

Oregon State Bar

LEGAL ETHICS COMMITTEE HANDBOOK

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GENERAL INFORMATION AND PROCEDURES

I. INTRODUCTION

The Oregon State Bar Legal Ethics Committee (“LEC”) consists of ten to sixteen volunteer members appointed by the Oregon State Bar Board of Governors (“BOG”) to consider, study and resolve ethics issues presented to the LEC. Typically, this consists of drafting formal ethics opinions (“Formal Opinions”), proposing changes in the Oregon Rules of Professional Conduct (“ORCP” or “Disciplinary Rules”), and participating in or providing recommendations on various task force proposals that involve the Disciplinary Rules.

The Oregon State Bar General Counsel’s Office provides staff liaison support to the LEC and performs various administrative functions including maintaining files, preparing and distributing meeting agenda packets, serving as a resource to the LEC, and performing follow-up for the LEC’s projects. The General Counsel’s Office may also assist in editing the LEC’s proposed Formal Opinions and other LEC projects. Minutes of LEC meetings are prepared by the LEC’s Secretary.

The Oregon State Bar began publishing Formal Opinions in 1936 and by August 1990 had issued and published 533 Formal Opinions in the Professional Responsibility Manual. In 1991, the Board of Governors withdrew those Formal Opinions and issued a volume containing 129 “new” Formal Opinions numbered 1991-1, et seq. In the years following, several new Formal Opinions were issued each year. In 2005, the BOG re-issued Formal Opinions 1991-1 through 2004-175 to conform to the Disciplinary Rules that went into effect on January 1, 2005. The revised Formal Opinions were given the leading number 2005-1, et seq. Through of February 21, 2015, there have been 189 Formal Opinions issued (although two have been superseded and two withdrawn). They are available on the Oregon State Bar’s website and in the Oregon State Bar’s FORMAL ETHICS OPINIONS publication.

II. LEC CHARGE

The BOG has developed the following charge for the LEC:

General:

1. Provide input, analysis and evaluation of the LEC program to the BOG.
2. Make recommendations to the BOG regarding how the program can be improved.
3. Serve as volunteers for LEC program elements.

Specific Program Outcomes:

1. Provide timely responses to inquiries.
2. Prepare Formal Opinions as appropriate for BOG approval.
3. Study and recommend changes to the Disciplinary Rules, based on issues considered by the LEC, or as directed by the BOG.

4. Review existing Formal Opinions in light of the subsequent changes to the Disciplinary Rules.
5. Solicit nominations for the Oregon State Bar's Award of Merit, President's Public Service Award, Membership Service Award, Affirmative Action Awards, and Joint Bench Bar Professionalism Award, as well as any other state, local and national awards for lawyers who make a contribution to serving the legal needs of Oregonians.

III. LEC FORMAL OPINIONS

A. Submission to General Counsel; LEC-Generated Formal Opinions. Any member of the Oregon State Bar who desires a Formal Opinion on whether specific prospective conduct conforms to the Disciplinary Rules must submit a request to the General Counsel's Office in writing. If there is existing authority on point, General Counsel's Office will answer the inquiry in the form of a direct Advice Letter; otherwise, the inquiry will be forwarded by the General Counsel's Office to the LEC. The LEC may generate its own topics for a Formal Opinion based on matters of interest to LEC members, on the suggestion of General Counsel's Office, or on the request of the BOG.

B. Submission to the LEC; Assignment. Inquiries submitted to the LEC may, at the option of the inquirer, be done anonymously, with all references to the inquirer's name and other identifying information redacted from the inquiry. The General Counsel's Office will open a file and acknowledge receipt of the inquiry. The inquiry will be discussed briefly at the next LEC meeting, where one or more interested LEC members will be assigned to the Project.

C. Preparation of Draft Response. The assigned LEC member will research the issue presented and prepare a draft response for the LEC to review. If anonymity has been requested by the inquirer, any contact with the inquirer to get additional information is handled by the General Counsel's Office. Responses generally are in the form of a draft Formal Opinion (using the "Facts, Questions, Conclusions, Discussion" format); but occasionally an early submission will be in the form of an informal memorandum.

D. LEC Review of Draft Formal Opinions. Draft informal memoranda or Formal Opinions for the LEC to consider are distributed by the General Counsel's Office with the LEC meeting Agenda two weeks in advance of the next LEC meeting. LEC members are expected to prepare for each LEC meeting by reading the Agenda and accompanying materials, and to be ready to discuss them at the LEC meeting. Most draft Formal Opinions are revised at least once after the LEC's initial discussion. Development of a Formal Opinion is designed to be a collaborative effort and LEC members are expected to contribute their candid views as the draft Formal Opinion develops. LEC members are encouraged to offer editorial suggestions in writing in advance of the next LEC meeting, and to provide of substantive comments at the LEC meeting itself.

E. Form of Response. The LEC can provide its response to an inquiry by: recommending the General Counsel's Office prepare an Advice Letter to the inquirer, or preparing a proposed Formal Opinion,¹ depending upon the importance of the issue to the Oregon State Bar as a

¹ The LEC previously issued "informal opinions"; but the practice was discontinued in the late 1990's based on the LEC's conclusion that informal opinions were of limited value (since they were not distributed to anyone other than the inquirer). Responses of that nature are now handled by the General Counsel Office's direct Advice Letters.

whole, the novelty or complexity of the issue or issues involved, and other considerations (see, Guidelines for Formal Opinions). All Formal Opinions drafted by the LEC are subject to the BOG's approval.

1. *Advice Letter.* If the LEC recommends an Advice Letter, the General Counsel's Office will prepare the Advice Letter and send it to the inquirer. Advice Letters are retained for several years in a "Direct Advice Notebook" maintained by the General Counsel's Office. Advice Letters are not distributed to the Oregon State Bar membership; but may be sent to a subsequent inquirer who raises the same issue.
2. *Formal Opinion.* If the LEC pursues a Formal Opinion, a copy of LEC's final proposed Formal Opinion is sent to the BOG. The General Counsel's Office will prepare a memorandum to the BOG, summarizing the proposed Formal Opinion, and explaining the LEC's analysis and conclusions, including any minority view expressed within the LEC. The BOG may: approve the proposed Formal Opinion; send a proposed Formal Opinion back to the LEC for further study or revision; ask that the proposed Formal Opinion be circulated to interested bar groups or bar-related groups for comment; or direct that no Formal Opinion be issued in the matter.
3. *No Response.* Infrequently, the General Counsel's Office or the LEC decide not to respond to a particular inquiry if it is determined there is adequate available authority on the issue, or if it is determined that the inquiry does not raise issues of legal ethics or professional responsibility. This decision is relayed to the inquirer by the General Counsel's Office.
4. *Disclaimer.* Whether the response is an Advice Letter or a Formal Opinion, the inquirer is reminded that the Advice Letter or Formal Opinion is advisory and not the official position of the Oregon State Bar. Reliance on an Advice Letter or Formal Opinion does not insulate a lawyer from possible disciplinary action, although Oregon RPC 8.5 permits reliance on a Formal Opinion to be considered in mitigation and as evidence of the lawyer's good faith effort to comply with the Disciplinary Rules.

F. Publication of Formal Opinions. When the BOG approves a Formal Opinion, it is then reviewed and edited by the Oregon State Bar CLE Publications staff for conformity to the standard opinion style. It is then made available on the Oregon State Bar's web site and in the OREGON STATE BAR FORMAL ETHICS OPINIONS publication.

IV. LEC MEETINGS AND PROCEDURES.

A. Meeting Schedule. The LEC meets other month on a schedule that is set at the first LEC meeting of the year. Meetings are held on Saturdays beginning at 9:30 a.m. and last for approximately two hours, depending upon the Agenda. In conformity with Oregon State Bar policy, some of the meetings are scheduled to be held outside the Portland metropolitan area, generally in the office of one of the LEC's Members, in Salem, in Central Oregon (Bend), or Southern Oregon (Medford), or on the Oregon Coast.

B. Meeting Notice. LEC members receive email LEC meeting notices from the General Counsel's Office three weeks prior to scheduled LEC meetings, with instructions on how to inform the LEC's Secretary whether they will attend (in person or by telephone). Members' replies should *not* be sent to the General Counsel's Office.

C. Agenda Material. Three weeks prior to scheduled LEC meetings, LEC members receive a Meeting Notice from the General Counsel's Office, asking each LEC member to confirm their anticipated attendance at the meeting, and reminding them of the following week's deadline for submission of their informal memoranda, draft Formal Opinions, and other materials for consideration at the meeting. LEC members submit their materials to the General Counsel's Office no later than 5:00 p.m. on the following Thursday. One to two weeks prior to the scheduled LEC meeting, LEC members receive a Meeting Agenda for the LEC meeting from the General Counsel's Office, accompanied by the materials to be reviewed by LEC members for discussion at the LEC meeting. The Meeting Agenda and accompanying materials are distributed via email in PDF format. If LEC members have submissions for the LEC's consideration that were not submitted by the Thursday deadline, LEC members themselves email copies of the submissions directly to the all LEC members and the General Counsel's Office prior to the LEC meeting, as well as bring hard copies to the LEC meeting.

D. Attendance. OSB Bylaw 14.9 requires a quorum for conducting LEC business. Even where no final decision is made during an LEC meeting, it is important to have as many LEC members present (either in person or by telephone) as possible to participate in discussions, since the LEC's Formal Opinions can have widespread and long- term effects. The LEC depends on the regular attendance and meaningful contributions of its members in order to be efficient and to maintain the quality of its work product. Personal attendance is encouraged, but members who are unable to attend a meeting in person may attend by telephone. A toll-free call-in number is included in the Agenda; members are responsible to call in at the appointed time. In the event an LEC member does not regularly attend or make meaningful contributions to the LEC and its work, it is expected that the member will resign from the LEC so that a new member of the Oregon State Bar can be appointed to fulfill the requirements of being an LEC member.

E. MCLE Ethics Credits. Members of the LEC are entitled to two ethics credits for each twelve months of service on the LEC (6 credits for a full three-year term). LEC Members can also apply for research and writing credits for Formal Opinions they author or co-author. The forms for claiming the credits (MCLE Forms 4 and 5) can be downloaded from the Oregon State Bar web site (in the Forms Directory), or can be obtained from the Oregon State Bar MCLE staff.



GUIDELINES FOR FORMAL OPINIONS

The LEC responds to inquiries for members of the Oregon State Bar by requesting that the General Counsel Office's issue an Advice Letter, or by issuing a Formal Opinion. Formal Opinions must be approved by the BOG. The following guidelines were developed to determine the appropriate form of response in various situations.

Advice Letters

The LEC may respond to inquiries from members of the Oregon State Bar, if appropriate, by requesting that the General Counsel's Office issue an Advice Letter in the following circumstances:

1. Where existing Formal Opinions, informal opinions or Disciplinary Rules already squarely answer the issue raised by the inquiry.
2. Where LEC members share a concern about the ethical implications of the conduct that is the subject of the inquiry; but there is no consensus as to the analytical framework for a response.
3. Where LEC members reach a consensus as to the appropriate conclusion, but disagree on the policy and decide to recommend a Disciplinary Rule change to address the issue(s) raised by the inquiry.

Formal Opinions

The LEC may respond to inquiries from members of the Oregon State Bar, if appropriate, by preparing and submitting a proposed Formal Opinion to the BOG for approval when any of the following criteria are met:

1. The issues presented are of substantial significance to the Oregon State Bar membership as a whole.
2. The proposed Formal Opinion modifies, distinguishes or overrules the position taken by the LEC in a previously-issued Formal Opinion.
3. The issue presented in the Formal Opinion raise questions of first impression, not addressed in any substantial manner in a previously-issued Formal Opinion.
4. Substantive changes in either the law or the Disciplinary Rules affect the applicability or accuracy of a previously-issued Formal Opinion.
5. There is a need to clarify or rectify inconsistencies that may exist in a previously-issued Formal Opinion.
6. The BOG or the Oregon State Bar membership has requested, commissioned, or instructed the LEC to study a particular area of ethics for the purpose of reporting back on the subject.



OSB BYLAWS

Article 19 Legal Ethics Questions and Opinions

Section 19.1 General Counsel's Office

19.100 Submission and Questions

All legal ethics questions from members or the public regarding the propriety of a course or act of professional conduct or the intent or interpretation of a rule or statute regulating the professional conduct of members of the Bar must be submitted or referred to General Counsel's office. Legal ethics questions may be submitted in writing by mail, e-mail, fax or by telephone.

19.101 Determination by General Counsel

General Counsel's office will determine whether the matter appears to present or involve a question of ethics or professional conduct and whether it states facts sufficient to permit the formulation of an opinion based on the facts stated. General Counsel's office may ask the inquirer to submit necessary additional facts or may advise the inquirer that no question of ethics or professional conduct is presented or involved.

19.102 Ethics Advice to Bar Members

General Counsel's office will endeavor to assist bar members in analyzing the ethics of the inquirer's prospective conduct and may provide reactions to the questions presented. Ethics questions and responses thereto are not confidential and communications with General Counsel's office are not privileged. No attorney-client relationship is intended or created by such communications with the Bar. Members submitting ethics questions must specify a deadline by which they need a response from the Bar. General Counsel's office will endeavor to meet the member's deadline, but General Counsel's office always has at least three business days after receiving a member's question to provide a written response to the member.

19.103 Application of ORPC 8.6

For ORPC 8.6 to apply to a request for ethics assistance, a member must put his or her ethics

question in writing. "In writing" includes letters, faxes or e-mails. General Counsel's office will respond in writing, by fax, e-mail or regular mail, as time allows. The Bar will retain all written ethics assistance requests and General Counsel's office responses for at least five years and those requests are public records. General Counsel's office has the discretion to decline to provide a written response, if it determines that the question should be considered by the Legal Ethics Committee due to the difficulty, complexity or novelty that the question raises or the difficulty or complexity of an appropriate response. Members must provide General Counsel's office and the Legal Ethics Committee with accurate, and as complete as possible, explanations of the facts underlying their ethics questions. General Counsel's office may ask the inquirer to submit additional or clarifying information and the timeframe for response as set forth in Subsection 19.102 of the Bar's Bylaws does not begin until General Counsel's office receives the requested information.

Section 19.2 Limitation of Advice

Responses and opinions provided by General Counsel's office, the Legal Ethics Committee and the Board of Governors are limited to and deemed to address only the facts as submitted by the inquirer.

Section 19.3 Legal Ethics Committee

19.300 Response to Inquiries

A bar member may request that a question be submitted to the Legal Ethics Committee. The chair of the Committee will assign those requests and questions submitted directly to the Committee to one or more committee members to prepare a response. Inquiries submitted to the Committee should be anonymous, insofar as possible. To preserve anonymity, if the facts are inadequate to permit the formulation of an opinion or a direct answer, General Counsel's office may ask for submission of necessary additional facts. On receipt of those additional facts, General Counsel's office will promptly submit them to the assigned member of the Committee. The Committee may, in its

discretion, write opinions on subjects that the Committee believes would be helpful to the membership, whether or not the Committee receives a specific inquiry on the subject. Such opinions will be handled in the same fashion as opinions based on specific questions.

19.301 Formal Opinion Process

The Committee will review and discuss all responses prepared by individual members and will, by majority vote, determine whether the response should be referred to the Board of Governors to be issued as a formal opinion or whether it should be issued by the Committee as a letter of direct advice to the inquirer. The Committee will establish and will periodically review guidelines for determining the appropriate form of response. Members may use formal opinions and letters of direct advice issued by the Committee in the same manner and to the same

effect under DR 1-105 as written responses from General Counsel's office. When the Committee approves an opinion and recommends formal publication, General Counsel's office will place a copy of the opinion on the Board's next meeting agenda. All dissents, comments of substance or minority opinions will also be placed on the Board's agenda. The Board will review the proposed opinion and either approve it for formal publication, refer it back to the Committee for further study or revision or direct that no opinion be issued in the matter. The Board may also distribute the opinion to the membership for comment before making a final decision. All opinions that the Board designates to be issued as formal opinions will be published in Oregon Formal Ethics Opinions (OSB 1991 & Supp.) and on the Bar's website.

(Note: Effective November 20, 2003, these bylaws replaced *former* BOG Policies.)

RESOURCES

- OREGON RULES OF PROFESSIONAL RESPONSIBILITY ANNOTATED (Oregon Law Institute 6th ed. 2010)
- THE ETHICAL OREGON LAWYER (OSB Legal Publications)
- OREGON FORMAL ETHICS OPINIONS (OSB Legal Publications)
- ABA Model Rules of Professional Conduct
- ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT
- Fastcase
- WestLaw (Ethics & Professional Responsibility Library)
- LEXIS (Ethics & Professional Responsibility Library)
- www.osbar.org
- www.law.com
- www.abanet.org