

Oregon State Bar
2014 House of Delegates Meeting

Oregon State Bar Center
16037 SW Upper Boones Ferry Road
Tigard, Oregon 97224
503.620.0222
Friday, November 7, 2014
10:00 a.m.

Oregon State Bar

Dear Oregon State Bar Member:

I am pleased to invite you to the 2014 OSB House of Delegates meeting, which will begin at **10:00 a.m.** on **Friday, November 7, 2014**, at the Oregon State Bar Center.

The preliminary agenda for the meeting includes proposed amendments to the Oregon Rules of Professional Conduct, a resolution supporting adequate funding for low-income legal services, and two delegate resolutions seeking input from the membership regarding the OSB logo and the nature of appropriate matters for HOD consideration. The agenda also includes a notice of the annual membership fees and assessments for 2015, which will remain unchanged from 2014.

All bar members are welcome and encouraged to participate in the discussion and debate of HOD agenda items, but only delegates may vote on resolutions. If you are unable to attend, please contact one of your delegates to express your views on the matters to be considered. Delegates are listed on the bar's website at www.osbar.org/docs/leadership/hod/hodroster.pdf.

If you have questions concerning the House of Delegates meeting, please contact Camille Greene, Executive Assistant, by phone at 503-431-6386, by e-mail at cgreene@osbar.org, or toll free inside Oregon at 800-452-8260 ext 386. Remember that delegates are eligible for reimbursement of round-trip mileage to and from the HOD meeting. Reimbursement is limited to 400 miles and expense reimbursement forms must be submitted within 30 days after the meeting.

I look forward to seeing you at the HOD Meeting on November 7, and I thank you in advance for your thoughtful consideration and debate of these items.

I hope you will also join us following the HOD meeting for the 2:00 p.m. unveiling of the Diversity Story Wall. Funded by the generous contributions of law firms and individual members, the Story Wall is a museum-quality informational display highlighting diversity in the legal profession in Oregon together with major milestones that have advanced diversity and access to justice in Oregon and across the U.S.



Tom Kranovich, OSB President

OREGON STATE BAR

2014 House of Delegates Meeting AGENDA

Oregon State Bar Center, 16037 SW Upper Boones Ferry Road, Tigard, Oregon 97224
10:00 a.m., Friday, November 7, 2014
Presiding Officer: Tom Kranovich, OSB President

Reports

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| <p>1. Call to Order
<i>Tom Kranovich</i>
<i>OSB President</i></p> <p>2. Adoption of Final Meeting Agenda
<i>Tom Kranovich</i>
<i>OSB President</i></p> <p>3. Report of the President
<i>Tom Kranovich</i>
<i>OSB President</i></p> | <p>4. Comments from the Chief Justice of the Oregon Supreme Court
<i>Thomas A. Balmer, Chief Justice</i>
<i>Oregon Supreme Court</i></p> <p>5. Report of the Board of Governors Budget and Finance Committee & Notice of 2015 Annual Fees
<i>Hunter B. Emerick, Chair</i>
<i>BOG Budget and Finance Committee</i></p> <p>6. Overview of Parliamentary Procedure
<i>Alice M. Bartelt, Parliamentarian</i></p> |
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Resolutions

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| <p>7. In Memoriam
(Board of Governors Resolution No. 1)
<i>Presenter:</i>
<i>Jenifer Billman, BOG, Public Member</i></p> <p>8. Amendment of Oregon Rule of Professional Conduct 8.4
(Board of Governors Resolution No. 2)
<i>Presenter:</i>
<i>Bonnie Richardson, Portland</i></p> <p>9. Amendment of Oregon Rule of Professional Conduct 5.5
(Board of Governors Resolution No. 3)
<i>Presenter:</i>
<i>Helen Hirschbiel, General Counsel</i></p> <p>10. Veterans Day Remembrance
(Board of Governors Resolution No. 4)
<i>Presenter:</i>
<i>Richard Spier, BOG, Region 5</i></p> <p>11. Amendment of Oregon Rule of Professional Conduct 1.2
(Board of Governors Resolution No. 5)
<i>Presenter:</i>
<i>Helen Hirschbiel, General Counsel</i></p> | <p>12. Support for Adequate Funding for Legal Services to Low-Income Oregonians
(Delegate Resolution No. 2)
<i>Presenters:</i>
<i>Kathleen Evans, HOD, Region 6</i>
<i>Gerry Gaydos, HOD, Region 2</i>
<i>Ed Harnden, HOD, Region 5</i></p> <p>13. Investigation Regarding Change to Oregon State Bar Logo
(Delegate Resolution No. 3)
<i>Presenter:</i>
<i>David Seulean, HOD, Region 3</i></p> <p>14. HOD Agenda Items
(Delegate Resolution No. 4)
<i>Presenter:</i>
<i>Danny Lang, Douglas Co. Bar</i></p> <p>15. Fair Compensation for Indigent Defense Providers
(Board of Governors Resolution No. 6)
<i>Presenter:</i>
<i>Patrick Ehlers, BOG, Region 5</i></p> |
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Notice of 2015 Annual Fees

The Oregon State Bar annual membership fees and assessments for 2015 (including the Client Security Fund and Diversity and Inclusion Assessments) are as follows:

<i>Membership Category</i>	<i>If paid by February 2, 2015</i>	<i>If paid after February 2 but by March 4, 2015</i>	<i>If paid after March 4, 2015</i>
Active members admitted in any jurisdiction before 1/1/13	\$537.00	\$587.00	\$637.00
Active members admitted in any jurisdiction on or after 1/1/13	\$453.00	\$503.00	\$553.00
Inactive members	\$125.00	\$150.00	\$175.00
Active pro bono members	\$125.00	\$125.00	\$125.00

Resolutions

7. In Memoriam

(Board of Governors Resolution No. 1)

Resolved, That the OSB House of Delegates and members assembled stand for a moment of silence in honor of the members of the Oregon State Bar who have died since the 2013 House of Delegates Meeting.

Laila E. Aarnas	Lynda A. Clark	Hon. Robert Jones	James P. O'Neal
Hon. Philip T. Abraham	Shannon K. Connall	Thomas A. Kennedy	Michelle I. Pauly
Richard H. Allen	Des Connall	Peter R. Knipe	Walter H. Pendergrass
Arthur R. Barrows	Debra Deem	David B. Larsen	Lester L. Rawls
David S. Barrows	Michael J. Dooney	James P. Leahy	Steve Rissberger
William R. Barrows	Edward Ray Fechtel	Hon. Winfrid K.F. Liepe	John Leslie Roe
William O. Bassett	Douglas M. Fellows	Margaret M. Maginnis	Matthew C. Runkle
Marc D. Blackman	Barbara H. Fredericks	Michael V. Mahoney	William A. Sabel
Joseph A. Brislin Jr	George C. Fulton	Lisa A. Maybee	Ross M. Shepard
James W. Britt III	Joel A. Gallob	Daniel T. McCarthy	Herman F. Smith
Nancy Elizabeth Brown	Caroline D. Glassman	William S. McDonald	Monica A. Smith
Franklyn N. Brown	James B. Griswold	Lee J. McFarland	Scott D. Sonju
Ellen P. Bump	Hon. Harl H. Haas	Rodney W. Miller	Harvard P. Spigal
John H. Buttler	Samuel A. Hall Sr	Robert Mix	Garth F. Steltenpohl
Victor Calzaretta	Lloyd G. Hammel	Richard H. Muller	Sharon C. Stevens
David F. Cargo	John N. Harp Jr	Stephen B. Murdock	Randolph J. Stevens
Richard R. Carney	Eric Haws	C. Richard Neely	Robert H. Thomson
Robert R. Carney	Donald E. Heisler	Robert J. Neuberger	Harold Uney
Lawrence Lee Carter	Loren D. Hicks	Gregory A. Nielson	Hon. Darrell J. Williams
James Casby	Hon. Ralph M. Holman	Hon. Albin W. Norblad	Gerald Williams
Kelly WG Clark	James H. Huston	Hon. Jack F. Olsen	M. Keith Wilson

*Presenter: Jenifer Billman
Board of Governors, Public Member*

**8. Amendment of Oregon Rule of Professional Conduct 8.4
(Board of Governors Resolution No. 2)**

Whereas, The Board of Governors has formulated the following amendment to the Oregon Rules of Professional Conduct pursuant to ORS 9.490(1); and

Whereas, The Oregon State Bar House of Delegates must approve any changes in the rules of professional conduct before they are presented to the Oregon Supreme Court for adoption pursuant to ORS 9.490(1); now, therefore, be it

Resolved, That the amendment of Oregon Rule of Professional Conduct 8.4 as set forth below is approved and shall be submitted to the Oregon Supreme Court for adoption:

RULE 8.4 MISCONDUCT

(a) It is professional misconduct for a lawyer to:

- (1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;
- (4) engage in conduct that is prejudicial to the administration of justice;
- (5) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law; [or]
- (6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law[.]; or
- (7) in the course of representing a client, knowingly intimidate or harass a person because of that person's race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability.**

(b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

(c) Notwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein.

Background

In November 2013, the OSB House of Delegates approved an amendment to Oregon RPC 8.4 that would have prohibited a lawyer, in the course of representing a client, from knowingly manifesting bias or prejudice on a variety of bases. The HOD amendment was presented to the Supreme Court in accordance with ORS 9.490, but the Court deferred action on the proposal and asked the bar to consider changes that would address the Court's concerns that the RPC 8.4 amendment as drafted would impermissibly restrict the speech of OSB members.

Because of the strong HOD support for an anti-bias rule, the OSB Board of Governors decided to convene a special committee (the RPC 8.4 Drafting Committee) to develop a revised proposal that would satisfy the Court's concerns.

The Drafting Committee was comprised of nine individuals: two who had personally appeared and presented written objections to the 2013 HOD proposal at the Supreme Court public meeting in December 2013; three representatives of the Legal Ethics Committee who had participated in the development of the 2013 HOD proposal; two representatives of specialty bars who had also been involved in the development of the 2013 HOD proposal; and, two persons suggested by the Court as having some expertise in Oregon free-speech jurisprudence. There were also two nonvoting BOG liaisons.

In its charge from the BOG, the Drafting Committee was asked to leave to the BOG and HOD the policy question of whether the bar should have any rule on the issue, and to only recommend language that will not impermissibly restrict lawyer speech, while at the same time establishing a standard for appropriate professional conduct.

The Committee met four times during the spring of 2014. The agendas, minutes, and materials considered during the meetings were all posted on the OSB website. As instructed, the Committee focused its efforts on developing a rule that would both address conduct the 2013 HOD proposal tried to reach and pass constitutional muster by focusing on harmful effects, rather than expression. During the first two meetings, the Committee struggled with articulating harmful effects within the construct of the 2013 HOD proposal. Unable to make any headway using this approach, the Committee abandoned the prohibition against "manifesting bias or prejudice" and instead returned to the original purpose behind the development of the rule, which was to prohibit harassment, intimidation, and discrimination.

Thereafter, the Committee considered what class or classes of individuals the rule should protect. The Committee discussed at length whether to keep the list in the 2013 HOD proposal, whether to limit the list to immutable characteristics, or whether to omit select classes of individuals. In particular, the question of whether to include socio-economic status, gender identity, and gender expression generated considerable debate. The list included in the 2013 HOD proposal had derived from a suggestion made to the Legal Ethics Committee in April 2013 to include individuals protected under Oregon law. With this in mind the Committee decided to omit socio-economic status and retain the remaining classes listed in the new proposal.

The Committee also discussed whether to apply the rule only to the lawyer "in the course of representing a client" or whether to expand its application to a lawyer representing himself or

herself. In deference to the 2013 HOD rule, the Committee decided that the proposed rule should apply only to a lawyer acting “in the course of representing a client.”

Finally, the Committee discussed whether to retain the exception for legitimate advocacy contained in the 2013 HOD-approved RPC 8.4(c). While some members of the Committee doubted the need for it, everyone agreed that there was no harm in retaining the exception for legitimate advocacy. On the other hand, the Committee also unanimously agreed to omit language in the 2013 version that a lawyer shall not be prohibited from “declining, accepting, or withdrawing from representation of a client in accordance with Rule 1.16.” Three reasons were put forth. First, there is already a rule governing withdrawal, which would apply regardless of any additional language in RPC 8.4(c). Second, the language made little sense in light of the changes to the substance of RPC 8.4(a)(7). Third, the clause might conflict with lawyers’ obligations under the public accommodation laws.

The Committee unanimously recommended that the language it drafted be presented to the Board of Governors for its consideration. At its meeting on June 27, 2014, the BOG considered the Committee’s proposal and voted unanimously to recommend it to the HOD.

*Presenter: Bonnie Richardson
Portland*

**9. Amendment of Oregon Rule of Professional Conduct 5.5
(Board of Governors Resolution No. 3)**

Whereas, The Board of Governors has formulated the following amendment to the Oregon Rules of Professional Conduct pursuant to ORS 9.490(1); and

Whereas, The Oregon State Bar House of Delegates must approve any changes in the Oregon Rules of Professional Conduct before they are presented to the Oregon Supreme Court for adoption pursuant to ORS 9.490(1); now, therefore, be it

Resolved, That the amendment of Oregon Rule of Professional Conduct 5.5 as set forth below is approved and shall be submitted to the Oregon Supreme Court for adoption:

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- (c) A lawyer admitted in another [*United States*] jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
 - (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

- (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
 - (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternate dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission;
 - (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; or
 - (5) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission.
- (d) A lawyer admitted in another [*United States*] jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.
- (e) A lawyer who provides legal services in connection with a pending or potential arbitration proceeding to be held in this jurisdiction under paragraph (c)(3) of this rule must, upon engagement by the client, certify to the Oregon State Bar that:
- (1) the lawyer is in good standing in every jurisdiction in which the lawyer is admitted to practice; and
 - (2) unless the lawyer is in-house counsel or an employee of a government client in the matter, that the lawyer
 - (i) carries professional liability insurance substantially equivalent to that required of Oregon lawyers, or
 - (ii) has notified the lawyer's client in writing that the lawyer does not have such insurance and that Oregon law requires Oregon lawyers to have such insurance.

The certificate must be accompanied by the administrative fee for the appearance established by the Oregon State Bar and proof of service on the arbitrator and other parties to the proceeding.

Background

In May 2013, the BOG appointed the Task Force on International Trade in Legal Services to study the effect of free-trade agreements and the regulatory framework for lawyers practicing law in Oregon on the delivery of legal services across international borders. The reasons for the Task Force were two-fold.

First, international trade is increasingly important in Oregon. It supports nearly 490,000 jobs, and Oregon exports billions of dollars in goods and services annually to customers in 203 countries around the globe. Foreign-owned companies invest in Oregon and employ more than

40,000 Oregonians. Thus, Oregon lawyers are more often serving clients who have legal needs that cross international borders.

Second, in addition to the General Agreement on Trade in Services (GATS) and the North American Free Trade Agreement (NAFTA), the United States has negotiated 15 other international trade agreements, all of which contain a common clause requiring that parties to the treaty ensure that domestic regulation measures do not create unnecessary barriers to trade. Lawyer regulation is no exception, and the federal government arguably has the power to compel states to ensure that their lawyer regulations do not unreasonably interfere with trade agreement obligations. Therefore, many jurisdictions are recognizing that reviewing regulations relating to the practice of law for “unnecessary barriers to trade” is a prudent undertaking.

The Task Force studied issues relating to both permanent and temporary practice in Oregon by foreign-licensed lawyers and continues to work on its final report and recommendations. This proposal relates only to the Task Force’s findings and recommendations relating to temporary practice by foreign-licensed lawyers.

A. Barriers to Trade

Currently, Oregon RPC 5.5(c) allows lawyers licensed in another U.S. jurisdiction to provide legal services in Oregon on a temporary basis under certain circumstances. In addition, Oregon RPC 5.5(d) allows lawyers licensed in other U.S. jurisdictions to provide legal services in Oregon when federal law specifically authorizes them to do so. Out-of-state lawyers may not establish a “systematic or continuous presence” within Oregon, nor hold themselves out to the public as admitted to practice in Oregon unless that is, in fact, the case.

Notably, RPC 5.5(c) and (d) do not apply to or otherwise address temporary law practice by lawyers licensed outside of the United States. In fact, unless they are also licensed in Oregon, lawyers licensed outside of the United States are not authorized to provide any legal services within the state of Oregon under any circumstances.

There are problems with the current approach. Given the pervasive expansion of international business transactions noted above, and lawyers’ interests in supporting and advancing their clients’ objectives in such matters, the Task Force believes that more lawyers from outside the United States will seek to visit Oregon to provide legal services to their clients and that Oregon lawyers have an interest in encouraging such visits for the benefit of their clients. Although the Task Force found no empirical evidence for this conclusion, its members recounted numerous examples from their own experiences of needing or wanting foreign lawyers to provide legal services on a temporary basis to their clients. The Rules of Professional Conduct as currently written, however, stand as a barrier to the provision of such services.

The Task Force then considered whether the barrier is necessary. Laws prohibiting the practice of law without a license are consumer-protection measures, designed to protect the public from the consequences that flow from the provision of services by those who are neither trained nor qualified to do so. The Task Force concluded that precluding foreign lawyers from providing legal services on a temporary basis in Oregon—under the same terms and conditions that lawyers licensed in other U.S. jurisdictions do—is not necessary in order to protect the

public and therefore constitutes an unnecessary barrier to trade. Specifically, the Task Force could not find any basis to conclude that a foreign-licensed lawyer would pose any more of a risk to consumers than an out-of-state lawyer would when providing services on a temporary basis as allowed under RPC 5.5(c) and (d). This conclusion is based in large part on the restrictions that currently exist within the rule that serve to protect the consumer.

B. Existing Rule and Effect of Changes

By simply deleting the reference to “United States” in two places in the rule, amended RPC 5.5 will allow lawyers licensed to practice law outside of the United States to provide legal services on a temporary basis in Oregon to the same extent as lawyers who are licensed in other U.S. jurisdictions are currently allowed to do.

Currently, under RPC 5.5(c) (1) and (2), an out-of-state lawyer may provide legal services on a temporary basis in Oregon out of court by associating with a lawyer admitted to practice in Oregon or in court by complying with the *pro hac vice* admission requirements, which include associating with an Oregon lawyer who participates substantially in the matter, certifying that he or she will comply with all Oregon laws, and carrying professional liability insurance coverage substantially equivalent to that required of Oregon lawyers. *See* UTCR 3.170. Most importantly, the court in which the lawyer will be appearing has to approve *pro hac vice* admission and has continued oversight and ability to revoke the *pro hac vice* admission. These requirements are designed to protect the consumers of the out-of-state lawyer’s services.

An out-of-state lawyer may provide legal services on a temporary basis in Oregon without association of local counsel under RPC 5.5(c) (3) and (4) as long as the services arise out of, or are reasonably related to, the lawyer’s practice in the jurisdiction in which the lawyer is licensed. Although this phrase has not been interpreted in Oregon, the ABA Model Rule 5.5, Comment [14] offers examples of how such a relationship might be determined:

The lawyer’s client may have been previously represented by the lawyer or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer’s work might be conducted in that jurisdiction. The necessary relationship might arise when the client’s activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer’s recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

The underlying premise of RPC 5.5(c)(3) and (4) is that clients are protected either by virtue of having a past relationship with the lawyer or because the lawyer has some expertise in the area of law at issue.

RPC 5.5(c)(5) currently allows an out-of-state lawyer to provide legal services to the lawyer’s employer or its organizational affiliates. As noted by the ABA Model Rule commentary, provision of services in this context generally serves the interest of the employer and does not

create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

Finally, RPC 5.5(d) recognizes that federal law preempts state licensing requirements to the extent that the requirements hinder or obstruct the goals of the federal law. *See Sperry v. Florida ex rel. Florida Bar*, 373 US 379 (1963). Thus, when federal law allows foreign lawyers to practice, Oregon could not prohibit it, notwithstanding the current rule.

The proposed amendments to RPC 5.5 would allow a foreign-licensed lawyer to provide legal services in Oregon on a temporary basis under the same conditions as set forth above. The Task Force felt that the same consumer protection measures that currently exist would be equally applicable to foreign lawyers. Furthermore, just like out-of-state lawyers, foreign lawyers would not be allowed to establish a "systematic or continuous presence" within Oregon, nor hold themselves out to the public as admitted to practice in Oregon unless that is, in fact, the case.

C. Comparison to ABA Model Rule

ABA Model Rule 5.5 takes a narrower approach than what is proposed here, permitting foreign-licensed lawyers to practice temporarily in a U.S. jurisdiction only as house counsel on foreign law issues or as otherwise authorized by federal law.

Connecticut, Indiana, Kansas, and Wisconsin have adopted rules that are the same or similar to the ABA rule. Arizona and Alabama allow practice by foreign lawyers only when authorized by federal law. Ten jurisdictions (Colorado, Delaware, the District of Columbia, Florida, Georgia, Idaho, New Hampshire, North Carolina, Pennsylvania, and Virginia) have amended their Rule 5.5 in the same manner as proposed here.

D. Conclusion

Because of the potential problems with the current rule, the BOG concurs with the Task Force recommendation that RPC 5.5(c) and (d) be amended as set forth above to allow the temporary practice of law in Oregon by lawyers licensed in jurisdictions outside of the United States.

*Presenter: Helen Hierschbiel
OSB General Counsel*

**10. Veterans Day Remembrance
(Board of Governors Resolution No. 4)**

Whereas, Military service is vital to the perpetuation of freedom and the rule of law; and

Whereas, Thousands of Oregonians have served in the military, and many have given their lives; now, therefore, be it

Resolved, That the Oregon State Bar hereby extends its gratitude to all those who have served and are serving in the military, and further offers the most sincere condolences to the families and loved ones of those who have died serving their country.

*Presenter: Richard Spier
Board of Governors, Region 5*

**11. Amendment of Oregon Rule of Professional Conduct 1.2
(Board of Governors Resolution No. 5)**

Whereas, The Board of Governors has formulated the following amendment to the Oregon Rules of Professional Conduct pursuant to ORS 9.490(1); and

Whereas, The Oregon State Bar House of Delegates must approve any changes in the rules of professional conduct before they are presented to the Oregon Supreme Court for adoption pursuant to ORS 9.490(1); now, therefore, be it

Resolved, That the amendment of Oregon Rule of Professional Conduct 1.2 as set forth below is approved and shall be submitted to the Oregon Supreme Court for adoption:

**RULE 1.2 SCOPE OF REPRESENTATION AND
ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER**

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(d) Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon’s marijuana-related laws. In the event Oregon law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.

Background

In November 1998, Oregon voters approved the Oregon Medical Marijuana Act (OMMA). The state implemented a registration program the following year and, early this year, a medical marijuana dispensary program. In November 2014, Oregon voters will decide whether to legalize and regulate the recreational use of marijuana.

Since the implementation of OMMA, lawyers have been asked to assist clients with various legal matters relating to the medical marijuana industry, such as: real estate transactions when use of the property will involve the cultivation, dispensation, sale, or use of marijuana; entity formation for the purpose of operating a marijuana business authorized by OMMA; and, regulatory compliance with OMMA. If recreational use of marijuana is legalized in Oregon, the need for legal counsel will likely expand further.

While users, growers, and dispensaries who comply with OMMA requirements are protected from state criminal prosecution for production, possession, or delivery of marijuana, OMMA does not protect individuals from federal prosecution under the Federal Controlled Substances Act or related federal statutes. In other words, while the client’s conduct may be legal under state law, it remains illegal under federal law. Thus, lawyers who counsel or assist their clients with such conduct violate Oregon RPC 1.2(c) as written.

Other states that have legalized the medical or recreational use of marijuana have recognized the difficult situation created by the limitations imposed by Rule 1.2. The bars and courts in these other jurisdictions have responded in differing ways. The State Bar of Arizona adopted a formal ethics opinion that allows lawyers to counsel or assist clients in legal matters permitted under the Arizona Medical Marijuana Act as long as: (1) the Act has not been held to be preempted, void, or invalid; (2) the lawyer reasonably believes the client’s conduct is allowed under the Act; and (3) the lawyer advises the client about the federal-law implications. See State Bar of Arizona Ethics Op No 11-01.

By contrast, the Colorado Bar Association concluded in its formal ethics opinion that “a lawyer cannot advise a client regarding the full panoply of conduct permitted by” Colorado’s marijuana laws. Specifically, the Colorado Bar Association determined that the plain language of Rule 1.2 would prohibit lawyers from assisting clients in structuring or implementing transactions in furtherance of a marijuana business, because the client’s conduct would violate federal law. See Colorado Bar Association Formal Op No 125. Subsequently, the Colorado Supreme Court adopted commentary to its Rule 1.2, which clarifies that lawyers may counsel and assist clients regarding their state’s medical marijuana laws. To the extent that such laws conflict with federal law, the commentary also requires that lawyers advise the client regarding related federal law and policy. The Nevada Supreme Court followed suit, adopting commentary to its Rule 1.2, and the Washington Supreme Court is considering doing the same.

The Oregon Supreme Court has thus far declined to add commentary to the Oregon Rules of Professional Conduct, so the Colorado approach is not an option in Oregon. To resolve the uncertainty surrounding this issue, the OSB Board of Governors asked the OSB Legal Ethics Committee to either draft a formal ethics opinion or an amendment to the rules that would clarify that lawyers may provide legal counsel and assistance to clients with medical marijuana businesses without running afoul of their professional responsibilities.

A majority of the Legal Ethics Committee determined that any opinion they would draft would likely reach a conclusion similar to that reached by the Colorado Bar Association. Moreover, the LEC felt that an amendment to RPC 1.2 would provide greater clarification and assurance to lawyers about the propriety of advising and assisting clients with their marijuana-related businesses. Therefore, the LEC recommended adoption of an amendment to RPC 1.2.

In order to avoid the unintended consequences of a very broadly worded exception to RPC 1.2(c), the LEC proposal limits the exception to marijuana-related laws. At the same time, the proposal does not refer specifically to OMMA, so that the exception would cover any issues that might similarly arise from the legalization of recreational marijuana. Given the continued existence of conflicting federal law, the LEC felt it important to require lawyers to advise clients about federal law and policy related to marijuana. This requirement is similar to language included both in the commentary adopted by the Colorado and Nevada Supreme Court, and in the Arizona Formal Ethics Opinion.

*Presenter: Helen Hirschbiel
OSB General Counsel*

12. Support of Adequate Funding for Legal Services for Low-Income Oregonians (Delegate Resolution No. 2)

Whereas, Providing equal access to justice and high quality legal representation to all Oregonians is central to the mission of the Oregon State Bar; and

Whereas, Equal access to justice plays an important role in the perception of fairness of the justice system; and

Whereas, Programs providing civil legal services to low-income Oregonians is a fundamental component of the bar's effort to provide such access; and

Whereas, Since 1998, pursuant to ORS 9.575, the Oregon State Bar has operated the Legal Services Program to manage and provide oversight for the state statutory allocation for legal aid in accordance with the bar's Standards and Guidelines (which incorporate national standards for operating a statewide legal aid program); and

Whereas, Poverty in Oregon increased 61% between 2000 and 2011, the 8th largest increase in the nation, and most of Oregon's poor have nowhere to turn for free legal assistance; and

Whereas, During the great recession the staffing for legal aid programs was reduced while the poverty population in Oregon increased dramatically, thus broadening "the justice gap" in Oregon; and

Whereas, Oregon’s legal aid program currently has resources to meet about 15% of the civil legal needs of Oregon’s poor creating the largest “justice gap” for low-income and vulnerable Oregonians in recent history; and

Whereas, Oregon currently has one legal aid lawyer for every 9,440 low-income Oregonians, but the national standards for a minimally adequately funded legal aid program is two legal aid lawyers for every 10,000 low-income Oregonians; and

Whereas, Assistance from the Oregon State Bar and the legal community is critical to maintaining and developing resources that will provide low-income Oregonians meaningful access to the justice system; now, therefore, be it,

Resolved, That the Oregon State Bar:

(1) Strengthen its commitment and ongoing efforts to improve the availability of a full range of legal services to all citizens of our state, through the development and maintenance of adequate support and funding for Oregon’s legal aid programs and through support for the Campaign for Equal Justice.

(2) Request that Congress and the President of the United States make a genuine commitment to equal justice by adequately funding the Legal Services Corporation, which provides federal support for legal aid.

(3) Work with Oregon’s legal aid programs and the Campaign for Equal Justice to preserve and increase state funding for legal aid and explore other sources of new funding.

(4) Actively participate in the efforts of the Campaign for Equal Justice to increase contributions by the Oregon legal community, by establishing goals of a 100% participation rate by members of the House of Delegates, 75% of Oregon State Bar Sections contributing \$50,000, and a 50% contribution rate by all lawyers.

(5) Support the Oregon Law Foundation and its efforts to increase resources through the interest on Lawyers Trust Accounts (IOLTA) program, and encourage Oregon lawyers to bank at OLF Leadership Banks that pay the highest IOLTA rates.

(6) Support the Campaign for Equal Justice in efforts to educate lawyers and the community about the legal needs of the poor, legal services delivery, and access to justice for low-income and vulnerable Oregonians.

(7) Encourage Oregon lawyers to support civil legal services programs through enhanced pro bono work.

(8) Support the fundraising efforts of those nonprofit organizations that provide civil legal services to low-income Oregonians that do not receive funding from the Campaign for Equal Justice.

Background

“The mission of the Oregon State Bar is to serve justice by promoting respect for the rule of law, by improving the quality of legal services and by increasing access to justice.” OSB Bylaw 1.2. One of the four main functions of the bar is to be “a provider of assistance to the public. As such, the bar seeks to ensure the fair administration of justice for all.” *Id.*

The Board of Governors and the House of Delegates have adopted a series of resolutions supporting adequate funding for civil legal services in Oregon (Delegate Resolutions in 1996,

1997, 2002, 2005–2013). This resolution is similar to the resolution passed in 2013, but specifically provides updates regarding the “justice gap.”

The legal services organizations in Oregon were established by the state and local bar associations to increase access for low-income clients. The majority of the boards of the legal aid programs are appointed by state and local bar associations. The Oregon State Bar operates the Legal Services Program pursuant to ORS 9.572 to distribute the state statutory allocation for civil legal services and provide methods for evaluating the legal services programs. The Campaign for Equal Justice works collaboratively with the Oregon Law Foundation and the Oregon State Bar to support Oregon’s legal aid programs. The bar and the Oregon Law Foundation each appoint a member to serve on the board of the Campaign for Equal Justice.

Oregon’s legal aid program consists of four separate nonprofits that work together as part of an integrated service-delivery system designed to provide high-priority free civil legal services to low-income Oregonians in all 36 Oregon counties through offices in 17 communities. There are two statewide programs, Legal Aid Services of Oregon (LASO) and the Oregon Law Center (OLC); and two county-wide programs, Lane County Legal Aid and Advocacy Center and the Center for Non-Profit Legal Services (Jackson County). Because the need is great and resources are limited, legal aid offices address high-priority civil legal issues such as safety from domestic violence, housing, consumer law, income maintenance (Social Security, unemployment insurance, and other self-sufficiency benefits), health, employment, and individual rights. Over 40% of legal aid’s cases are family law cases, usually helping victims of domestic violence. All of these programs work to stretch limited resources through pro bono programs and self-help materials. Legal aid’s website, oregonlawhelp.com receives about 70,000 unique visitors a year.

Providing access to justice and high quality legal representation to all Oregonians is a central and important mission of the Oregon State Bar. An Oregon study concluded that low-income Oregonians who have access to a legal aid lawyer have a much improved view of the legal system compared with those who do not have such access: 75% of individuals without access to a lawyer felt very negatively about the legal system, but of those who had access to a legal aid lawyer, 75% had a positive view of the legal system regardless of the outcome of their case. The 2014 Task Force on Legal Aid Funding, which included representatives of the bar, the Law Foundation, the judiciary, the legislature, and private practice, concluded that legal aid funding should be doubled over the next 10 years. Because funding for legal aid is a state, federal, and private partnership, with about 80 different sources of funding, increases in funding must be made across the board to address the justice gap.

Currently, slightly more than 20% of lawyers contribute to the Campaign for Equal Justice, but in some Oregon regions (Jackson County and Lane County, for example), participation is as high as 40%.

Presenters:

Kathleen Evans, HOD, Region 6

Gerry Gaydos, HOD, Region 2

Ed Harnden, HOD, Region 5

**13. Investigation Regarding Change of Oregon State Bar Logo
(Delegate Resolution No. 3)**

Whereas, The previous Douglas Fir logo of the Oregon State Bar was a beautiful symbolic representation for the Oregon State Bar; and

Whereas, The current logo of the Oregon State Bar is a simple block list that sets forth no distinguishing characteristic logo for the Oregon State Bar; and

Whereas, Certain members of the Oregon State Bar have expressed an interest in changing the logo of the Oregon State Bar back to the Douglas Fir logo; now, therefore, be it

Resolved, The administrative staff of the Oregon State Bar shall investigate the costs associated with changing the Oregon State Bar logo back to the Douglas Fir logo and conduct a survey among members of the Oregon State Bar to determine whether or not a majority of the membership of the Oregon State Bar desires a change back to the Douglas Fir logo and report such findings back to the membership of the Oregon State Bar House of Delegates for considering whether or not to change the logo of the Oregon State Bar back to the Douglas Fir logo at the 2015 Oregon State Bar House of Delegates meeting.

Background

The previous logo of the Oregon State Bar contained emblems of Douglas Fir trees and presented a logo that uniquely represented the Oregon State Bar and its membership. The current logo is a simple block that does not make the representation for the bar and its members. A survey of the membership of the Oregon State Bar should be undertaken to determine a logo the membership desires.

Financial impact: Financial impact of any change will be determined by the Oregon State Bar's administrative staff research. Determination of the desire of the Oregon State Bar membership regarding a change of logo would be minimal.

*Presenter: David P.A. Seulean
House of Delegates, Region 3*

**14. HOD Agenda Items
(Delegate Resolution No. 4)**

Whereas, Section 1.2 [Purposes] of the By-Laws of the Oregon State Bar includes providing for consideration of Matters relevant to the "Advancement of the Science of Jurisprudence"; and

Whereas, Bar members and HOD Delegates have submitted Proposed HOD Agenda Items upon a variety of subjects under the umbrella of pertaining to the "Advancement of the Science of Jurisprudence"; and

Whereas, Examples of subject matter for inclusion may or may not include matters of Public Interest, such as the Oregon Death Penalty, legalization of marijuana, Gay Marriage, Gender and Economic Bias; compared with subjects limited to internal Oregon State Bar issues such as Admittance, Bar Exam, and Discipline; and

Whereas, Issues have arisen among Oregon State Bar Members and within the Board of Governors as to whether or not each such topic qualified for inclusion upon the House of Delegates Agenda; now, therefore, be it

Resolved, That the House of Delegates recommends that the Board of Governors undertake a Survey of the Membership to better focus the scope of Matters allowed to be placed upon the House of Delegates Agenda and provide guidance/standards for inclusion or exclusion accordingly.

*Presenter: Danny Lang
Douglas County Bar Association Alternate for
Ron Sperry, III
Douglas County Bar Association President*

**15. Fair Compensation for Indigent Defense Providers
(Board of Governors Resolution No. 6)**

Whereas, the United States and Oregon constitutions and fundamental fairness require that all people charged with a criminal offense have the right to assistance by ethical and competent counsel; and

Whereas, the United States and Oregon constitutions require that all people charged with a criminal offense who are determined eligible for public defense have ethical and competent counsel compensated by the state; and

Whereas, the United States and Oregon constitutions, Oregon laws, and fundamental fairness require that all people facing state court proceedings that may result in the deprivation of an individual's constitutionally or statutorily protected rights (such as parental rights) have a right to assistance by ethical and competent counsel paid by that state, if a court determines the person is eligible; and

Whereas, the House of Delegates has long supported fair compensation for public defense providers; and

Whereas, despite a modest increase in rates for public defense compensation in 2007, an unacceptable disparity remains between the rates of compensation for prosecutors and public defense providers; therefore be it

Resolved, that the Oregon State Bar, through its Board of Governors and staff, continue to participate actively with the Office of Public Defense Services and the Oregon Criminal Defense Lawyers Association in the establishment of a plan for achieving fair compensation for public defense providers.

*Presenter: Patrick Ehlers
Board of Governors, Region 5*