

Regulations Affecting Board Members

Members of the Board of Governors (“governors”) are subject to a variety of statutes and regulations that affect eligibility to serve, limit participation in other activities, define conflicts of interest, and provide for indemnification and defense of claims:

Structure of the OSB

ORS 9.010(1) provides that the OSB is a “public corporation and an instrumentality of the Judicial Department of the government of the State of Oregon.” The statute lists several specific statutes applicable to public bodies to which the OSB is subject. Except as provided in ORS 9.010(3), however, the bar is not subject to any statute applicable to a state agency, department, board or commission or public body unless the statute expressly provides that it is applicable to the Oregon State Bar. In general, then, OSB employees are not public employees and members of the Board of Governors are not public officials.

Eligibility

A lawyer governor is disqualified from service and the governor’s term ends automatically upon the governor’s termination of active membership in the bar; change in principal office from the region the governor was elected to represent; or assumption of office as a judge of municipal, state, or federal court or other full-time judicial office. (ORS 9.025(5).)

Governors are subject to recall on petition of 25% of the members in the governor’s region or by 2/3 vote of the Board of Governors. If, after receiving notice of the recall request, the governor does not resign, the question will be decided by majority vote of the members voting in the governor’s region. (ORS 9.050.)

Governors are ineligible to serve as pro tem judges of any municipal, state or federal court. (ORS 9.025(6).)

A governor is suspended from service upon the SPRB’s approval of formal disciplinary charges and remains suspended until the charges have been resolved. If the governor is suspended as a result of the charges, the governor’s ineligibility to serve continues until the governor is reinstated to active practice. The BOG may appoint a replacement after consultation with members of the suspended governor’s region. (OSB Bylaw 18.6.)

Limits on Other Activities

Governors may participate publicly in judicial election and appointment campaigns, but must do so in a way that does not identify them as members of the board, officers of the bar, or otherwise representing the Oregon State Bar. (OSB Bylaw 2.103.)

Governors may not testify as witnesses in any admission, disciplinary, or reinstatement proceeding, except pursuant to subpoena. (OSB Bylaw 2.603.)

No governor may prosecute or defend a PLF-covered claim, but a governor may serve as a mediator in PLF claim matters. This disqualification is not applicable to other lawyers in the governor's firm, provided the governor is screened in the manner set forth in OSB Bylaw 23.503.

Governors are not eligible to serve as counsel for the accused in disciplinary proceedings or for applicants in contested admission proceedings during their terms or in connection with any case that was investigated or authorized for prosecution during the governor's term. (BR 2.1(c) and (d).) This disqualification does not apply to other lawyers in the governor's firm provided the governor is screened in the manner set forth in BR 2.1(f).

Governors may not serve on the Disciplinary Board during their terms, and may not sit on a trial panel relating to any matter considered by the board during the governors term. This disqualification applies to all of the lawyers in a governor's firm. (BR 2.4(d)(2).)

Conflicts of Interest

Governors are subject to certain provisions of ORS Chapter 244, the Government Standards and Practices Act. Similar rules are found in OSB Bylaw 2.600 to 2.602. Under both regulations, the following is prohibited:

- Using or attempting to use the governor's official position to obtain any financial gain or the avoidance of any financial detriment not otherwise available to the governor but for the governor's holding the official position. (This does not apply to reimbursement of expenses for official activities or unsolicited awards for professional achievement.)
- Attempting to further the governor's personal gain through the use of confidential information gained by reason of an official activity or position.
- Soliciting or receiving, during any calendar year, a gift or gifts having an aggregate value of more than \$50 from a single source reasonably known to have an interest in any matter over which the governor has authority or responsibility.
- Soliciting or receiving a promise of future employment based on an understanding that any official action will be influenced by the promise.

For purposes of ORS Chapter 244 and Bylaw 2.600:

- A "potential conflict of interest" means that the governor, a relative of the governor, or a business with which the governor or the governor's relative is associated could derive a private pecuniary benefit or detriment as a result of the governor's action.

- An “actual conflict of interest” means that the governor, a relative of the governor, or a business with which the governor or the governor’s relative is associated will derive a private pecuniary benefit or detriment as a result of the governor’s action.

When faced with a potential conflict of interest, governors must declare publicly the nature of the conflict before taking any official action thereon. When faced with an actual conflict of interest, governors must declare publicly the nature of the conflict and may not participate in any discussion or vote on the issue; provided, however, that if the governor’s vote is needed to meet a requirement for a minimum number of votes, the governor may vote but may not participate in discussion of the matter.

The disclosure of a potential or actual conflict of interest will be recorded in the minutes with an explanation of how it was resolved.

Indemnity and Defense of Claims

The Oregon Tort Claims Act, to which the bar is subject by virtue of ORS 9.010, limits the liability of the bar and requires the bar to defend and indemnify governors for tort claims relating to the performance of the governor’s official duties. Indemnification and defense of tort claims is also provided by OSB Bylaw 2.106.

Governors are absolutely immune from any civil liability in the performance of their duties relative to proposed or pending admission, reinstatement, or disciplinary proceedings. (ORS 9.537(2).)

The bar will defend current or former governors against any complaint of professional misconduct arising out of an act or omission in the performance of the governor’s official duties, except in cases of malfeasance, gross negligence, or willful or wanton neglect of duty. (OSB Bylaw 2.107.)

Speaking for the Bar

The OSB President is the official spokesperson for the bar. If the appearance or statement of another governor is deemed necessary, prior approval must be obtained from the President. Any statements made must be informational in nature and may not indicate personal opinion or positions not considered or adopted by the board.

Guidelines for Political Activity

Unlike state agencies, the OSB is not limited by ORS 260.432, which prohibits the state from using public employees to support or oppose candidates or measures while on the job during working hours. (OSB employees are not “public employees.”) The OSB is also not prohibited from using its financial resources to support a candidates or measures. Historically, however, in an abundance of caution, the bar has limited its involvement in partisan political issues to stating a position for or against, but not going any further in support or opposition.

The application of ORS 294.100 is less clear. That statute makes public officials personally liable for “expend[ing] any money in excess of the amounts, or for any other

or different purpose than provided by law.” It is part of a chapter entitled “County and Municipal Financial Administration,” and the handful of cases interpreting it involve county or other local governments or districts. The Attorney General has historically pointed to ORS 294.100 as a possible basis for personal liability of all public officials, even those holding state offices, although when pressed, the Attorney General’s office admits it has no authority for that position.

As a general proposition, members of the Board of Governors are not “public officials;” only where the bar is subject to a statute otherwise applicable to public officials do BOG members have the same rights or responsibilities. It is also significant then that ORS 294.100 is not one of the statutes to which the bar is subject pursuant to ORS 9.010, nor is the bar mentioned anywhere in Chapter 294. (Note, too, that ORS 294.100 is designed to prevent unauthorized and illegal expenditures by local governments. Assuming it applied to the BOG, liability would attach only if a board member or employee spent bar funds without authorization and for a purpose unrelated to the bar’s statutory mandate.)

Assuming no statutory impediment to political activity, the bar must still comply with *Keller v. State Bar of California*,¹ which prohibits the use of mandatory dues to endorse or advance political or ideological positions not closely related to the purpose for which the bar was formed. Pursuant to ORS 9.080(1), the BOG is charged with directing its power to “the advancement of the science of jurisprudence² and the improvement of the administration of justice.” (A more exhaustive explanation of the “Keller” rule is appended to the orientation materials.)

Guidance about political activity is also found in Bylaw 12.1:

Bar legislative or policy activities must be reasonably related to any of the following subjects: Regulating and disciplining lawyers; improving the functioning of the courts including issues of judicial independence, fairness, efficacy and efficiency; making legal services available to society; regulating lawyer trust accounts; the education, ethics, competence, integrity and regulation of the legal profession; providing law improvement assistance to elected and appointed government officials; issues involving the structure and organization of federal, state and local courts in or affecting Oregon; issues involving the rules of practice, procedure and evidence in federal, state or local courts in or affecting Oregon; or issues involving the duties and functions of judges and lawyers in federal, state and local courts in or affecting Oregon.

Prior to the adoption of Bylaw 12.1, the bar’s guidelines for legislative and policy activities were in *former* BOG Policy 11.800 which included a requirement that the bar “endeavor to respect the divergent opinions of subgroups within the profession” and make reasonable effort to “avoid committing bar funds to issues which are divisive or result in creating factions within the profession.” It is not clear why that language was

¹ 496 US 1 (1990).

² Webster’s Dictionary defines jurisprudence as “the philosophy of law or the formal science of law.”

deleted; even without such a specific directive, however, the BOG can always consider that factor when deciding whether and how to address a political issue.

A final consideration regarding participation in partisan political activity is preservation of the bar's long-standing reputation as a source of reliable and credible information on the issues. Some of this comes, of course, from the bar's historical reluctance to do anything more than take a position on issues affecting the practice of law or the administration of justice, and to limit our expenditures to educational forums and other neutral information. Nevertheless, the bar is doubtless viewed by many citizens as an organization whose function is to help people understand the law and the implications of initiatives and legislative proposals, without attempting to influence votes. On the other hand, many of our members see the bar as the perfect advocate on issues that are likely to impair the administration of justice and the legal profession. Striking the right balance will depend upon the facts and circumstances at the time.

Finally, the BOG establishes its legislative and other priorities from time to time, and makes appropriate budget allotments based on those priorities. Requests that the bar engage in advocacy for political issues that arise between budgeting and priority-setting periods need to be considered in connection with the impact the activity will have on the budget and the ability to meet other priorities.

Given the foregoing legal and policy framework, the PAC considers the following factors in determining what, if any, role the bar should play in connection with specific measure or other political initiatives:

1. Is the subject matter related to the bar's purpose of advancing the science of jurisprudence and improving the administration of justice (i.e., does it comply with *Keller*)?
2. What is the significance of the possible outcomes on the practice of law in Oregon or access to justice in Oregon? Should the OSB limit its activities to those that are critical or at least of high importance?
3. Is the issue one about which our members are likely to have strongly divided views? Can the bar act in a way that is sensitive to both views?
4. What effect will the bar's taking a partisan position have on the bar's credibility? Can the bar have a meaningful impact by remaining more neutral, or at least by offering balanced information to explain the partisan position?
5. Does the issue fit into existing priorities? If not, is the issue sufficiently important to justify adjusting existing priorities?
6. What kind of expenditures will be required? How will they be funded? Will the bar ask members to contribute to the cause? Are the resources available? How will the bar's position be publicized? How can the efforts of individual board members be distinguished from those of the bar?

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