira has been busy with legislative matters involving his employer but has maintained contact with his assigned committees and sections and is well-informed of their issues and activities.

Mr. Greene reported on his attendance at a local “talk to your legislator” event. While he was not able to speak formally, he did talk to some of the Ways & Means Committee members individually to encourage them to put money back in the judicial budget. The judges in attendance appeared to appreciate his efforts. Mr. Greene also mentioned recent interaction with some new lawyers and his pleasure at their enthusiasm and excitement about being lawyers.

Ms. Worcester reported she is enjoying her assignment as liaison to the PLF Board. She will try to meet with her assigned committee, but so far has had scheduling conflicts.

Ms. Skerjanec attended the Eastern Oregon Ways & Means Committee meeting and was able to testify and urge increased funding for judicial salaries. She finds the Elder Law Section meeting fascinating and mentioned the section’s active use of the list serve.

Mr. Gaydos mentioned that Mark Clark was being sworn in as a judge in Lane County today. Mr. Gaydos also testified at Ways & Means and believes it had some impact. He also commended Ms. Grabe’s work, noting that she enjoys respect at the state and federal level, which enhances the bar’s credibility at Law Day and in our lobbying efforts.

Mr. Menashe mentioned that there are eight new judges in Multnomah County so far this year. Nena Cook was standing in for him at Judge Stuart and Judge Walker’s investiture because of the BOG meeting conflict.

4. Special Appearances

A. ABA Delegates Report on the 2007 Midyear Meeting

The Honorable Adrienne Nelson and Marilyn Harbur reported. The meeting highlight was approval of the revised ABA Model Code of Judicial Conduct and the debate over retaining the prohibition against conduct that has the appearance of impropriety. Judge Rosenblum was very involved in the development of the Code revisions and presented Canon 3 to the House. Other successful resolutions were support for defense against attacks on the judiciary and for representation of unpopular clients; asking Congress to increase federal judicial pay; aid to military lawyers and military families; promotion of terrorism insurance; endorsing “apology” legislation for malpractice; limiting the collateral consequences of a criminal conviction; and providing legal services after natural disasters.

Issues to be considered at the annual meeting in August include civil trial standards and bankruptcy legislation. Ms. Harbur reported that this year's ABA president's initiatives are: rule of law with international emphasis; youth at risk; the "Second Season of Service" that develops ways for senior lawyer to pass on their experience and stay involved; recruitment of solos into the ABA; tax simplification; and attorney-client privilege.

Ms. Harbur indicated that the ABA is expected to issue a statement regarding Attorney General Gonzales. Ms. Harbur and Judge Nelson also noted that Katherine O'Neil has been appointed the Oregon delegate to the ABA Board of Governors. Sharon Stevens continues on the Board. Judge Nelson also explained the process for selection of the ABA president. Both delegates encouraged board members to bring to their attention any issues that would be appropriate for the ABA.

B. Oregon New Lawyers Division

Ms. Garst indicated that Mr. Newton's wife was having their baby and he was unable to attend the meeting. She said that the New Lawyers Division Executive Committee met on Saturday, April 14. ONLD is in the process of re-branding itself by evaluating its mission and core programs and identifying a unifying concept to market it to its members and the community. In May, they are going to Bend where they will host a CLE program, a new lawyers social, participate in a team-building event at the Pole Pedal Paddle while hosting a public service display booth distributing free legal information.

5. Professional Liability Fund

A. General Report

Ron Bryant is the PLF liaison to the BOG for 2007. He reported that claims and claim expense are down for the first two months of 2007, but claim severity is up some and the number of covered parties is increasing by 1-2% each year. The primary program enjoyed a good first quarter. The practice management group visited 94 lawyer offices and the OAAP assessed a greater number of lawyers than in the past. There is increasing competition for the excess program and the PLF is looking at ways to maintain its market share. The 2006 audit was clean and copies of the report have been mailed to all BOG members. Investments are doing well.

B. Report on PLF 2007 Projects

Major focuses for 2007 will be migrating to electronic storage and a paperless office; succession planning for senior staff; and containment of defense costs.

6. Rules and Ethics Opinions

A. Proposed New Formal Ethics Opinion

Paul Levy, chair of the Legal Ethics Committee, presented the proposed opinion on excessive indigent defense caseloads to the board. He explained that he believes the opinion responds to the HOD resolution because it adopts the reasoning of ABA Formal Op. 06-411; the committee also followed the HOD directive to consider the ethical issues

surrounding the letting of contracts to overburdened public defenders. Mr. Levy explained that the committee discussed that issue at length and ultimately concluded that the law was unclear and the committee believed it was not appropriate to guess at those issues in a formal opinion.

In response to questions, Mr. Levy indicated that he does not believe the opinion says anything remarkable, merely applies existing regulation to a specific practice area. At the same time, he believes the opinion provides some guidance to indigent defense practitioners.

Questions from the board included: does this opinion add anything to our existing regulatory framework? Should it clarify the process for following the chain of command in different practice settings? Will the opinion have any effect on ineffective assistance of counsel claims? What impact will the opinion have on the lawyers doing the work? What if they can't get relief from their supervisors? Will this opinion generate more complaints against busy defense lawyers? Will it reduce the number of people willing to do indigent defense? Does the requirement to complain to one's supervisor mandate insubordination and put the lawyer at risk of termination? Can we really require lawyers to withdraw without permission? How does that help the client?

Action: Ms. Fisher moved, Ms. Worcester seconded, and the board voted unanimously to send the proposed opinion back to the committee for further consideration.

B. Request to Supreme Court re: ORPC 5.5

Ms. Stevens explained that the Supreme Court order adopting the Oregon Rules of Professional Conduct effective 1/1/05 included an automatic repeal of Rule 5.5 unless the Court orders otherwise by 12/31/07. Informal discussions with the Chief Justice indicate that the Court is prepared to enter an order permanently adopting Rule 5.5 at the Board's request.

Action: Mr. Newell moved, Mr. Gerking seconded, and the board voted unanimously that Ms. Stevens should request that the Supreme Court permanently adopt Rule 5.5.

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

A. Budget and Finance Committee

1. New Bar Center

Mr. Greene updated the board on developments. The sale of the existing building is going forward; the buyer has put money in escrow and a lease is being negotiated. OPUS continues to move quickly and anticipates occupancy in early 2008.

2. Report of Ad Hoc Committee on Bar Grants

Mr. Gaydos reported on the ad hoc subcommittee's discussion of the bar making grants to the Classroom Law Project and the Campaign for Equal Justice. Its consensus was that the OSB is not a grant-making organization. However, the work of those two groups is closely related to and advances the mission of the bar, so it makes sense to offer some financial assistance when possible. The Budget & Finance Committee adopted the recommendation of the ad hoc committee.

Action: On motion of the Budget & Finance Committee, the board unanimously approved the adoption of a policy covering how and to whom the bar will provide financial assistance to programs that advance the bar's mission and requested that a bylaw be drafted for consideration by the Policy & Governance Committee. The bylaw should be broad enough to allow for organizations other than the CLP and CEJ, but make should be clear that the bar will not entertain grant applications. The bylaw also needs to be clear that funding is at the sole discretion of the BOG and can be withdrawn if a group ceases to function consistently with the bar's mission.

B. Member Services Committee

1. 2007 Economic Survey

Mr. Yugler indicated that a subcommittee has been formed to guide the work of this survey. Ms. Fabien is chairing this subcommittee. Several bar entities will be involved in the development of the survey.

2. HOD 2007 Recruitment Status

Mr. Yugler indicated that many potential HOD candidates had been contacted. Some indicated they would run if they were not opposed. There are a few vacancies and they will be filled by appointment.

C. Policy and Governance Committee

1. Discipline Information on the Bar's Website

Mr. Gerking explained the committee's recommendation to amend Bylaws 6.2 and 8.101 to clarify the authority for putting discipline information on the OSB website. The authority exists now, but this will make it explicit.

Action: Mr. Gaydos moved, Mr. Newell seconded, and the board voted unanimously to waive the one-meeting notice for a bylaw change.

Action: On the committee's motion, the board unanimously approved the changes to Bylaws 6.2 and 8.101.

2. Creation of a Nominating Committee

Mr. Gerking reminded the board that it had reviewed a proposed bylaw change in February that would create a nominating committee for electing board officers. Based on the board's discussion at that time, the committee made some changes to the proposal to address concerns about disenfranchisement of members not on the nominating committee; having a process to challenge the nominating committee's candidate; and how to resolve a deadlock on the nominating committee. The committee recommends deleting the word "other" in paragraph (b), but otherwise recommends the revised proposal contained in the agenda.

During the ensuing discussion, the following points were made in opposition to the motion: the 4th year class will be choosing the candidate rather than the people who will work under the candidate; the revised bylaw requires talking to other members but doesn't explicitly require taking their concerns into consideration; the process that has been used in the past works and doesn't need changing just to make it less personally painful for candidates; this approach underestimates the ability of the board to select the right leader; this process could still result in having two candidates with very different philosophies; there will still be contested elections unless the board accepts the committee nomination, so this isn't going to really change anything.

Comments in favor of the proposal included: the new process will serve the organization better because it is more deliberative; no one is disenfranchised because there can be an optional second candidate; just because the existing process works doesn't mean it can't be improved; this is more civilized than requiring the unsuccessful candidates spend the rest of the day acting as if nothing happened; this will require more direct communication with potential candidates; fosters consensus building but won't eliminate campaigning.

Action: On motion of the committee, the board voted 13-2 to adopt the bylaw revisions to create a nominating committee. (yes, 13 [Fabien, Vieira, Gaydos, Hill, Newell, Evans, Menashe, Gerking, Greene, Yugler, Worcester, Lehner, Skerjanec; no, 2 [Eyerman, Fisher]; absent, 1 [Wright]).

D. MCLE Regulation Regarding Presenter Credits

Mr. Gerking presented the MCLE Committee's request for a new regulation clarifying that speakers in multi-person panels get teaching credit based only on their actual speaking time multiplied by 2 or 4 depending upon whether written materials are produced as part of the presentation. Some board members wondered whether full credit was more fair, since all speakers on a panel spend the same amount of time before the audience and often need to be available to respond to questions.

Action: On the committee's motion, the board voted unanimously to adopt the MCLE regulation proposed.

1. Military Ads in the *Bulletin*

Mr. Gerking explained the staff's suggestions for amending Bylaws 10 and 11.2, which the committee approved after deleting the phrase "or solicitation from employment" from Bylaw 10. One member asked whether the change would allow the military to place discriminatory ads for purposes other than employment. Mr. Gerking responded that the committee's reason for deleting that language was so that the bylaw change closely mirrored the membership vote.

Action: On the committee's motion, the board voted unanimously to amend Bylaws 10 and 11.2 to allow military ads in the bar publications.

E. Public Affairs Committee

1. Political Update

Mr. Gaydos reported that the committee is taking a cautious but aggressive approach to supporting increases in judicial salaries, consistent with the bar's partnership with the judiciary. Oregon's judicial salaries are now at 50th in the nation and the Ways & Means budget is \$7 million short of current levels. At the same time, the PAC wants to be sure to support the entire judicial system, including court facilities. Committee representatives have been sent to Ways & Means meetings and are also writing letters (and encouraging others to do so) to legislators and local newspapers. Ms. Eyerman pointed out that the bar's strategy has changed slightly in response to some legislators' refusal to support 30% salary increases for anyone. Our approach is broader, including support for money for the judicial system as a whole and the Chief Justice understands the bar's position. This multi-prong approach is serving the judiciary and the bar well.

The courthouse facilities issue is doing reasonably well; a commission will examine the status of each courthouse, determine necessary expenditures, and establish priorities. Funding for the commission remains a problem. The idea that

lawyers should fund courthouse facilities through a dues “surcharge” seems to have died. Mark Comstock testified last week on technology initiatives. The next budget hearing is April 26.

Ms. Grabe reported that a compromise bill on attorney-client privilege in public records has passed the Senate and is on its way to the House. Senator Burdick expects one proposal for an amendment, but is not certain it has any support. The Oregonian editorial was helpful.

Ms. Grabe also reported on last week’s hearing on HB 2886, which would mandate cultural competency training as part of the MCLE requirement and require lawyers to provide unbiased and effective representation to all clients. It is not clear that the bill will have any further hearings. Judge Adrienne Nelson has promised to write to Representatives Shields and Merkley to help them see that the bill is not necessary.

Mr. Gaydos indicated that the Constitutional Law Section suggested that the bar should support the civil union bill, but the committee concluded it was outside the activities permitted by *Keller*.

It is expected that the session will end on June 29.

2. Creation of Post Conviction Relief Task Force

Ms. Eyerman introduced the Oregon Public Defense Services Commission’s request that the BOG create a task force to develop standards for post-conviction relief cases, similar to those developed previously for criminal trial counsel and juvenile representation. There is concern in the defense community and courts about the competency in post-conviction relief practice. Mr. Gaydos indicated there would be no direct financial impact on the bar, since the task force would be composed of volunteers and staffed by the Public Affairs Department.

Action: On the committee’s motion, the board voted unanimously to establish the Task Force on Post-Conviction Relief Standards. Appointments will be made at a later time.

3. Oregon State Bar Public Policy Activities

Mr. Gaydos reviewed how the PAC has moved from a traditionally restrained approach to being slightly more active politically. While still moving cautiously, the PAC has developed a template for analyzing issues as they arise, which will ensure a deliberative process so that decisions are more likely to be acceptable to a majority of the bar. There is no budgetary impact. The committee decided to delete the word “partisan” from two places in the template included in the agenda packet.

Action: On motion of the committee, the board voted unanimously to approve the template.

8. Consent Agenda

The minutes of the February 23-24, 2007 meeting were amended at paragraph 5.B.3 to reflect that the president was authorized to sign a commitment letter for \$13,500,000.

Action: Mr. Gaydos moved, Mr. Gerking seconded, and the board voted unanimously to waive the one-meeting notice to adopt the amendment to Bylaw 16.302.

Action: Mr. Gaydos moved, Mr. Gerking seconded, and the board voted unanimously to adopt the consent agenda items as amended.

9. Default Agenda

The board was encouraged to review the items which appear on the Default Agenda.

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

Ms. Stevens indicated that the Legal Ethics Committee expects to present its recommendation for a formal opinion on trial publicity for the board to consider in June and it is likely to be a difficult one. Mr. Newell suggested the new proposed opinion be circulated to the board as far in advance of the meeting as possible.