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FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL Z. CROWE; LAWRENCE K.
PETERSON I; OREGON CIVIL
LIBERTIES ATTORNEYS,
an Oregon nonprofit corporation,

Plaintiffs-Appellants,

v.

OREGON STATE BAR, a Public
Corporation; OREGON STATE BAR
BOARD OF GOVERNORS; VANESSA
A. NORDYKE, President of the
Oregon State Bar Board of
Governors; CHRISTINE
CONSTANTINO, President-elect
of the Oregon State Bar Board
of Governors; HELEN MARIE
HIERSCHBIEL, Chief Executive
Officer of the Oregon State Bar;
KEITH PALEVSKY, Director of
Finance and Operations of the
Oregon State Bar; AMBER
HOLLISTER, General Counsel
for the Oregon State Bar,

Defendants-Appellees.

No. 19-35463

D.C. No.
3:18-cv-02139-JR

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DIANE L. GRUBER; MARK RUN-
NELS,

Plaintiffs-Appellants,

v.

OREGON STATE BAR; CHRISTINE
CONSTANTINO; HELEN MARIE HI-
ERSCHBIEL,

Defendants-Appellees.

No. 19-35470

D.C. No.
3:18-cv-01591-JR

OPINION

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Argued and Submitted May 12, 2020
Portland, Oregon

Filed February 26, 2021

Before: Jay S. Bybee and Lawrence VanDyke, Circuit
Judges, and Kathleen Cardone,* District Judge.

Per Curiam Opinion;
Partial Concurrence and Partial Dissent
by Judge VanDyke

COUNSEL

Jacob Huebert (argued) and Timothy Sandefur, Scharf-
Norton Center for Constitutional Litigation at the
Goldwater Institute, Phoenix, Arizona; Luke D. Miller,
Military Disability Lawyer LLC, Salem, Oregon; for

* The Honorable Kathleen Cardone, United States District
Judge for the Western District of Texas, sitting by designation.

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Plaintiffs-Appellants Daniel Z. Crowe, Lawrence K. Peterson I, and Oregon Civil Liberties Attorneys.

Michael L. Spencer (argued), Klamath Falls, Oregon, for Plaintiffs-Appellants Diane L. Gruber and Mark Runnels.

Elisa J. Dozono (argued) and Taylor D. Richman, Miller Nash Graham & Dunn LLP, Portland, Oregon; Steven M. Wilker (argued) and Megan K. Houlihan, Tonkon Torp LLP, Portland, Oregon; Michael Gillette, Schwabe Williamson & Wyatt P.C., Portland, Oregon; for Defendants-Appellees.

Ellen F. Rosenblum, Attorney General; Benjamin Gutman, Solicitor General; Christopher A. Perdue, Assistant Attorney General; Department of Justice, Salem, Oregon; for Amicus Curiae State of Oregon.

Vanessa L. Holton, General Counsel; Robert G. Retana, Deputy General Counsel; Brady R. Dewar, Assistant General Counsel; Office of the General Counsel, State Bar of California, San Francisco, California; for Amicus Curiae State Bar of California.

Mary R. O'Grady and Kimberly Friday, Osborn Maledon P.A., Phoenix, Arizona, for Amicus Curiae State Bar of Arizona.

OPINION

PER CURIAM:

To practice in Oregon, every lawyer must join and pay annual membership fees to the Oregon State Bar

(“the Bar” or “OSB”). In these cases, Plaintiffs¹ claim these compulsions violate their freedoms of speech and association as guaranteed by the First Amendment, made applicable to the states by the Due Process Clause of the Fourteenth Amendment.

The district court dismissed all of Plaintiffs’ claims, concluding that the Bar was immune from suit under the Eleventh Amendment; that Plaintiffs’ free association and free speech claims were barred by precedent; and that the Bar’s objection and refund procedures were constitutionally adequate. We agree with the district court that precedent forecloses the free speech claim, but neither the Supreme Court nor this court has resolved the free association claim now before us. For the reasons that follow, Plaintiffs may have stated a viable claim that Oregon’s compulsory Bar membership requirement violates their First Amendment right of free association. We accordingly affirm in part, reverse in part, and remand to the district court with instructions.

I. BACKGROUND

A. *The Oregon State Bar*

“The Oregon State Bar is a public corporation and an instrumentality of the Judicial Department of the

¹ “Plaintiffs” refers to Appellants in both No. 19-35463 (Daniel Crowe, Lawrence Peterson, and the Oregon Civil Liberties Attorneys (individually referred to as the “Crowe Plaintiffs”)) and No. 19-35470 (Diane Gruber and Mark Runnels (individually referred to as the “Gruber Plaintiffs”)).

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government of the State of Oregon.” Or. Rev. Stat. § 9.010(2). OSB is an integrated bar, meaning lawyers must join it and pay an annual membership fee to practice law in Oregon. *Id.* §§ 9.160(1), 9.200. OSB is administered by its board of governors, who may “adopt, alter, amend[,] and repeal” the Bar’s bylaws. *Id.* § 9.080. “[A]t all times,” the board must “serve the public interest” by “[r]egulating the legal profession and improving the quality of legal services; [s]upporting the judiciary and improving the administration of justice; and [a]dvancing a fair, inclusive[,] and accessible justice system.” *Id.* The State of Oregon is not responsible for OSB’s debts. *Id.* § 9.010(6). Instead, OSB satisfies its own financial needs and obligations from the membership fees it collects. *Id.* § 9.191(3). Subject to oversight by the Oregon Supreme Court, OSB administers bar exams, investigates applicants’ character and fitness, formulates and enforces rules of professional conduct, and establishes minimum continuing legal education requirements for Oregon attorneys. *Id.* §§ 9.210, 9.490, 9.114.

OSB also publishes a monthly *Bar Bulletin*, which is subject to the bylaws’ general communications policy:

Communications of the Bar and its constituent groups and entities, including printed material and electronic communications, should be germane to the law, lawyers, the practice of law, the courts and the judicial system, legal education and the Bar in its role as a mandatory membership organization. Communications, other than permitted advertisements,

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should advance public understanding of the law, legal ethics and the professionalism and collegiality of the bench and Bar.

OSB Bylaws § 11.1.² OSB's Chief Executive Officer "has sole discretion . . . to accept or reject material submitted to the Bar for publication." *Id.* § 11.203. "[P]artisan political advertising is not allowed[,]" and "[p]artisan political announcements or endorsements will not be accepted for publication as letters to the editor or feature articles." *Id.* § 11.4.

OSB's legislative and public policy activities must reasonably relate to any of the following nine 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.

² The OSB Bylaws are available at http://www.osbar.org/_docs/rulesregs/bylaws.pdf.

Id. § 12.1. The Bar maintains that all its communications and activities are intended to adhere to the above-listed topics, and considers all these topics germane to its regulatory purpose.

B. *The April 2018 Bulletin Statements*

At the heart of Plaintiffs' suits are two statements published alongside each other in the April 2018 edition of the *Bulletin*, reproduced below in full. The first was attributed to the Bar, signed by its leaders, and stated as follows:

Statement on White Nationalism and Normalization of Violence

As the United States continues to grapple with a resurgence of white nationalism and the normalization of violence and racism, the Oregon State Bar remains steadfastly committed to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians. As we pursue that vision during times of upheaval, it is particularly important to understand current events through the lens of our complex and often troubled history. The legacy of that history was seen last year in the streets of Charlottesville, and in the attacks on Portland's MAX train. We unequivocally condemn these acts of violence.

We equally condemn the proliferation of speech that incites such violence. Even as we celebrate the great beneficial power of our

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First Amendment, as lawyers we also know it is not limitless. A systemic failure to address speech that incites violence emboldens those who seek to do harm, and continues to hold historically oppressed communities in fear and marginalization.

As a unified bar, we are mindful of the breadth of perspectives encompassed in our membership. As such, our work will continue to focus specifically on those issues that are directly within our mission, including the promotion of access to justice, the rule of law, and a healthy and functional judicial system that equitably serves everyone. The current climate of violence, extremism and exclusion gravely threatens all of the above. As lawyers, we administer the keys to the courtroom, and assist our clients in opening doors to justice. As stewards of the justice system, it is up to us to safeguard the rule of law and to ensure its fair and equitable administration. We simply cannot lay claim to a healthy justice system if whole segments of our society are fearful of the very laws and institutions that exist to protect them.

In today's troubling climate, the Oregon State Bar remains committed to equity and justice for all, and to vigorously promoting the law as the foundation of a just democracy. The courageous work done by specialty bars throughout the state is vital to our efforts and we continue to be both inspired and strengthened by those partnerships. We not only refuse to become accustomed to this climate, we are intent on

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standing in support and solidarity with those historically marginalized, underrepresented and vulnerable communities who feel voiceless within the Oregon legal system.

Across the page, a “Joint Statement of the Oregon Specialty Bar Associations Supporting the Oregon State Bar’s Statement on White Nationalism and Normalization of Violence” stated:

The Oregon Asian Pacific American Bar Association, the Oregon Women Lawyers, the Oregon Filipino American Lawyers Association, OGALLA-The LGBT Bar Association of Oregon, the Oregon Chapter of the National Bar Association, the Oregon Minority Lawyers Association, and the Oregon Hispanic Bar Association support the Oregon State Bar’s Statement on White Nationalism and Normalization of Violence and its commitment to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians.

Through the recent events from the Portland MAX train attacks to Charlottesville, we have seen an emboldened white nationalist movement gain momentum in the United States and violence based on racism has become normalized. President Donald Trump, as the leader of our nation, has himself catered to this white nationalist movement, allowing it to make up the base of his support and providing it a false sense of legitimacy. He has allowed this dangerous movement of racism to gain momentum, and we believe this is

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allowing these extremist ideas to be held up as part of the mainstream, when they are not. For example, President Trump has espoused racist comments, referring to Haiti and African countries as “shithole countries” and claiming that the United States should have more immigrants from countries like Norway. He signed an executive order that halted all refugee admissions and barred people from seven Muslim-majority countries, called Puerto Ricans who criticized his administration’s response to Hurricane Maria “politically motivated ingrates,” said that the white supremacists marching in Charlottesville, North Carolina in August of 2017 were “very fine people,” and called into question a federal judge, referring to the Indiana-born judge as “Mexican,” when the race of his parents had nothing to do with the judge’s decision. We are now seeing the white nationalist movement grow in our state and our country under this form of leadership.

As attorneys who lead diverse bar associations throughout Oregon, we condemn the violence that has occurred as a result of white nationalism and white supremacy. Although we recognize the importance of the First Amendment of the United States Constitution and the protections it provides, we condemn speech that incites violence, such as the violence that occurred in Charlottesville. President Trump needs to unequivocally condemn racist and white nationalist groups. With his continued failure to do so, we must step in and speak up.

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As attorneys licensed to practice law in Oregon, we took an oath to “support the Constitution and the laws of the United States and of the State of Oregon.” To that end, we have a duty as attorneys to speak up against injustice, violence, and when state and federal laws are violated in the name of white supremacy or white nationalism. We must use all our resources, including legal resources, to protect the rights and safety of everyone. We applaud the Oregon State Bar’s commitment to equity and justice by taking a strong stand against white nationalism. Our bar associations pledge to work with the Oregon State Bar and to speak out against white nationalism and the normalization of racism and violence.

OSB maintains both *Bulletin* statements are germane to its role in improving the quality of legal services. When Plaintiffs and other OSB members complained about the statements, however, the Bar refunded \$1.15 to Plaintiffs and other objectors—the portion of their membership fees used to publish the April 2018 *Bulletin*. On appeal, the Bar explains it paid the refunds because “it has always sought, in accordance with its Bylaws, to strictly adhere to the standards of ‘germane’ speech as set forth in *Keller*. . . . [T]he Bar sought to avoid even the appearance of funding non-germane speech, by refunding their proportional dues with interest.”

C. *District Court Proceedings*

Plaintiffs filed these lawsuits against OSB officials and OSB itself, alleging the compelled membership and membership fee requirements violate their First Amendment rights. Plaintiffs contend that (1) the two statements from the April 2018 *Bulletin* are not germane; (2) compelling them to join and maintain membership in OSB violates their right to freedom of association; and (3) compelling Plaintiffs to pay—without their prior, affirmative consent—annual membership fees to OSB violates their right to freedom of speech. In addition, the *Crowe* Plaintiffs alone contend that the Bar’s constitutionally mandated procedural safeguards for objecting members are deficient. And the *Gruber* Plaintiffs alone continue to argue on appeal that OSB is not entitled to sovereign immunity from suit.

Below, these cases were referred to a magistrate, who first determined that OSB (but not the individual OSB officials) was an “arm of the state” and immune from suit pursuant to the Eleventh Amendment. The magistrate then held the OSB statement “was made within the specific context of promotion of access to justice, the rule of law, and a healthy and functional judicial system that equitably serves everyone” and “[wa]s germane to improving the quality of legal services.” Assuming the Specialty Bars’ statement could “include[] political speech that is not germane to a permissible topic,” the magistrate noted it was not technically attributed to OSB but rather a “routinely publishe[d] statement[]” in the *Bulletin*’s “forum for the exchange

of ideas pertaining to the practice of law.” The magistrate alternatively concluded that, even assuming the statements contained nongermane speech, Plaintiffs would still have suffered no constitutional injury because of OSB’s existing safeguards designed to refund membership funds misused for political purposes.

The magistrate recommended the district court grant the Bar’s motions to dismiss and deny the *Gruber* Plaintiffs’ motion for partial summary judgment. The district court fully adopted the magistrate’s findings and recommendations and dismissed these cases. Plaintiffs timely appealed.

II. STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343. We have jurisdiction under 28 U.S.C. § 1291, and “review de novo a dismissal on the basis of sovereign immunity or for failure to state a claim upon which relief can be granted.” *Ariz. Students’ Ass’n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016). Moreover, we must “accept the complaint[s] well-pleaded factual allegations as true, and construe all inferences in the plaintiff[s] favor.” *Id.*

III. DISCUSSION

Plaintiffs raise the same issues that were before the district court in their appeals. We will begin with Plaintiffs’ free speech and free association claims. We consider the parties’ arguments with respect to the

germaneness of the April 2018 *Bulletin* statements and the adequacy of OSB's procedural safeguards as they pertain to Plaintiffs' free speech and free association claims. Because we conclude that Plaintiffs have stated a claim based on their right to free association, which we must remand to the district court, we will then address the question of OSB's immunity from a suit for damages, a claim only raised by the *Gruber* Plaintiffs.

A. *Free Speech*

In *Keller v. State Bar of California*, 496 U.S. 1, 13–14 (1990), the Supreme Court concluded that a state bar may use mandatory dues to subsidize activities “germane to those goals” of “regulating the legal profession and improving the quality of legal services” without running afoul of its members' First Amendment rights of free speech. *Id.* As a preliminary matter, Plaintiffs argue that both April 2018 *Bulletin* statements constitute political speech nongermane to the Bar's role in regulating the legal profession. We need not decide whether the district court erred in concluding that the *Bulletin* statements are germane under *Keller* (or, in the case of the Specialty Bars' statement, not attributable to OSB) for purposes of this appeal because, even assuming both statements are nongermane, Plaintiffs' free speech claim fails.

In rejecting the plaintiffs' free speech claim in *Keller*, the Supreme Court subjected integrated bars to “the same constitutional rule with respect to the use of

compulsory dues as are labor unions.” *Keller*, 496 U.S. at 13 (adopting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–36 (1977) (holding that a union may not fund from mandatory fees political or ideological activities nongermane to its collective bargaining duties)). However, the Supreme Court recently overruled *Abood* because the “line between chargeable [germane] and nonchargeable [nongermane] union expenditures has proved to be impossible to draw with precision,” and because even union speech germane to collective bargaining “is overwhelmingly of substantial public concern.” *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2477, 2481 (2018). Plaintiffs argue that, given *Keller*’s reliance on *Abood*, faithful application of *Keller* now requires that we consult *Janus* in analyzing their *Keller* claim and apply exacting scrutiny. *See id.* at 2477, 2486. According to Plaintiffs, OSB engages in political and ideological activities (e.g., the *Bulletin* statements), so forcing them to pay mandatory membership fees violates their free speech rights. Plaintiffs urge that, under *Janus*, OSB’s membership fee requirement cannot survive exacting scrutiny, and therefore, membership fees may only be constitutionally assessed if attorneys provide prior, affirmative consent.

Given *Keller*’s instruction that integrated bars adhere to the same constitutional constraints as unions, 496 U.S. at 13, Plaintiffs’ argument is not without support. But *Keller* plainly has not been overruled. *See Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting) (noting that “today’s decision does not question” cases

applying *Abood*, including *Keller*). Although *Abood*'s rationale that *Keller* expressly relied on has been clearly “rejected in [another] decision[], the Court of Appeals should follow the [Supreme Court] case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.” *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). We are a lower court, and we would be scorning *Agostini*'s clear directive if we concluded that *Keller* now prohibits the very thing it permitted when decided.³

In the alternative, the *Crowe* Plaintiffs alone insist that, assuming mandatory dues remain constitutionally permissible, the district court nevertheless erred in concluding that OSB provides adequate procedural safeguards. As discussed above, *Keller* subjected integrated bars to the same constitutional constraints as unions, allowing them to use compulsory dues only to regulate attorneys or improve the quality of their States' legal professions—but not for “activities of an ideological nature which fall outside of those areas of activity.” 496 U.S. at 13–14. Having saddled integrated bars with this “*Abood* obligation,” the Court concluded they could satisfy that obligation “by adopting the sort of procedures described in *Hudson*.” *Id.* at 17 (referencing *Chicago Teachers Union v. Hudson*, 475 U.S. 292

³ Because we do not think the Supreme Court has clearly abrogated or altered *Keller*'s holding, our precedent likewise bars Plaintiffs' requested relief as to this claim. See *Gardner v. State Bar of Nev.*, 284 F.3d 1040, 1042–43 (9th Cir. 2002).

(1986)). At a minimum, *Hudson*'s safeguards "include an adequate explanation of the basis for the [compulsory] fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310.

Here, OSB's bylaws provide a dispute resolution procedure for a "member of the Bar who objects to the use of any portion of the member's bar dues for activities he or she considers promotes or opposes political or ideological causes. . . ." OSB Bylaws § 12.600. The objecting member must notify OSB's Board of Governors, and "[i]f the Board agrees with the member's objection, it will immediately refund the portion of the member's dues that are attributable to the activity, with interest." *Id.* § 12.601. If the Board disagrees with the objecting member, it offers binding arbitration before a neutral decisionmaker who conducts a hearing and promptly decides "whether the matters at issue are acceptable activities for which compulsory fees may be used under applicable constitutional law." *Id.* § 12.602. If the objector prevails, OSB pays the same refund described above; conversely, if OSB prevails, the matter is closed. *Id.*

The *Crowe* Plaintiffs argue that OSB's procedures are deficient because (1) OSB does not provide an independently audited report⁴ explaining how

⁴ Plaintiffs concede that OSB publishes information about its allocation of membership fees each year.

mandatory dues are calculated; and (2) OSB does not provide the required escrow procedure. We disagree.

First, to the extent the *Crowe* Plaintiffs urge us to require wholesale application of the procedures in *Hudson* in this context, we decline to do so. Nowhere does *Keller* require state bars to adopt procedures identical to or commensurate with those outlined in *Hudson*. 496 U.S. at 17 (“[A]n integrated bar *could* certainly meet its *Aboud* obligation by adopting the *sort of procedures* described in *Hudson*.”) (emphasis added). Indeed, the Court in *Keller* explicitly recognized that it lacked the “developed record” available in *Hudson* and accordingly held that “[q]uestions [of] whether one or more alternative procedures would likewise satisfy that obligation are better left for consideration upon a more fully developed record.” *Id.* Thus, we decline to require an independently audited report and escrow solely because *Hudson* required as much.

Nor are we persuaded that adherence to *Hudson* is necessary—or even effective—to minimize infringement here. With respect to the independent audit, *Hudson* required this high-level explanation in the context of a union that affirmatively planned to engage in activities unrelated to collective bargaining for which it could only charge its members. 475 U.S. at 298. The Court obligated the union to provide a detailed statement of fees in advance so that nonmembers could object before being charged for impermissible activities. *Id.* at 305–07. *Hudson* fashioned the escrow requirement for the same reason—to “avoid the risk that [nonmembers’] funds will be used, even

temporarily, to finance ideological activities unrelated to collective bargaining.” *Id.* at 305.

The *Crowe* Plaintiffs do not allege any similarly affirmative plans by OSB to use Bar members’ dues for nongermane purposes. Indeed, OSB maintains a policy mandating that dues be used for germane activities and communications. *See, e.g.*, OSB Bylaws §§ 11.1, 12.1. As a practical matter, then, advance notice would not have offered additional protection against the alleged constitutional violations because OSB would have characterized all of its activities as germane.⁵ Similarly, an escrow requirement would not further minimize risk of infringement because, unlike in *Hudson*, the allegedly impermissible speech is only identifiable after the fact.

A refund, which Plaintiffs received here, is the only meaningful remedy for Plaintiffs’ alleged injuries. Under the circumstances, OSB provides procedures adequately tailored to “minimize the infringement” of its members’ First Amendment rights. *Hudson*, 475 U.S. at 303. Indeed, we have observed, albeit in dicta, that “allow[ing] members to seek a refund of the proportion of their dues that the State Bar has spent on political activities unrelated to its regulatory function” complies with *Keller. Morrow v. State Bar of California*,

⁵ We recognize that there is an argument to be made regarding the propriety of permitting OSB to define for itself what is germane. That is not before us. Moreover, such an argument does not alter the fact that advance notice in this case would not have prevented Plaintiffs’ asserted constitutional injury.

188 F.3d 1174, 1175 (9th Cir. 1999). OSB clearly provides that process here.

In sum, nothing in *Keller* mandates a strict application of the *Hudson* procedures. Indeed, an application of such procedures here would not have provided greater protections for Plaintiffs. As alleged, the OSB's refund process is sufficient to minimize potential infringement on its members' constitutional rights. We therefore affirm the district court as to Plaintiffs' free speech claim and the adequacy of OSB's procedural safeguards with respect to protecting Plaintiffs' free speech rights.

B. *Free Association*

In Oregon, “a person may not practice law . . . unless the person is an active member of the Oregon State Bar.” OR. REV. STAT. § 9.160(1). Plaintiffs claim that because OSB engages in nongermane political activity like the *Bulletin* statements, this membership requirement violates their freedom of association under the First and Fourteenth Amendments. We first must decide whether the district court erred by concluding this claim was foreclosed by existing precedent.

1. Does existing precedent foreclose Plaintiffs' Free Association claim?

In *Keller*, the Supreme Court expressly declined to address the “freedom of association claim” that attorneys “cannot be compelled to associate with an organization that engages in political or ideological activities

beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*.” 496 U.S. at 17. *Keller* explained this unaddressed claim was “much broader . . . than [the claim] at issue in *Lathrop*.” *Id.* (discussing *Lathrop v. Donohue*, 367 U.S. 820 (1961)). Plaintiffs here insist they have presented precisely this yet-to-be-resolved free association claim. The district court concluded that *Lathrop* and *Keller* foreclosed Plaintiffs’ association claim, so we examine those cases in turn.

In *Lathrop*, a plurality of the Supreme Court held:

[T]he Supreme Court of Wisconsin, in order to further the State’s legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity.

367 U.S. at 843. On its own terms, *Lathrop*’s “free association” decision was limited to “compelled financial support of group activities,” *id.* at 828; the Court emphasized that “[t]he only compulsion to which [Lathrop] ha[d] been subjected by the integration of the bar [wa]s the payment of the annual dues of \$15 per year.” *Id.* at 828 (“We therefore are confronted . . . *only* with a question of compelled financial support of group

activities, *not with involuntary membership in any other aspect.*") (emphasis added).⁶

Lathrop also complained that the Wisconsin Bar engaged in lobbying. *See Lathrop*, 367 U.S. at 827. But the *Lathrop* plurality presumed, on the bare record before it, that all the bar's activities, including lobbying, related to "the regulatory program" of "improving the profession." *Id.* at 843. In other words, from what little the *Lathrop* plurality could divine, even the bar's lobbying was germane to the regulatory purposes justifying compelled financial association in the first place. *Id.* *Lathrop's* ultimate conclusion was deliberately limited: a state "may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program." *Id.* At bottom, *Lathrop* merely permitted states to compel practicing lawyers to pay toward the costs of regulating their profession. *See Keller*, 496 U.S. at 9 (discussing "the limited scope of the question [*Lathrop*] was deciding").

Decades later, the Court revisited the issue in *Keller*. As discussed above, *Keller*, like *Lathrop*, concluded that states could compel practicing attorneys to pay dues to an integrated bar but that those dues could

⁶ The Supreme Court framed its decision in this way even though *Lathrop's* actual free association claim was *similar* to the broader one Plaintiffs raise here. *Lathrop*, 367 U.S. at 827 ("The core of appellant's argument is that he cannot constitutionally be compelled to join . . . an organization which . . . utilizes its property, funds and employees for the purposes of influencing legislation and public opinion toward legislation.").

only “constitutionally fund activities germane to those goals” of “regulating the legal profession and improving the quality of legal services.” *Id.* at 13–14. *Keller* then augmented the constitutional analysis, prohibiting integrated bars from funding with mandatory dues “activities having political or ideological coloration which are not reasonably related to the advancement of [its regulatory] goals.” *Id.* at 15. In a later compelled speech case, the Supreme Court explained that “[t]he central holding in *Keller* . . . was that the objecting members were not required to give speech subsidies for matters not germane to the larger *regulatory* purpose which justified the required association.” *United States v. United Foods, Inc.*, 533 U.S. 405, 414 (2001) (emphasis added).

Crucially, *Keller* expressly declined to address the petitioners’ separate free association claim: “that they cannot be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*.” *Keller*, 496 U.S. at 17. *Keller* acknowledged this was “a much broader freedom of association claim than was at issue in *Lathrop*.” *Id.* (explaining that the *Keller* petitioners’ free association claim challenged more than “their ‘compelled financial support of group activities’” (quoting *Lathrop*, 367 U.S. at 828)). *Keller* and *Lathrop* thus speak for themselves: the Supreme Court has never resolved this broader free association claim based on compelled bar membership.

Nor have we. In *Morrow*, the “plaintiffs complain[ed] that by virtue of their mandatory State Bar membership, they [we]re associated in the public eye with viewpoints they d[id] not in fact hold . . . [which] violate[d] their First Amendment rights to free association.” 188 F.3d at 1175 (“The issue is whether plaintiffs’ First Amendment rights are violated by their compulsory membership in a state bar association that conducts political activities beyond those for which mandatory financial support is justified.”). This is, essentially, the same claim Plaintiffs raise here. Just like the instant claim, the *Morrow* plaintiffs raised the “much broader freedom of association claim” that *Keller* and *Lathrop* left unresolved. *See Morrow*, 188 F.3d at 1177 (“Plaintiffs nevertheless contend that language in *Keller* leaves open the question whether membership alone may cause the public to identify plaintiffs with State Bar positions in violation of plaintiffs’ First Amendment rights.”). Nevertheless, we did not resolve that claim.

When we reached the *Morrow* plaintiffs’ association claim, we essentially reformulated it: “[h]ere, plaintiffs do not allege that they are compelled to associate in any way with the California State Bar’s political activities.” *Id.* By reformulating the claim, *Morrow* held that the claim before it was “no broader than that in *Lathrop*,” and noted “[t]he claim reserved in *Keller* was a broader claim of violation of associational rights than was at issue in either *Lathrop* or in this case.” *Id.* Our avoidance of this broader free association claim cannot preclude Plaintiffs’ efforts to resolve it here.

Accordingly, Plaintiffs raise an issue that neither the Supreme Court nor we have ever addressed: whether the First Amendment tolerates mandatory membership itself—independent of compelled financial support—in an integrated bar that engages in nongermane political activities. In concluding that precedent foreclosed this claim, the district court erred.

2. Plaintiffs’ free association claim is viable.

The First Amendment protects the basic right to freely associate for expressive purposes; correspondingly, “[t]he right to eschew association for expressive purposes is likewise protected.” *Janus*, 138 S. Ct. at 2463 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)). Freedom from compelled association protects two inverse yet equally important interests. First, it shields individuals from being forced to “confess by word or act their faith” in a prescriptive orthodoxy or “matters of opinion” they do not share. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Second, because “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association,” *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958), freedom from compelled association checks the power of “official[s], high or petty, [to] prescribe what [opinions] shall be orthodox.” *Barnette*, 319 U.S. at 642. In short, like the “freedom of belief,” freedom from compelled association “is no incidental or secondary aspect of the

First Amendment’s protections.” *Abood*, 431 U.S. at 235.

Plaintiffs’ freedom of association claim based on the April 2018 *Bulletin* statements is viable. Because the district court erred in dismissing this claim as foreclosed by our precedent, we reverse and remand.

On remand, there are a number of complicated issues that the district court will need to address. To begin, the district court will need to determine whether *Janus* supplies the appropriate standard for Plaintiffs’ free association claim and, if so, whether OSB can satisfy its “exacting scrutiny standard.” *Janus*, 138 S. Ct. at 2477; *see also, e.g., Fleck v. Wetch*, 139 S. Ct. 590 (2018) (remanding a mandatory bar membership case for further consideration in light of *Janus*). Given that we have never addressed such a broad free association claim, the district court will also likely need to determine whether *Keller’s* instructions with regards to germaneness and procedurally adequate safeguards are even relevant to the free association inquiry. To avoid issuing an advisory opinion, we defer consideration of these issues at this stage of the case. *See Ball v. Rodgers*, 492 F.3d 1094, 1119 (9th Cir. 2007) (declining to address an issue “at this time” until after the district court has an opportunity to review on remand in light of the court’s instructions related to separate issues).

C. *Sovereign Immunity*

As set forth above, the district court adopted the magistrate's recommendation, in which the magistrate determined that OSB is "an arm of the state entitled to Eleventh Amendment Immunity." Although the magistrate cited several district court decisions and unpublished Ninth Circuit dispositions⁷ that have alluded to this conclusion, this is a matter of first impression before this court. The Eleventh Amendment bars, with a few exceptions (*see, e.g., Ex parte Young*, 209 U.S. 123 (1908)), federal suits against unconsenting states, their agencies, and their officers "regardless of the nature of the relief sought." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). "[N]ot all state-created or state-managed entities are immune from suit in federal court. . . . an entity may be organized or managed in such a way that it does not qualify as an arm of the state entitled to sovereign immunity." *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1423 (9th Cir. 1991).

In *State ex rel. Frohnmayer v. Oregon State Bar*, the Oregon Supreme Court held that OSB is a state agency as defined by its public records law. 767 P.2d 893, 895 (Or. 1989); *see also* OR. REV. STAT. § 192.311(6) ("'State Agency' means any state officer, department, board, commission or court created by the Constitution

⁷ Of note, the district court cited to our unpublished disposition in *Eardley v. Garst*, 232 F.3d 894 (9th Cir. 2000). Our circuit rules prohibit citations to unpublished dispositions issued prior to January 1, 2007 except in limited circumstances, none of which are present here. *See* 9th Cir. R. 36.

or statutes of this state. . .”). And we acknowledge that the Oregon Supreme Court “is the final authority on the ‘governmental’ status of the [Bar] for purposes of state law. But its determination . . . is not binding on [federal courts] when . . . [deciding] a federal question.” *Keller*, 496 U.S. at 11. We think that *Frohnmayr* has answered, definitively, an important question: Is the Oregon State Bar a state actor? The Oregon Supreme Court has said “Yes,” and that means that OSB is bound by those provisions of the U.S. Constitution that bind state actors, such as the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See, e.g., Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 717 (1961). Finding that an entity is the “state” for purposes of the First Amendment or the Due Process and Equal Protection Clauses, however, is not the same as concluding that the entity is the “state” for purposes of the Eleventh Amendment. *See, e.g., Monell v. N.Y.C. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 n.54 (1978) (explaining there is no “basis for concluding that the Eleventh Amendment is a bar to municipal liability” in § 1983 suits). We recently discussed the different tests for state action and, as we will see, they are quite different from our consideration of factors required for sovereign immunity. *See Pasadena Republican Club v. W. Just. Ctr.*, ___ F.3d ___, 2021 WL 235775, at *4 (9th Cir. Jan. 25, 2021) (listing various tests for state action). Accordingly, *Frohnmayr* does not answer the question before us: Whether OSB is an arm of the state entitled to immunity under the Eleventh Amendment.

To determine whether OSB, which is “an instrumentality of the . . . government of the State of Oregon,” OR. REV. STAT. § 9.010(2), is an arm of the state entitled to immunity, we apply the *Mitchell* framework. See *Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988). The *Mitchell* factors are as follows:

[1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity. To determine these factors, the court looks to the way state law treats the entity.

Id. (citation omitted). OSB “bear[s] the burden of proving the facts that establish its immunity under the Eleventh Amendment.” *ITSI T.V. Prods., Inc. v. Agric. Ass’ns*, 3 F.3d 1289, 1292 (9th Cir. 1993). We conclude that, on the whole, the factors weigh against finding OSB an “arm of the state” entitled to immunity.

1. Vulnerability of the State’s treasury

The first factor—whether a money judgment would be satisfied out of state funds—weighs strongly against immunity because Oregon law clearly answers this question in the negative. OR. REV. STAT. § 9.010(6) (“No obligation of any kind incurred or created under this section shall be, or be considered, an indebtedness or obligation of the State of Oregon.”).

In this circuit, “the source from which the sums sought by the plaintiff must come is the most important single factor in determining whether the Eleventh Amendment bars federal jurisdiction.” *Durning*, 950 F.2d at 1424 (citing *Rutledge v. Ariz. Bd. of Regents*, 660 F.2d 1345, 1349 (9th Cir. 1981); *Ronwin v. Shapiro*, 657 F.2d 1071, 1073 (9th Cir. 1981); *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982)). Unlike the district court, we are not inclined to discount the importance of this factor.⁸ Although it is true that “[t]he Eleventh Amendment does not exist solely . . . to prevent federal-court judgments that must be paid out of a State’s treasury,” *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) (cleaned up), “the vulnerability of the State’s purse [i]s the most salient factor in Eleventh Amendment determinations.” *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994). Indeed, as the Supreme Court acknowledged in *Hess*, “the vast majority of Circuits . . . have generally accorded this factor dispositive weight.” 513 U.S. at 49 (internal quotation marks omitted). We certainly have, *see Durning*, 950 F.2d at 1424 (citing cases).

Nor are we persuaded by the district court’s observation that, “[d]espite the fact the Bar alone is responsible for any money damages it may incur. . . . [a]ny money judgment would come from the Bar’s collection

⁸ The district court suggested that this factor carries less weight in cases for primarily equitable relief. But even assuming such a distinction bears on the weight of this factor, it has little effect here as both complaints seek the return of OSB membership fees Plaintiffs have paid during the statute of limitations period.

of fees that is made possible because the State authorized the Bar to collect those fees.” Rather, we find OSB’s collection of dues weighs against immunity, for like the bar in *Keller*, OSB’s “principal funding comes, not from appropriations made to it by the legislature, but from dues levied on its members by the board of governors.” 496 U.S. at 11.⁹

In short, Oregon law expressly disavows State financial responsibility for OSB, which is funded by membership fees. Therefore, the first and most important *Mitchell* factor weighs strongly against immunity.

2. Central government functions

Mitchell’s second factor, “whether the entity performs central governmental functions,” is a closer call, but we conclude that it weighs slightly against immunity. *Mitchell*, 861 F.2d at 201. To be sure, OSB, “an instrumentality of [Oregon’s] Judicial Department,” performs important government functions. OR. REV. STAT. § 9.010(2). The district court detailed how the Bar, subject to the review and direction of the Oregon Supreme Court, manages bar examinations and attorney admissions, discipline, resignations, and reinstatements; and how the Oregon Supreme Court approves

⁹ The district court further opined, in a footnote, that if Plaintiffs succeeded in eliminating mandatory membership fees, the regulatory costs to the State would correspondingly increase. These concerns, however well-intentioned, exceed the proper scope of this first factor’s inquiry: Whether a money judgment would be satisfied out of state funds.

changes to some OSB bylaws, adopts rules of professional conduct, reviews OSB's annual financials, and approves its budget for certain activities.

We agree that OSB “undoubtedly performs important and valuable services for the State by way of governance of the profession.” *Keller*, 496 U.S. at 11. But like the integrated bar in *Keller*, “those services are essentially advisory in nature.” *Id.* Integrated bars are “a good deal different from most other entities that would be regarded in common parlance as governmental agencies.” *Id.* (internal quotation marks omitted). OSB “was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession.” *Id.* at 13. And although *Keller* never specifically addressed sovereign immunity, its analysis is pertinent and analogous to the immunity question here. *Keller* identified (after a lengthy discussion) constitutionally significant differences between an integrated bar and “traditional government agencies and officials.” *Id.* On that basis, the Supreme Court rejected the argument that “the bar is considered a governmental agency” that is “exempted . . . from any constitutional constraints on the use of its dues.” *Id.* at 10. Indeed, this was the principal basis on which the Supreme Court reversed the California Supreme Court in *Keller*. *Id.* at 11–13.

Moreover, the second *Mitchell* factor inquiry must be guided by “[t]he treatment of the entity under state law.” *Durning*, 950 F.2d at 1426. The *Gruber* Plaintiffs point out that under Oregon law, the Oregon Supreme

Court—not OSB—makes final decisions on admitting attorneys, disciplining attorneys, and adopting rules of professional conduct. These same considerations convinced the Supreme Court in *Keller* that the California bar was not “the typical government official or agency,” but rather a professional association that provided recommendations to the ultimate regulator of the legal profession. 496 U.S. at 11–12 (reversing the California Supreme Court’s conclusion to the contrary). The Oregon Supreme Court exerts the same direct, regulatory control over Oregon attorneys. See *Ramstead v. Morgan*, 347 P.2d 594, 601 (Or. 1959) (“No area of judicial power is more clearly marked off . . . than the courts’ power to regulate the conduct of the attorneys who serve under it.”). Given OSB’s similarity to the integrated bar in *Keller*, we find that the second *Mitchell* factor weighs slightly against immunity.¹⁰ We note that even if we were inclined to discount *Keller*—which we cannot—and view OSB’s functions as central government functions, the second *Mitchell* factor is, at most, a wash for OSB because the remaining four factors weigh against immunity.

¹⁰ Our pre-*Mitchell* decisions in *O’Connor v. State of Nevada*, 686 F.2d 749, 750 (9th Cir. 1982) and *Ginter v. State Bar of Nevada* 625 F.2d 829, 830 (9th Cir. 1980) do not require a contrary result. Neither opinion offers an explanation as to *why* the Nevada state bar is an arm of the state. More importantly, our present inquiry concerns Oregon’s state bar—not Nevada’s.

3. Power to sue or be sued

Oregon law unequivocally imparts to OSB the power to sue and be sued. OR. REV. STAT. § 9.010(5). This factor thus militates against immunity. The district court nevertheless reasoned to the contrary because Oregon law elsewhere provides civil immunity to the Bar and its officials in the performance of their duties related to admissions, licensing, reinstatements, disciplinary proceedings, and client security fund claims. OR. REV. STAT. §§ 9.537(2), 9.657. We are not persuaded that limited grants of immunity for specific functions cancel out the clear statutory grant of the power to sue or be sued. In any event, we have recognized that although this factor warrants “some consideration, [it] is entitled to less weight than the first two factors.” *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 254 (9th Cir. 1992). As such, this factor weighs slightly against immunity.

4. Power to take property in its own name

It is clear that OSB may “enter into contracts and lease, acquire, hold, own, encumber, insure, sell, replace, deal in and with and dispose of real and personal property.” OR. REV. STAT. § 9.010(5). This factor accordingly weighs against immunity.

5. Corporate status

“[OSB] is a public corporation and an instrumentality of . . . the State.” *Id.* § 9.010(2). But because the Bar appoints its own leaders, amends most of its by-laws, and manages its internal affairs, OSB “is a

corporate entity sufficiently independent from the state.” *Durning*, 950 F.2d at 1428. Our decision in *Durning* is illustrative here. There, the Wyoming Community Development Authority was “a *body corporate* operating as a state instrumentality operated solely for the public benefit” and its board was government appointed. *Id.* at 1427 (emphasis in original). Yet *Durning* concluded the fifth *Mitchell* factor weighed against immunity. *Id.* at 1428. We reach the same conclusion here, for OSB is even more independent than the Authority in *Durning*. OSB’s Board of Governors, for instance, are not government appointed. OR. REV. STAT. § 9.025(1)(a). The Board appoints OSB’s CEO. *Id.* § 9.055. And OSB “has the authority to . . . regulat[e] and manag[e] . . . [its own affairs].” *Id.* § 9.080(1).

* * *

In sum, three factors, including the first and most important, weigh against immunity and the other two still lean slightly against immunity. The *Mitchell* factors thus compel the conclusion that OSB is not an “arm of the state” entitled to immunity. We note that even viewing two factors as neutral, OSB has not met its burden to prove immunity.

IV. CONCLUSION

In light of the foregoing, the district court is **AF-FIRMED IN PART, REVERSED IN PART**, and these cases are **REMANDED** for further proceedings consistent with this opinion.

VANDYKE, Circuit Judge, concurring in part and dissenting in part:

I agree with and concur in the entirety of the panel's opinion in these cases, except its resolution of the *Crowe* Plaintiffs' inadequate procedural safeguards claim based on *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

At first blush, it's not obvious to me that the Bar's existing after-the-fact safeguards, which no one disputes fail to comply with the Supreme Court's direction in *Hudson*, adequately "prevent[] compulsory subsidization of ideological activity by" objecting bar members. *Id.* at 302 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 (1977)). As the panel's opinion correctly concludes, even though the Supreme Court seems to have moved on from the *Abood* rationale upon which its *Keller* decision relied, we must still follow *Keller* and thus reject Plaintiffs' free speech claims in these cases. But I don't think that requires us to go further and ignore that the Supreme Court has now concluded even *Hudson's* minimal safeguards are not enough in other contexts. See *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2482, 2486 (2018) (concluding that "the *Hudson* notice in the present case and in others that have come before us do not begin to permit" objectors to protect their First Amendment rights, and overruling *Abood*).

Given these developments in the law, it is hard for me to see how something less than *Hudson's* safeguards could suffice in the context of compulsory bar

membership dues. *Keller* said that “an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*,” *Keller v. State Bar of California*, 496 U.S. 1, 17 (1990), which of course we are bound by until the Supreme Court tells us otherwise. See *Agostini v. Felton*, 521 U.S. 203, 237 (1997). But *Keller* never addressed what procedures less protective than those required by *Hudson* would suffice. Even assuming some type(s) of less protective procedures might have been defensible before *Janus* overruled *Abood*, it doesn’t strike me as very defensible now that the Supreme Court has told us *Hudson*’s procedures are no longer sufficient in other contexts. Following *Keller* and *Janus* and *Agostini*, it may be that *Hudson*’s requirements are now both a floor and a ceiling for integrated bars—at least until the Supreme Court gives us more guidance.

Ultimately, however, I would address the *Crowe* Plaintiffs’ inadequate safeguards claim by not doing so in this appeal. We are remanding Plaintiffs’ free association claim, and if on remand they prevail on that claim, the Bar will presumably need to change its by-laws, and maybe its entire structure. Because such alterations would likely change the procedures the *Crowe* Plaintiffs currently challenge, I don’t think it is necessary that we review those procedures at this stage of the case. To avoid issuing an advisory opinion, I would defer consideration of this issue. See *Ball v. Rodgers*, 492 F.3d 1094, 1119 (9th Cir. 2007) (declining to address a claim “at this time,” and waiting until

after the district court on remand reviews the claim anew in light of our court’s instructions on separate issues that could affect that claim). Accordingly, I respectfully dissent on this singular claim.

[cited in and attached to Crowe v. Oregon State Bar No. 19-35463 archived on February 22, 2021]

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Article 1 Purpose of Bar and Definitions

Section 1.1 Definition

In these Bylaws, unless the context or subject matter otherwise requires:

- (A) “State Bar” and “Bar” mean the Oregon State Bar, as described in ORS Chapter 9.
- (B) “State Bar Act” and “Bar Act” mean ORS Chapter 9.
- (C) “Board of Governors” and “Board” mean the Board of Governors of the Oregon State Bar.
- (D) “House of Delegates” and “House” mean the House of Delegates of the Oregon State Bar created by ORS 9.136.
- (E) “President” means the President of the Oregon State Bar.
- (F) “President-elect” means the President-elect of the Oregon State Bar.
- (G) “Chief Executive Officer” means the Chief Executive Officer of the Oregon State Bar.
- (H) “Governor” means a member of the Board of Governors of the Oregon State Bar.

(I) “Member” means a member of the Oregon State Bar.

Section 1.2 Purposes

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.

The Bar fulfills that mission through the following functions:

(A) We regulate the legal profession and improve the quality of legal services.

(B) We support the judiciary and improve the administration of justice.

[8] (C) We advance a fair, inclusive, and accessible justice system.

Article 2 Board of Governors

Section 2.1 Duties and Responsibilities

Subsection 2.100 General

(a) The Board of Governors governs the Bar, except as provided in ORS 9.136 to 9.155, and must at all times direct its power to serve the public interest as provided in ORS 9.080(1).

(b) The Board establishes and monitors implementation of the mission, strategic plan, programs, services and policies of the bar.

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(c) The Board monitors the financial condition of the bar, ensures that adequate resources exist for operations, programs, and services, and approves the annual bar budget.

(d) The Board selects and appoints the Chief Executive Officer, who is the Board's only employee. The Chief Executive Officer is responsible for implementing, administering and supervising bar operations, bar staff, bar programs and services as provided in OSB Bylaw 2.8. The Board supports, provides direction to, evaluates the performance of, and determines compensation for the Chief Executive Officer. The Board commits to providing a work environment for the Chief Executive Officer that is free of harassment and intimidation, as provided in the BOG Anti-Harassment Policy. Any board member who is aware that a board member has engaged in harassment or intimidation against the Chief Executive Officer or any other OSB staff should report the information immediately to the bar president, president-elect, Chief Executive Officer or OSB General Counsel, as appropriate.

(e) Board members are ambassadors for the bar. Board members should listen to stakeholders and bring their perspectives and concerns to the attention of the board. They should share information with stakeholders about the mission, strategic plan, programs, services, activities and policies of the bar. Stakeholders include, but are not limited to, members of the public, bar members and law students within the board member's region, committees, sections and other bar groups to which the board member

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is appointed as liaison, members of local, specialty and affinity bars, and state and local government officials.

(f) Board members are advocates for the bar within the legal and other communities and should avoid speaking publicly in opposition to positions taken by the Board of Governors.

(g) Board members are leaders within the legal and other communities who should model the values of the Oregon State Bar.

(h) Board members are committed to providing a professional, inclusive, and harassment-free experience for everyone at bar-sponsored events, meetings and functions. Any board member who is aware that someone has engaged in harassment or intimidation against an attendee of a bar-sponsored event, meeting or function, should report the information immediately, as provided in the OSB Event Anti-Harassment Policy.

[9] (i) Board members are committed to preparing for and attending all board meetings and other functions except when, in a board member's judgment, an emergency or compelling circumstance arises that prevents participation.

(j) Board members are committed to development of the skills and competencies needed to contribute to the successful governance of the bar, including but not limited to, organizational knowledge, oversight of the Chief Executive Officer, financial literacy, and cultural competency.

(k) Each board member has special talents, perspectives, and community connections that contribute to the successful governance of the Bar. Expressing opinions, sharing expertise, and providing diverse perspectives on issues before the Bar are important and encouraged.

Subsection 2.101 Election

(a) The election of lawyer-members of the Board will be conducted according to Article 9 of the Bar's Bylaws. Newly elected governors and officers of the Bar take office on January 1 of the year following their election.

(b) Candidate statements for the office of Governor from a region must be in writing. The Chief Executive Officer will prepare the forms for the candidate statements and supply the forms to the applicants. Applicants must complete and file the form with the Chief Executive Officer by the date set by the Board. The Chief Executive Officer must conduct elections in accordance with the Bar Bylaws and the Bar Act.

Subsection 2.102 Board Committee and Other Assignments

At or shortly after the annual orientation and retreat, board members will be invited to indicate their preferences for board committee and other assignments. Members of the senior class will be invited to identify one or more board committees they would like to chair. The Chief Executive Officer and president-elect will

develop a slate of assignments based on the preferences. Senior class members shall have priority in the choice of assignments, but the preferences of all member will be honored to the extent possible and appropriate. The proposed slate will be circulated to the board and any board member may request a change of assignments. The president-elect will make reasonable effort to accommodate any change requests, but the president-elect's decision will be final.

Subsection 2.103 Judicial Campaigns and Appointments

(a) Bar Positions on Judicial Campaigns and Appointments. The members of the Board must refrain from stating or suggesting that the bar or Board is taking a position on judicial campaigns or appointments, except to relay recommendations made by the Board pursuant to OSB Bylaw 2.703, Statewide Judicial Appointments.

(b) Personal Positions on Judicial Campaigns and Appointments. If a member agrees to be listed as supporting or opposing a judicial candidate and be identified as a member of the Board, any publication must include a prominent disclaimer that the views expressed are the member's own and do not represent the views of the bar or Board. Members of the Board who express a personal position on a judicial campaign or appointment should strive to explain that they are not taking a position on behalf of the bar or Board. public involvement in judicial campaigns and appointments

that in any way identifies them as members of the Board, officers of the Bar, or otherwise representing the Oregon State Bar.

[10] ***Subsection 2.104 Separation of Powers***

The Board will not nominate or appoint persons who work in or for the state executive or legislative departments to the following bodies: State Professional Responsibility Board, Disciplinary Board, Minimum Continuing Legal Education Board and Commission on Judicial Fitness and Disability. In the case of a challenge to the candidacy of a member of the Board of Governors under ORS 9.042, the Board will follow the procedures outlined in the statute.

Subsection 2.105 Amicus Curiae Briefs

A section or committee that wishes to enter an *amicus curiae* appearance before any trial court or appellate court must obtain prior approval from the Board. The request must be in writing and must include a synopsis of the question involved, the posture of the case, the position to be taken in the *amicus* appearance, and the anticipated cost of appearing *amicus curiae* including lawyer fees, if any. The question involved must directly or substantially affect admission to the practice of law, the practice of law, discipline of members of the bench or bar, the method of selecting members of the judiciary or other questions of substantial interest to the Bar or a committee or section. The Board will determine whether the question involved can be adequately

presented to the court without the *amicus* appearance of the committee or section. All costs for appearance by a section must be paid by the section; if the Board approves the filing of an *amicus* appearance by a committee, the Bar will pay any costs for the appearance.

Subsection 2.106 Indemnification

The Bar must indemnify its officers, board members, directors, employees and agents and defend them for their acts and omissions occurring in the performance of their duties, to the fullest extent permitted by ORS Chapter 30 relating to indemnification by public bodies, especially the provisions of ORS 30.285. The term “officers, board members, directors, employees and agents” of the Bar includes subordinate groups established by the Bar or the Supreme Court to perform one or more of the Bar’s authorized functions, including the Board of Bar Examiners, the Professional Liability Fund, the State Professional Responsibility Board, the Disciplinary Board, bar counsel and the State Lawyers Assistance Committee. The right to and method and amount of defense and indemnification are determined in accordance with the provisions of ORS 30.285 or comparable provisions of law governing indemnity of state agents in effect at the time of a claim.

Subsection 2.107 Defense of Disciplinary Complaints and Proceedings

(a) The bar will defend any of its current and former officers, employees and agents (hereafter “Accused”),

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whether elected or appointed, against any complaint of professional misconduct arising out of an act or omission occurring in the performance of his or her official duties on behalf of the bar as provided in this bylaw.

(b) The duty to defend does not apply in the case of malfeasance, gross negligence or willful or wanton neglect of duty.

(c) If any complaint is made to the Oregon State Bar or other agency or court with disciplinary jurisdiction over the Accused or a disciplinary proceeding is brought by the Oregon State Bar or such agency or court against an Accused which on its face [11] falls within the provisions of subsection (a) of this bylaw, or which the Accused asserts to be based in fact on an act or omission in the performance of his or her official duties on behalf of the bar and not within the scope of subsection (b) of this bylaw, the Accused may file a written request for a defense with the General Counsel, or if the request is by the General Counsel, the President of the bar. The General Counsel or President, as the case may be, will thereupon present his or her recommendations to the Board of Governors regarding the approval of an agreement to pay for the defense of the Accused, including attorney fees and costs during the investigation, prosecution, and appeal of a complaint of professional misconduct. The Board of Governors will approve such terms and conditions of payment for the defense as it deems appropriate under the circumstances, including the Board's right to select counsel to defend the Accused, unless the Board

determines that the complaint does not arise out of an act or omission occurring in the performance of official duties on behalf of the bar, or that the act or omission amounted to malfeasance, gross negligence or willful or wanton neglect of duty, in which case the Board will reject the request.

(d) If the Board agrees to pay for the defense of a complaint or disciplinary proceeding, the Accused shall cooperate fully with the lawyer(s) hired by the bar to defend the Accused. If the Board determines that the Accused has not cooperated with defense counsel or has otherwise acted to prejudice defense counsel's good faith decisions regarding the proper defense of the matter for which a defense is provided, the Board may at any time terminate the continued defense of the matter and require the Accused to reimburse the bar for all funds it has paid on account of the defense of the Accused. The Board may condition the provision of a defense under this bylaw on the Accused's agreement to make such reimbursement upon the Board's good faith determination that the Accused has failed to cooperate with defense counsel or otherwise acted to prejudice defense counsel's good faith decisions regarding the proper defense of the matter.

(e) If the Board concludes, after undertaking to pay for the Accused's defense, that the conduct was malfeasance, grossly negligent, or the willful or wanton neglect of duty, the Board will terminate the continued defense of the matter and require the Accused to reimburse the bar for all funds it has paid on account of the defense. The Board may condition the provision of a

defense under this bylaw on the Accused's agreement to make such reimbursement upon the Board's good faith determination that the Accused has engaged in such conduct.

(f) If the Accused in a disciplinary proceeding is found to have violated the rules of professional duct, a disciplinary statute or disciplinary regulation, the Accused must reimburse the bar for all funds it has paid on account of the defense of the Accused. The Board may condition the provision of a defense under this bylaw on the Accused's agreement to make such reimbursement upon the entry of a final judgment imposing discipline on the Accused. Discipline for purposes of this bylaw should be a reprimand or greater sanction imposed by the Disciplinary Board or the Oregon Supreme Court or other court or agency having disciplinary jurisdiction over the Accused. If the discipline is a reprimand, the board may waive the reimbursement requirement.

(g) If the Board denies an Accused a defense under this bylaw or terminates the provision of such a defense under the terms of this bylaw and the Accused is found in any disciplinary proceeding for which a defense was denied or terminated not to have violated any rule of professional conduct or disciplinary statute or regulation, [12] the bar will reimburse the Accused for his or her reasonable attorney fees and costs in defense of such matter so long as the Accused's conduct occurred in the performance of official duties on behalf of the bar and did not separately constitute malfeasance, gross negligence or willful or wanton

neglect of duty, as, in good faith, is determined by the Board. Pro se representation does not qualify for the reimbursement of reasonable attorney fees and costs under this subsection.

Subsection 2.108 BOG member Censure or Suspension from Service

(a) A board member may be censured or suspended from board service for cause on a two-thirds vote of the entire Board of Governors. The board must provide the board member to be censured or suspended with advance written notice of the vote. Upon request, the board must also provide the reason for the proposed censure or suspension and an opportunity to contest it in writing or in person at a meeting of the Board. "Cause" includes, but is not limited to: incapacity to serve; a serious breach of, or repeated failures to meet, the duties outlined in these bylaws, or; conduct or activities that bring discredit to, or may give rise to liability for, the bar.

(b) A board member against whom charges of misconduct have been approved for filing by the State Professional Responsibility Board is automatically suspended from board service until the charges filed against them have been resolved or until their term ends or is terminated as provided in ORS 9.025(5).

(c) The Board of Governors may appoint a temporary replacement to serve until the board member suspended under this bylaw is again able to serve.

Section 2.2 Officers

Subsection 2.200 Duties

(a) President

The President presides at all meetings of the Board and has the authority to exercise the Board's power between board meetings and to take appropriate action whenever the President finds that a board meeting is not necessary or cannot reasonably be convened. However, the President's action must be consistent with any actions taken or policies previously adopted by the Board or by the membership. The President must report any such action at the next board meeting. The President performs such other duties as the Board directs.

(b) President-Elect

The President-elect performs the duties of the President in the absence, inability or refusal of the President to perform those duties. The President-elect performs other duties as the Board directs.

(c) Immediate Past President

The Immediate Past President is a non-voting *ex officio* member of the Board. Upon completion of the term for which the President is elected, the President becomes the Immediate Past-President for one year. The duties of the Immediate Past President will be as agreed between the Immediate Past President and the Board from time to time. Expenses of the Immediate Past President will be reimbursed as approved by the Board.

[13] ***Subsection 2.201 Election***

(a) Time of Election

The President and President-elect are elected at the last regularly scheduled board meeting of the calendar year. The only candidate for President is the President-elect.

(b) President-Elect

Any lawyer member of the second-year class may be a candidate for the office of President-elect by notifying the Chief Executive Officer by September 1. Each candidate must submit with said notice a statement outlining the candidate's qualifications, reasons for seeking the position, and vision for the bar. A Nominating Committee, consisting of the fourth-year class and the current President-elect, will interview each candidate and nominating committee members will confer with the remaining board members to discuss their view about each candidate's respective qualifications. The Nominating Committee will announce its candidate for President-elect at least 20 days prior to the last regularly scheduled board meeting of the calendar year. The Nominating Committee's selection will be the sole candidate for President-elect unless at least six members nominate another candidate by written petition delivered to the Chief Executive Officer not less than 10 days prior to the last regularly scheduled board meeting of the calendar year. If the Nominating Committee is unable to select a sole candidate for President-elect, the board will elect a President-elect at its

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last regularly scheduled board meeting of the calendar year, pursuant to Subsection 2.201(c).

(c) Voting

If there is only one candidate for an office, the candidate is deemed elected without a formal vote. When there are two nominees for President-elect, the candidate receiving the most votes will be elected. If there are three nominees for President-elect and no candidate receives more than 50 percent of the votes on the first vote, the candidate receiving the fewest votes is eliminated and another vote will be taken. Only board members present at the meeting may vote.

Subsection 2.202 Removal

Any officer of the Bar may be removed with or without cause on a three-fourths affirmative vote of all board members. That position is then filled by the Board, at the same or a subsequent meeting, using the above rules as far as applicable.

Section 2.3 Public Members

In addition to the resident active members of the Bar required by ORS 9.025, four public positions exist on the Board of the Bar.

Subsection 2.300 Appointment

Any person appointed to a public position on the Board must meet the qualifications set forth in ORS 9.025(1).

Public members serve for a term of four years, beginning on January 1 of the year following appointment. Every attempt will be made to maintain geographic distribution; however, the priority will be to match the current needs of the Board with the areas of interest of the public members.

[14] ***Subsection 2.301 Powers and Duties***

Public members of the Board have the same voting rights as the lawyer members of the Board. They take the same oath of office and are charged with the same functions and duties as provided by statute and Board Policies. Public members cannot serve as officers of the Bar.

Subsection 2.302 Removal

Public members of the Board are subject to removal by the Board upon the following grounds and for the following reasons: A public member no longer meets the initial qualifications for appointment set forth in Subsection 2.300 of the Bar's Bylaws; or a public member commits an act substantially similar to the conduct proscribed by ORS 9.527 or fails to perform the duties of the office. If at least ten members of the Board propose that the public member be removed, the public member is given written notice of the proposed removal, together with the reasons therefore. The written notice must be given at least 15 days before the next regularly scheduled board meeting. Thereafter, on

a vote of at least ten members of the Board, the public member is removed and the position is vacated.

Subsection 2.303 Vacancies

On the death, resignation or removal of a public member of the Board, the Board must appoint a replacement to serve the unexpired portion of the then vacant position. Any person so appointed must satisfy the qualifications for appointment set forth in Subsection 2.400 of the Bar's Bylaws and is subject to removal as set forth in Subsection 2.302 of the Bar's Bylaws.

Section 2.4 Meetings

Subsection 2.400 Robert's Rules of Order

Board meetings are governed by ORS Chapter 9, these bylaws, and the most recent edition of Robert's Rules of Order.

Subsection 2.401 Regular Meetings

Meetings of the Board are held at such times and places as the Board determines. The Chief Executive Officer will provide notice of the time and place of all meetings in accordance with ORS 192.610 to 192.690.

Subsection 2.402 Special Meetings

A special meeting of the Board may be called by the President or by three Governors filing a written request with the Chief Executive Officer. If, within five

days after a written request by three Governors, the President fails or refuses for any reason to set a time for and give notice of a special meeting, the Chief Executive Officer must call the meeting and provide at least 24 hours' notice of the time and place of the special meeting in accordance with ORS 192.610 to 192.690.

Subsection 2.403 Emergency Meetings

When the President determines that a matter requires immediate attention of the Board, an emergency meeting may be called on less than 24 hours' notice. Notice must be given to members of the board, the media and other interested persons as may be appropriate under the circumstances. The notice must indicate the subject [15] matter to be considered. Only the matters for which the emergency meeting is called may be considered at the meeting.

Subsection 2.404 Minutes

Accurate minutes of all board meetings must be preserved in writing or in a sound, video or digital recording. The minutes must reflect at least the following information: members present, motions or proposals and their disposition, the substance of any discussion on any matter, and a reference to any document discussed at the meeting. The minutes must reflect the vote of each member of the Board by name if the vote is not unanimous. Draft minutes, identified as such, will be available to the public within a reasonable time

after the meeting. Final minutes will be available to the public within a reasonable time after approval by the Board. The minutes of executive sessions will be available to the public except where disclosure would be inconsistent with the purpose of the executive session.

Subsection 2.405 Oregon New Lawyers Division Liaison

The Oregon New Lawyers Division (“ONLD”) has a non-voting liaison to the Board, who must be a member of the ONLD Executive Committee. The ONLD liaison is appointed by the chair of the ONLD Executive Committee to serve for a one-year term. No person may serve more than three terms as ONLD liaison. If the ONLD liaison is unable to attend a meeting of the Board, the ONLD chair may appoint another member of the ONLD Executive Committee to attend the meeting.

Section 2.5 Expenses

Subsection 2.500 General Policy

All provisions of Section 7.5 of the Bar’s Bylaws (Expense Reimbursements) apply to the Board of Governors with the following additions. Officers of the Board who, because of their office, must occupy a suite or special room other than the standard room occupied by most board members will be entitled to be reimbursed for the extra expense. Members of the Board who host board dinners will be reimbursed the actual cost of the

dinner regardless of whether it is held in the board member's home or at a restaurant.

Subsection 2.501 Conferences

The Bar will reimburse the actual expenses of the President and/or President-elect and their spouses or partners and the Chief Executive Officer, to any out-of-state conference that is included in the annual budget. Other attending board members are not eligible for any reimbursement unless specifically authorized by the Board. Each year the Bar will reimburse the actual expenses of the President-elect and spouse or partner and the Chief Executive Officer, to attend the ABA Bar Leadership Conference or a comparable conference.

Subsection 2.502 Gifts

The expense of gifts by the Board to its retiring members is a budgeted expense.

Section 2.6 Conflicts of Interest

Bar officials are subject to the provisions of ORS Chapter 244, the Government Standards and Practices Act. Nothing in this section is intended to enlarge or [16] contradict the statutory provisions as they may apply to bar officials. To the extent anything in this section contradicts the provisions of ORS Chapter 244, bar officials shall be bound by the statutory provisions.

Subsection 2.600 Definitions

As used in Section 2:

(a) “Actual conflict of interest” means that the person, a relative of the person or a business with which the person or a relative of the person is associated will derive a private pecuniary benefit or detriment as a result of an action, decision or recommendation of the person in the course of bar-related activities.

(b) “Bar official” means members of the Board of Governors; appointees of the Board of Governors, including members of standing committees, bar counsel panels, and the State Professional Responsibility Board; section officers and executive committee members; and bar staff.

(c) “Business” means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed person and any other legal entity operated for economic gain, but excluding any income-producing not-for-profit corporation that is tax exempt under IRC §501(c) with which a bar official is associated only as a member or board director or in a non-remunerative capacity.

(d) “Business with which the person is associated” means:

(1) any private business or closely held corporation of which the bar official or the bar official’s relative is a director, officer, owner, employee or agent or any business or closely held corporation in which the bar official or the bar official’s relative

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owns or has owned stock worth \$1,000 or more at any point in the preceding year;

(2) Any publicly held corporation in which the bar official or the bar official's relative owns or has owned \$100,000 or more in stock or another form of equity interest, stock options or debt instruments at any point in the preceding calendar year; and

(3) Any publicly held corporation of which the bar official or the bar official's relative is a director or officer.

(e) Except as excluded by ORS 244.020(6), "gift" means something of economic value given to or solicited by a bar official, or a relative or member of the household of the bar official:

(1) Without valuable consideration of equivalent value, including the full or partial forgiveness of indebtedness, which is not extended to others who are not bar officials or the relatives or members of the household of bar officials on the same terms and conditions; or

(2) For valuable consideration less than that required from others who are not bar officials.

(f) "Potential conflict of interest" means that the bar official, a relative of the bar official or a business with which the bar official or a relative of the bar official is associated, could derive a private pecuniary benefit or detriment as a result of an action, decision or recommendation of the person in the course of bar-related

activities, unless the pecuniary benefit or detriment arises out of the following:

[17] (1) An interest or membership in a particular business, industry, occupation or other class required by law as a prerequisite to the holding by the bar official of the office or position.

(2) Any action in the bar official's official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the bar official, or the bar official's relative or business with which the person or the bar official's relative is associated, is a member or is engaged.

(3) Membership in or membership on the board of directors of a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code.

(g) "Member of the household" means any person who resides with the bar official.

(f) "Relative" means the bar official's spouse, the bar official's Oregon Registered Domestic Partner, any children of the bar official or the bar official's spouse or Oregon Registered Domestic Partner, and siblings and parents of the bar official or the bar official's spouse or Oregon Registered Domestic Partner. Relative also means any individual for whom the bar official provides benefits arising from the bar official's public employment or from whom the bar official receives benefits arising from that individual's employment.

Subsection 2.601 Prohibited Actions

Regardless of whether an actual or potential conflict is disclosed:

(a) No bar official may use or attempt to use the person's official position to obtain any financial gain or the avoidance of any financial detriment that would not otherwise be available to the person, but for the bar official's holding of the official position, except official salary, reimbursement of expenses for official activities or unsolicited awards for professional achievement for the bar official, a relative of the bar official, a member of the household of the bar official, or for any business with which the bar official or the bar official's relative is associated.

(b) No bar official may attempt to further the personal gain of the bar official through the use of confidential information gained by reason of an official activity or position.

(c) No bar official or relative or member of the household of a bar official may solicit or receive, during any calendar year, any gift or gifts with an aggregate value of more than \$50 from any single source that could reasonably be known to have an economic interest, distinct from that of the general public, in any matter subject to the decision or vote of the bar official acting in the bar official's official capacity. This provision does not apply to bar officials who are subject to the Oregon Code of Judicial Conduct.

(d) No bar official may solicit or receive a promise of future employment based on an understanding that any official action will be influenced by the promise.

Subsection 2.602 Disclosure of Conflict

When met with an actual or potential conflict of interest, a bar official must disclose the conflict and take any other action required by this bylaw.

[18] (a) If appointed by the Chief Executive Officer, the bar official must notify the Chief Executive Officer of the nature of the conflict and request the Chief Executive Officer to dispose of the matter giving rise to the conflict. Upon receipt of the request, the Chief Executive Officer will designate within a reasonable time an alternate to dispose of the matter, or will direct the bar official to dispose of the matter in a manner specified by the Chief Executive Officer.

(b) If the bar official is the Chief Executive Officer, she/he must notify the Board of Governors, through the President, of the nature of the conflict and request the Board of Governors to dispose of the matter giving rise to the conflict. Upon receipt of the request, the President will designate within a reasonable period of time an alternate to dispose of the matter, or will direct the Chief Executive Officer to dispose of the matter in a manner specified by the Board of Governors.

(c) If the bar official is elected to or appointed by the Board of Governors or other appointing authority to

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serve on a board, committee, council, commission or other public body, the bar official must:

(1) When met with a potential conflict of interest, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a bar official; (2) when met with an actual conflict of interest, announce publicly the nature of the actual conflict, and refrain from participating in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue, except that if the bar official's vote is necessary to meet a requirement of a minimum number of votes, the bar official may vote, but may not participate in any discussion or debate on the issue out of which the actual conflict arises.

(d) When a bar official gives notice of an actual or potential conflict of interest under subsection 2.602(c), the conflict must be recorded in the minutes or other official record of the board, committee, council, commission or other public body on which the official serves, together with an explanation of how the conflict was resolved. If there are no minutes or other official record, then the bar official, in addition to the disclosure to the board, committee, council, commission or other public body, must disclose the conflict in writing to the Chief Executive Officer.

(e) No decision or action of the any bar official or of any board, committee, council, commission or other public body on which the official serves is invalid or

voidable solely by reason of the failure to disclose an actual or potential conflict of interest.

Subsection 2.603 Board Members as Witnesses in Bar Proceedings

As provided in BR 5.3(c), a current member of the Board of Governors must not testify as a witness in any bar admission, discipline or reinstatement proceeding except pursuant to subpoena. If requested by a party to be a witness in a bar proceeding, board members should urge the party to present the anticipated testimony through other witnesses. However, the parties ultimately decide whether a board member will be subpoenaed to testify as a witness in a bar proceeding.

[19] Section 2.7 Judicial Selection

Subsection 2.700 General

The Bar plays an important role in judicial selection by interviewing and evaluating candidates for appellate court appointments. Results will be made public as soon as practicable to the press, the candidates and the appointing authority.

Subsection 2.701 Statewide Judicial Appointments

(a) For judicial appointments to a statewide court, the Board will appoint an Appellate Selection Committee to conduct the Board's appellate recommendation process. Bar members will be notified of the upcoming

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appointment and will be invited to participate in the appellate recommendation process. If an appellate recommendation process has been concluded within three months preceding the announcement of a new appellate vacancy, the Board may, at its discretion, forego conducting a separate appellate recommendation process and instead resubmit the previous list of highly qualified candidates to the Governor without notification to members.

(b) Prior to commencement of the appellate recommendation process, the Appellate Selection Committee shall establish policies and criteria for conducting its review of candidates for each position, which may include, but is not limited to, review of the written applications; interviews of candidates; reports from judges or hearings officers; reports from members of the legal and general community; reports from references supplied by the candidate; and review of writing samples.

(c) The Appellate Selection Committee will recommend to the Board at least three candidates it believes are highly qualified, based on the statutory requirements of the position, information obtained in its review of candidates, and based on at least the following criteria: integrity, legal knowledge and ability, professional experience, cultural competency, judicial temperament, diligence, health, financial responsibility, and public service. The Board will then determine the final list of highly qualified candidates to submit to the Governor. A “highly qualified” or “qualified” recommendation is intended to be objective. Failure to

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recommend a candidate in any particular selection process is not a finding that the person is unqualified.

(d) In addition to submitting its list of “highly qualified” candidates, the Board will respond to any specific inquiry from the Governor as to whether certain other candidates in the pool meet a “qualified” standard.

(e) Meetings of the Appellate Selection Committee are public meetings except for portions of meetings during which reference reports are presented and discussed. The term “reference reports,” for purposes of this section, means information obtained by committee members and staff from persons listed as references by the candidates and information obtained by committee members and staff from other persons knowledgeable about candidates as part of the candidate review process. Discussion of reference reports by the committee and the Board will be in executive session pursuant to ORS 192.660(1)(f).

[20] **Section 2.8 Chief Executive Officer**

Subsection 2.800 Duties

The Chief Executive Officer, appointed by and acting under the supervision of the Board, is the principal administrative officer of the Bar. The Chief Executive Officer is responsible for the day-to-day operations of the Bar including, without limitation: hiring, managing and terminating bar personnel; negotiating and executing contracts; collecting debts owed to the bar and assigning debts for collection as deemed appropriate;

and acquiring (through purchase or lease), managing and disposing of personal property related to the bar's operations, within the budget approved by the board. The Chief Executive Officer will attend all meetings of the Board and the House of Delegates; will keep the Board informed of all agenda items with appropriate background information and staff or committee reports; and will keep a record of the proceedings of all such meetings. The Chief Executive Officer is responsible for preparing an annual budget for the Board's Budget Committee. The Chief Executive Officer performs other duties as imposed by the Bar Act, the Bar Bylaws or as otherwise directed by the Board.

Subsection 2.801 Evaluation

No later than December 1 of each calendar year, the Board will evaluate and assess the performance of the Chief Executive Officer. The evaluation will relate to the duties and responsibilities of him or her, progress toward established goals and the working relationships among the Chief Executive Officer, staff and the membership. The Board will conduct the evaluation in executive session. The Board or its representative will meet with the Chief Executive Officer to discuss the evaluation.

Subsection 2.802 Service of Notice

When a statute or rule requires a petition, notice or other writing to be filed with or serve on the Bar or the

Board, the Chief Executive Officer is the designated agent for receipt.

Subsection 2.803 Board Member Contact with Staff

Board members will bring any requests for information, material or assistance to the Chief Executive Officer or the Chief Executive Officer's designee. The Chief Executive Officer will assign appropriate staff to respond to board member requests. If a board member is dissatisfied with the Chief Executive Officer action regarding any request or if the Chief Executive Officer believes a board member's request is inappropriate or unduly burdensome, the board member and Chief Executive Officer, as the case may be, may bring his or her concerns to the board for resolution. The Chief Executive Officer has the discretion to authorize board member contact with staff regarding designated matters and concerning particular topics. Board members are free to contact staff to pass on compliments and information relevant to bar activities, but only the Chief Executive Officer may be contacted regarding complaints about the conduct of a staff member or concerns about staff activities.

Section 2.9 Supreme Court Review of Oregon Rules of Professional Conduct

In recognition of the Oregon Supreme Court's inherent authority to regulate the practice of law in Oregon, on or before January 31 of each year, the Board shall

submit any proposals to amend the Oregon Rules of Professional Conduct that were [21] considered, but not adopted, in the prior calendar year to the Court for its review and consideration.

Article 3 House of Delegates

Section 3.1 Duties and Powers

The House of Delegates (“House”) is a forum for the membership of the Bar and representatives of sections and local bars to advise the Board and to debate and decide matters of policy relating to the membership or the administration of justice as provided in the Bar Act, these Bylaws and other rules and regulations of the Bar. (See rules adopted by the House.)

Section 3.2 Delegates

On or before February 1 of each year, the Board must determine the number of delegates each region should have and whether there are vacancies. Once elected, however, a delegate may serve a full term even if the lawyer population of the region falls below the number required to entitle the region to the delegate. Elected delegates are subject to recall as provided in the Bar Act. Public member delegates are subject to removal by the Board on the same grounds that a public member of the Board is subject to removal under the Bar Act and these Bylaws.

Section 3.3 Resolutions

House member or bar member resolutions must include the name of the bar member who will present the resolution and an estimate of the financial impact, if any, of the resolution. This information must be submitted at least 45 days before the House of Delegates meeting. The Board must independently evaluate the financial impact of the resolution. If the Board's evaluation of the financial impact differs from the sponsor's, both positions must be included when the resolution is presented to the House. Only proposed legislative measures or resolutions that appear in full in the printed agenda may be considered, except that unusually long measures or resolutions may be summarized by bar staff. If this exception applies, then the Bar must provide delegates with copies of the full text of the measures at or before the House meeting at which the proposed measures or resolutions will be discussed and voted on.

Section 3.4 Meeting Agenda

After receiving all resolutions, the Board must prepare an agenda for the House. The Board may exclude resolutions from the agenda that are inconsistent with the Oregon or United States constitutions, are outside the scope of the Bar's statutory mission or are determined by the Board to be outside the scope of a mandatory bar's activity under the U.S. Supreme Court decision in *Keller v. the State Bar of California*. The House agenda, including any resolutions that the Board has

excluded, must be published by the Board, with notice thereof, to all bar members, at least 20 days in advance of the House meeting.

Section 3.5 Parliamentarian

The Board must designate a parliamentarian for each House meeting. The parliamentarian should be knowledgeable about parliamentary procedure and [22] familiar with the Bar's Bylaws. The parliamentarian will serve without compensation; however, the Bar may pay the expenses for the parliamentarian to attend the House meeting as allowed in Subsection 7.501 of the Bar's Bylaws.

Section 3.6 Initiative Petitions and Referenda

An initiative petition of the membership or a referendum from the Board or House, brought under ORS 9.148, must be submitted to a vote of the active members. The proponent's question or measure must be printed or circulated to all members of the Bar, along with statements for and against the proposal. The Board determines the manner of circulating the required material. The Board also writes the ballot title and a factual summary of the proposal. Election procedures outlined in Article 9 of the Bar's Bylaws apply.

Section 3.7 Location

The meetings of the Bar's House of Delegates must be held within the geographical boundaries of the State of Oregon.

Article 4 Awards

Section 4.1 General Policy

The Board will select award recipients from among the nominations received from local bars, committees, sections, individual members, affiliated groups and bar groups.

Section 4.2 President's Membership Service Award

The criteria for the President's Membership Service Award is as follows: The nominee must have volunteered his or her time for the activity in which he or she was involved; the nominee must be an active member of the Bar; the nominee must have made a significant contribution to other lawyers through efforts involving Continuing Legal Education programs or publications, committees, sections, boards or the Bar's legislative/public affairs process or similar activities through local bar associations or other law-related groups.

Section 4.3 President's Public Service Award

The criteria for the President's Public Service Awards is as follows: The nominee must have volunteered his or her time for the activity in which she or he was involved; the nominee must be an active member of the Oregon State Bar; the nominee must have made a significant contribution to the public through efforts involving pro bono services; coordination of local public service law-related events, such as those associated with Law Day; service with community boards or organizations or similar activities that benefit the public.

Section 4.4 President's Diversity & Inclusion Award

The criteria for the President's Diversity & Inclusion Award is as follows: The nominee must be an active member of the Bar or be an Oregon law firm; the nominee must have made a significant contribution to the goal of increasing diversity and inclusion in the legal profession in Oregon through progressive employment [23] efforts, innovative recruitment and retention programs, advocacy or other significant efforts.

Section 4.5 President's Special Award of Appreciation

The President's Special Award of Appreciation is a discretionary award of the President of the Bar, with the concurrence of the Board, to be presented to a person who has made recent outstanding contributions to the bar, the bench and/or the community. The award will

be made in conjunction with the OSB Awards Dinner or House of Delegates events within the following guidelines. In any given year, there may be no award, one award or more than one award. The recipient may be a lawyer or a non-lawyer. The President will present his or her proposed award recipient to the Board at the same time the Board considers the Bar's other awards.

Section 4.6 Award of Merit

The Award of Merit is the highest honor that the Bar can bestow. The recipient may be (1) an Oregon lawyer who has made outstanding contributions to the bench, the bar and the community-at-large, and who exhibits the highest standards of professionalism or (2) a non-lawyer who has made outstanding contributions to the bar and/or bench, and who exhibits the highest standards of service to the community-at-large. The award does not have to be granted every year and only one award may be bestowed in any year.

Section 4.7 Wallace P. Carson, Jr. Award for Judicial Excellence

The Wallace P. Carson, Jr. Award for Judicial Excellence honors a member of the state's judiciary. The criteria for the award are as follows: 1) a current or retired state court judge or federal judge; 2) who has made significant contributions to the judicial system; and 3) who is a model of professionalism, integrity, and judicial independence.

Section 4.8 President's Public Leadership Award

The criteria for the President's Public Leadership Award are as follows: The nominee must not be an active or inactive member of the Oregon State Bar and the nominee must have made significant contributions in any of the areas described in the President's Awards (Section 4.2-4.4 above).

Section 4.9 President's Sustainability Award

The criteria for the President's Sustainability Award are as follows: The nominee must be an active or inactive member of the bar or be an Oregon law firm; the nominee must have made a significant contribution to the goal of sustainability in the legal profession in Oregon through education, advocacy, and leadership in adopting sustainable business practices or other significant efforts.

Section 4.10 President's Technology & Innovation Award

The criteria for the President's Technology & Innovation Award are as follows: The nominee may be an individual or entity; the nominee must have made a significant contribution in Oregon toward promoting respect for the rule of law, improving the quality of legal services or increasing access to justice through new technology or other innovations.

[24] Article 5 Oregon State Bar Delegates to the American Bar Association House of Delegates

Section 5.1 Selection

Candidate Statements for the House of Delegates of the American Bar Association (“ABA”) must be in writing. The Chief Executive Officer will prepare forms for the candidate statements and supply the forms to applicants. The applicants must file the forms with the Chief Executive Officer not more than 90 nor less than 30 days before the election held in conjunction with the Oregon State Bar House of Delegates election. Election of ABA delegates must be conducted according to Article 9 of the Bar’s Bylaws. The ABA delegates will be elected from the state at large and the term of office is two years. ABA delegates must be in-state active members of the Bar. The Board must fill a vacancy in the office of ABA delegate due to a delegate’s resignation, death or any other reason in the same manner as provided in ORS 9.040(2) for board members.

Section 5.2 Voting

Each delegate to the ABA House of Delegates, as a condition of election, must vote substantially consistent with any position or direction of the Board of Governors, the Oregon State Bar House of Delegates or the Bar’s membership.

Section 5.3 Expenses

The Oregon State Bar will reimburse Oregon State Bar delegates to the ABA House of Delegates their individual expenses in attending the ABA annual and mid-year meetings. Expenses subject to reimbursement under this section do not include those reimbursed by the ABA to individual delegates, and are limited to an amount established each year by the Board of Governors. Bar reimbursement of delegate expenses must not exceed each delegate's proportionate share of the total amount established by the Board of Governors each year.

Article 6 Membership Classification and Fees

Section 6.1 Classification of Members

Subsection 6.100 General

Members of the Bar are classified as follows:

- (a) Active member – Any member of the Bar admitted to practice law in the State of Oregon who is not an inactive or suspended member. Active members include Active Pro Bono members.
- (b) Inactive member – A member of the Bar who does not practice law may be enrolled as an inactive member. The “practice of law” for purposes of this subsection consists of providing legal services to public, corporate or individual clients or the performing of the duties of a position that federal, state, county or municipal law requires to be occupied by a person admitted to the

practice of law in Oregon. Inactive members include Retired members.

[25] ***Subsection 6.101 Active Pro Bono Status***

(a) Purpose

The purposes of the Active Pro Bono category of active membership in the Bar is to facilitate and encourage the provision of pro bono legal services to low-income Oregonians and volunteer service to the Bar by lawyers who otherwise may choose inactive status or even resign from membership in the Bar, and by lawyers who move to Oregon.

(b) Eligibility for Active Pro Bono Status

The Active Pro Bono category of active membership is available to lawyers in good standing: Who agree to provide pro bono legal services to indigent clients referred by pro bono programs certified under Section 13.2 of the Bar's Bylaws; who do not engage in the practice of law except for providing pro bono services specified above or in volunteer service on the State Professional Responsibility Board, the Disciplinary Board or as bar counsel; who agree to report annually to the Oregon State Bar the number of hours of pro bono service they provide; and who obtain professional liability coverage through the Professional Liability Fund or the program referring the pro bono cases.

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(c) Membership Fees

Active Pro Bono members are assessed a fee that is equivalent to the inactive membership fee.

(d) Procedure

The Bar will notify potentially eligible lawyers of the availability of the Active Pro Bono category of membership and provide interested members with an application form. The Chief Executive Officer or designee is authorized to determine members' eligibility for Active Pro Bono status and this determination is final.

(e) Reporting Requirement for Active Pro Bono Status

Bar Certified pro bono programs will report to the Bar no later than January 31 of each year the total hours of pro bono services that Active Pro Bono lawyers provided in the preceding calendar year. Active Pro Bono lawyer must ensure that the certified program reports their hours or must individually report their hours no later than February 15 of each year.

(f) Transfer from Active Pro Bono Status

Active Pro Bono members may continue in that status from year-to-year on certification that they remain eligible for such status and payment of the appropriate membership fees and assessments. Active Pro Bono members wishing to resume regular active membership status must comply with BR 8.14. Active Pro Bono members admitted through Admissions Rule 17.05 are not eligible to transfer their status to any other status.

Subsection 6.102 Retired Status

(a) Purpose.

The purpose of the Retired category of inactive members in the Bar is to recognize the continuing contributions to the legal profession of members who are at least 65 years of age and are retired from the practice of law.

[26] (b) Eligibility for Retired Status.

A member of the Bar who is at least 65 years old and who is retired from the practice of law (as defined in paragraph 6.100(b)) may be enrolled as a retired member.

(c) Membership Fees.

Retired members are assessed a fee that is equivalent to the inactive membership fee.

(d) Transfer of Membership.

Retired members wishing to resume regular active membership status must comply with BR 8.1 or 8.2, whichever is applicable. Retired members wishing to transfer to Active Pro Bono status must comply with BR 8.14.

Subsection 6.103 Reinstatement

Upon receipt of an application for reinstatement submitted under BR 8.1 of the Rules of Procedure, the bar shall publish notice of and a request for comment on

the application on the bar's web site for a period of 30 days before the application is considered.

Section 6.2 Register of Members

The Chief Executive Officer must keep a register of the enrollment of members of the Bar, which must contain such matters of information that the Board determines to be proper and desirable. The register is subject to public inspection in accordance with the Public Records Law (ORS 192.410-192.502). The register may be published in any manner the Chief Executive Officer determines suitable, including in print or electronically. The published information must include at least the member's name, bar number, and current status.

Section 6.3 Rights of Members

Subject to the other provisions of these policies, all active members have equal rights and privileges including the right to hold an office of the Bar, the right to vote, and the right to serve on bar committees. Inactive members may be members, but not officers, of sections. Suspended members may remain members of or join sections during the term of their suspensions, but may not hold an office of the Bar, vote or serve on the Board of Governors, in the House of Delegates or on any bar committee or section executive committee.

Section 6.4 Annual Membership Fees and Assessments

Subsection 6.400 Due Date

The payment date for annual membership fees and assessments is January 31. If the payment date falls on a Saturday, a legal holiday or a day that the bar office is closed for any reason, including inclement weather or natural disaster, the due date of such fees and assessments is the next day that the bar office is open for business. As used in this section, “legal holiday” means legal holiday as defined in ORS 187.010 and 187.020, which includes Sunday as a legal holiday.

[27] ***Subsection 6.401 Transfer of Member Status***

No part of the membership fees will be rebated, refunded or forgiven by reason of death, resignation, suspension, disbarment or change from active to inactive membership after January 31. However, a bar member who, by January 31, expresses a clear intent to the Bar to transfer to inactive status and pays the inactive membership assessment by that date, but does not timely submit a signed Request for Enrollment as an Inactive Member, may be allowed to complete the inactive transfer without payment of the active membership assessment, if extenuating circumstances exist. The Chief Executive Officer’s decision regarding the existence of sufficient extenuating circumstances is final.

Subsection 6.402 Late Payment Penalty

The Board will set a late payment penalty to be assessed on any member delinquent in payment of member fees.

Subsection 6.403 Effect of Failure to Pay

Any member in default of payment of annual member fees will be given a reasonable opportunity to cure the default as determined by the Board. The Chief Executive Officer shall send a notice of delinquency to each member in default at the member's electronic mail address on file with the bar on the date of the notice. The chief executive officer shall send the notice by mail to any member who is not required to have an electronic mail address on file with the bar under the rules of procedure. If a member fails to pay the fees or contributions within the time allowed to cure the default as stated in the notice, the member is automatically suspended.

Subsection 6.404 New Admittees

The Board may establish a uniform procedure for pro-rata of membership fees based on admission to practice during the course of the year. New admittees will have ninety (90) days from the date of admission to pay their membership fees. If a new admittee fails to pay the fees within the time allowed, the new admittee is automatically suspended.

Section 6.5 Waiver of Fees and Assessments

Subsection 6.500 Hardship

In case of proven extreme hardship, which must entail both physical or mental disability and extreme financial hardship, the Chief Executive Officer may exempt or waive payment of annual membership fees and assessments of an active or inactive member. Hardship exemptions are for a one-year period only, and requests must be resubmitted annually on or before January 31 of the year for which the exemption is requested. “Extreme financial hardship” means that the member is unemployed and has no source of income other than governmental or private disability payments. Requests for exemption under this bylaw must be accompanied by a physician’s statement or other evidence of disability and documentation regarding income.

Subsection 6.501 Military and Peace Corps Service

The Chief Executive Officer, may, each year, waive or exempt annual membership fees and assessments for members in active military service, the Peace Corps, VISTA or other volunteer programs serving the national interest or the legal profession, and [28] for which the member receives only a subsistence income, stipend or expense reimbursement that is the member’s principal source of income. Requests for waivers must be received on 15 days before the date that membership fees and assessments are due each year. Waivers will not be granted unless the lawyer’s service encompasses the majority of a year except in the case

of military waivers, which may be granted for less than a year under special circumstances such as a war of unknown duration.

Subsection 6.502 Emergencies

The Chief Executive Officer may take reasonable and necessary actions, including extending deadlines and waiving late fees, if national or statewide events occur that severely disrupt the normal course of business. Prior to taking action, the CEO will make reasonable efforts to consult with the Bar President..

Article 7 Financial Matters

Section 7.1 Management of Funds

Subsection 7.100 General Policy

All funds paid to the Bar will be received by the Chief Executive Officer or the Chief Financial Officer and deposited to the account of the Bar in a checking account or accounts with a commercial bank. The Chief Executive Officer or the Chief Financial Officer will make all disbursements from such accounts. The Board's Budget and Finance Committee will adopt the policy governing the investment, reinvestment, sale, conversion or other disposition of funds of the Bar, subject to the approval of the Board.

Subsection 7.101 Audit of the Books

The books of account of the Bar must be audited at least biennially, unless otherwise directed by the Board.

Subsection 7.102 Borrowing

(a) The President and either the Chief Executive Officer or the Chief Financial Officer acting for and on behalf of the Bar, are authorized and empowered:

- (1) To borrow from any bank, or other lending agency, on the terms agreed on between the officer and the lender and approved by the Board, a sum deemed prudent and necessary to effectuate the mission of the Bar.
- (2) To execute and deliver to any lender or other depository, the promissory note or notes or renewals thereof of the Bar at rates of interest and on terms as may be agreed on.
- (3) To mortgage, pledge or encumber and deliver to the lender, as security for the payment of loans, any savings of the Bar, regardless of form, on deposit with the lender.
- (4) To execute and deliver to any lender any financing statements, security agreements or other instruments in writing, of any kind or nature, that may be necessary to complete a financial transaction.
- [29] (5) To draw on or endorse to any lender the savings on deposit or to dispose of the proceeds there from as may be deemed advisable.

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(6) To perform other acts and to execute and deliver to any lender other documents as may be deemed reasonable, necessary or proper.

(b) The President and either the Chief Executive Officer or the Chief Financial Officer, acting for and on behalf of the Bar, are also authorized and empowered to execute and deliver documents to any lender to memorialize or otherwise complete any borrowing or other financial transaction that has been previously authorized by the Board of Governors.

Subsection 7.103 Check Signatures

Disbursements of \$10,000 or more require two of the following signatures: (One from each group or group one alone) Group One: Chief Executive Officer and Chief Financial Officer. Group Two: General Counsel or Deputy General Counsel.

Subsection 7.104 Credit Policy

Generally, credit will be extended to all members of the Bar. However, credit will not be extended further to accounts that are 90 days past due. Credit may be denied to members who have had delinquent accounts in the past. The Chief Financial Officer must approve charges that exceed \$5,000. Credit will not be extended for payment of annual membership or regulatory fees. The Bar may take any reasonable and financially prudent methods to collect on accounts, including accounts of members of the Bar, that are 90 days past due.

Subsection 7.105 Write-offs

The Chief Executive Officer has the authority to write off bar receivables that he or she has determined are uncollectible or for other financial reasons should be written off. In the calendar quarter after the fiscal year end, the Chief Financial Officer will prepare a list of all receivables over \$500 that the Chief Executive Officer has written off. The list will be submitted to the Board at the first meeting of the second calendar quarter. The list should include the reason for the write-off.

Section 7.2 Annual Budget

The Chief Executive Officer will develop a draft annual budget for review and approval by the Budget and Finance Committee. The Budget and Finance Committee will submit its recommendation for final approval to the Board.

Subsection 7.200 Approval by Board of Governors

After the annual budget is adopted, the Board must approve a substantive programmatic change not anticipated or included in the budget.

Subsection 7.201 Contingency Fund

A contingency fund will be established within the annual operating budget of the Bar, as a line item equal to one percent of the annual expenditure budget. The contingency fund is to be used for unanticipated expenditures that were not identified in the normal

budget process. All expenditures from the contingency fund must be approved by the Board.

[30] ***Subsection 7.202 Approval by Supreme Court***

The Board will establish each year the budget of the Bar's admissions, discipline and Minimum Continuing Legal Education programs in conjunction with the budgets of the other activities of the Bar. The admissions, discipline and Minimum Continuing Legal Education components of the Board's preliminary budget for the following year must be submitted to the Chief Justice of the Oregon Supreme Court for review and approval by the court. Any changes made by the court in the preliminary budgets of the Bar's admissions, discipline and Minimum Continuing Legal Education programs must be incorporated into the final budget approved by the Board. Additional provisions pertaining to the development and approval of the budget for the admissions component are set out in Article 28.

Subsection 7.203 Grants

The bar does not generally accept proposals for grants, contributions or sponsorships to non-profit or charitable organizations, including law-related organizations. The bar may provide financial support to the Classroom Law Project (CLP) and the Campaign for Equal Justice (CEJ) or any other organization that is germane to the Bar's purposes as set forth in Section 12.1 of these Bylaws. The bar's annual budget shall

include an amount dedicated to providing such financial support, although that amount may change from year to year based upon the overall financial needs of the bar. This budgeted amount shall be in addition to any amounts budgeted to allow bar leadership and staff attendance at local bar and community dinners and similar events.

Section 7.3 Reserve Policy

Subsection 7.300 Purpose

The Bar maintains separate funds for the general and designated operations of the Bar and for its financial welfare. The separate funds are the General Fund, the Client Security Fund, the Affirmative Action Program, Legal Services and all sections funds. A distinct and separate fund balance will be maintained for each fund.

Subsection 7.301 General Fund

The General Fund will maintain cash reserves sufficient to assure fulfillment of obligations to the membership and provide funds for unforeseen future contingencies. The reserves will be used to sustain an acceptable level of operation and continue service to the membership if the standard level of operations is interrupted by unforeseen events. It is also used to offset the effects of an operational reversal until expenditures can be adjusted and to fund specific future capital enhancements and improvements in the operation of the Bar.

Subsection 7.302 Reserve Funds

Separate reserve funds will be established and maintained for the general operating fund and the Board-authorized capital reserve fund, defined as follows:

(a) General Operating Reserve Fund: Established and maintained within the annual budget to assure continued operation of the Bar in the event of a non-dues revenue reversal or a catastrophic event.

[31] (b) Capital Reserve Fund: established by policy decisions based on predetermined activities to replace, replenish or preserve capital assets or capital improvements that are purchased or made infrequently, to meet current regulatory requirements or provide enhanced services to the membership. Capital reserve items are capital assets that cost more than \$5,000 or items whose implementation or purchase extend into more than one fiscal year or whose purchase is planned for a future year.

(c) Each fund will maintain a separate and distinct level of cash reserves, although the reserve funds may be merged for investment purposes to obtain a higher return on the total funds invested. The operating reserve of the General Fund will be a minimum of \$500,000. The capital reserve level will be determined by the Board based on predetermined activities.

Section 7.4 Investment Policy

Subsection 7.400 Purpose

This investment policy is established to provide direction and limits for the Bar's Chief Executive Officer and Chief Financial Officer and for any fee-for-service investment manager that have been engaged in investing financial assets held by the Bar. The investment objectives of the General Fund, Client Security Fund and Affirmative Action Fund are in order of importance: to ensure the safety of the assets, to ensure sufficient liquidity, and to obtain the highest possible rate of return. The investment objectives of the Legal Services Fund are in order of importance: to ensure the safety of the assets, to ensure sufficient liquidity, and to implement a twenty-year total return based spending policy. The policy consists of objectives for the Bar's short-term and long-term investments.

The Bar's short-term investments consist of cash and cash equivalents anticipated to be needed and used within the Bar's current fiscal year, generally one year or less. The objective shall be to maximize liquidity and minimize or eliminate risk while achieving a reasonable yield within the range of short-term expectations.

The Bar's General Fund, Client Security Fund and Affirmative Action Fund long-term investments include all reserve balances and designated funds. The objective of these investments is to provide for long-term growth and stability and to achieve reasonable yields while minimizing exposure to risk. The funds are invested to maximize the return on the investment,

consistent with an appropriate level of risk and subject to the generation of adequate current income. The long-term investments shall be diversified to provide reasonable assurance that investment in a single security, a class of securities, or industry will not have an excessive impact on the preservation of capital or returns on investment to the Bar.

The Bar's Legal Services Fund long-term investments are contained in a designated fund, and do not contain a reserve balance. The objective of these investments is to fund legal aid services in Oregon pursuant to ORS 9.572. These funds are invested based on a twenty-year total return based spending policy, to allow for phased proceeds to legal aid programs. These long-term investments shall be diversified to provide reasonable assurance that investment in a single security, a class of securities, or industry will not have an excessive impact on the preservation of capital or returns on investment to the Bar.

[32] ***Subsection 7.401 Investment Management***

The Chief Executive Officer or the Chief Financial Officer is authorized and directed to deposit, sell, convert or withdraw cash on deposit in excess of that required for current operations and to invest those funds in accordance with the Bar's investment policy using expert advice and assistance as the officers may require. The Bar may engage one or more fee-for-service investment managers with varying styles and expertise and delegate individual investment decisions to such

investment managers within the guidelines of the bar's Investment Policy and the specific direction of the Investment Committee.

Subsection 7.402 Management and Monitoring of Performance

Investment Committee. An "Investment Committee" consisting of members of the Budget & Finance Committee and the Bar's Chief Financial Officer shall manage and monitor the investment policy and portfolio. All policy and bylaw changes will be reviewed and approved by the Budget & Finance Committee.

Subsection 7.403 Prudent Investor Rule

The standard of prudence to be used by any fee-for-service investment manager that is engaged by the Bar in managing the overall portfolio will be the Prudent Investor Rule, which states: "Investments shall be made with judgment and care, under circumstances then prevailing, which persons of prudence, discretion and intelligence exercise in the management of their own affairs, not for speculation, but for investment, considering the probable safety of their capital as well as the probable income to be derived."

Section 7.5 Expense Reimbursements

Subsection 7.500 General Policy

Bar employees and members of the Board of Governors, State Professional Responsibility Board, Disciplinary

Board, New Lawyers Division Board or any other special task force or commission named by the Board of Governors will be reimbursed for their expenses in accordance with this policy when acting in their official capacities. Expenses of spouses or guests will not be reimbursed except as specifically approved by the Board of Governors. Requests for expense reimbursement must be received in the Accounting Department not later than 30 days after the expense has been incurred. If an expense reimbursement form is submitted more than 30 days after the expense is incurred, it must be supported by an explanation for the delay. The Chief Financial Officer may deny any late-submitted request for which the justification is deemed insufficient. A person whose request for reimbursement is denied may request that the Chief Executive Officer review the decision. Supporting documentation in the form of original receipts or copies of original receipts must be submitted with all requests for reimbursement of expenses while acting on official bar business.

Subsection 7.501 Eligible Expenses

Eligible reimbursable expenses while on official business include the following:

(a) Out-of-State Travel:

[33] Out-of-state travel for board members will be reimbursed for those persons and meetings set forth in the Bar's annual budget or as otherwise approved by the Board of Governors. Employees must obtain prior

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approval of the Chief Executive Officer prior to traveling out-of-state.

(b) Transportation:

Use of a personal automobile is reimbursed at the allowable IRS rate. Airfare is reimbursed at the actual cost of coach fare unless the flight is at least three hours and an upgrade to business class can be obtained for \$100 or less. Actual cost of taxi, bus or other public transportation is reimbursable. Actual cost of car rental at economy car rate when other transportation is not readily available.

(c) Lodging:

Actual cost for a moderately priced, double-occupancy room, except when the location of the meeting or conference requires other arrangements. Receipts for lodging must be attached to the reimbursement form.

(d) Meals:

Reimbursement for meals will be made at actual cost of the meal provided that the expense is supported by itemized receipts and meets the standard of reasonableness. A request for reimbursement for meals without receipts will be reimbursed according to the rates published under the Federal Travel Regulations as put out by the U.S. General Service Administration for federal government travel. Meals purchased for members of the Bar or other persons in the course of official bar business will be reimbursed at actual cost with submission of itemized receipts and an explanation

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provided it meets the standard of reasonableness. Official dinners of the Bar or law-related groups which staff, BOG members or volunteers and their spouses or guests are expected to attend will be paid for by the Bar and, if not, will be eligible for reimbursement.

(e) Miscellaneous Costs:

Telephone, postage, office expense, registration fees and other legitimate business expenses will be reimbursed at actual cost with submission of receipts or an explanation of the business purpose of the expense. Bar funds must not be used to pay the cost of alcoholic beverages.

Subsection 7.502 House of Delegates Meetings

(a) Elected delegates and ex officio delegates from sections and local bars will be reimbursed for their transportation to and from the annual HOD meetings. The reimbursement is limited to roundtrip mileage up to 400 miles at the allowable IRS rate. Requests for mileage reimbursement must be submitted on a form approved by the Bar within 30 days after the meeting.

(b) Public member delegates will be reimbursed for their transportation, meals and lodging as provided in Subsection 7.500 and 7.501.

Subsection 7.503 Travel Reimbursements

Any person who is entitled to a travel reimbursement pursuant to this section may retain travel awards, mileage awards, credit card awards and other awards

or benefits accrued while in the conduct of the person's official duties, as part of their reimbursement of expenses and official compensation. As to members of the Board [34] of Governors, this subsection shall only apply to the President and President-Elect in office on January 1, 2020, and members of the Board of Governors whose terms commence on or after January 1, 2019.

Section 7.6 Location of Office

Unless otherwise ordered by the Board, the bar office will be maintained in the Portland metropolitan area.

Article 8 Public Records/Meetings

Section 8.1 Public Records

Subsection 8.100 General Policy

The records of the Bar are subject to public inspection in accordance with the Public Records Law (ORS 192.410-192.502).

Subsection 8.101 Public Record Requests and Bar Fees for Public Records Searches and Copies

(a) The Chief Executive Officer will assign appropriate staff to respond to requests for public records. The Chief Executive Officer will advise the board of any public records disputes that are taken by the requestor to the attorney general for further consideration.

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(b) The Chief Executive Officer will propose and the board will adopt a fee schedule for public records requests. The fee schedule will include a per-page charge for paper records and a schedule of charges for staff time in locating records; reviewing records to delete exempt material; supervising the review of original records; summarizing, compiling, and tailoring records to the request; and any related activity necessary to respond to requests for public records.

(c) The fee schedule shall be reasonably calculated to reimburse the bar for the actual cost of making the records available. The charges for staff time shall be computed on the basis of the actual salary of the employee or employees engaged in responding to a particular public records request.

(d) The bar may estimate charges for delivering the requested documents and require the requestor to pay the estimated charges prior to the start of staff work to respond to the request. If the estimated cost of producing the records is \$25 or more, the bar will provide the estimate in writing and will take no action on the request until the requestor confirms that the bar should proceed. Any estimated fees paid in advance that exceed the actual cost of the search and production of public records will be refunded.

(e) The bar may furnish copies of public records without charge or at a substantially reduced fee if the Chief Executive Officer or department manager determines that the waiver or reduction of fees is in the public

interest because making the record available primarily benefits the general public.

(f) Public records shall be made available in alternative formats to qualified individuals with disabilities at no additional or at a reduced cost, provided that compliance with the request will not result in undue financial or administrative burden.

[35] Subsection 8.102 Public Disclosure of Client Assistance Office, Discipline Counsel's Office and Disciplinary Board Clerk Records

(a) Except as provided otherwise herein, the following records of Client Assistance Office, Disciplinary Counsel's Office and the Disciplinary Board Clerk are open to inspection on request:

- (1) Letters inquiring or complaining about the conduct of any member of the bar and all material submitted by inquirers, complainants, accused lawyers and other persons to the bar relating to such inquiries or complaints.
- (2) All correspondence by bar employees with inquirers, complainants, accused lawyers, witnesses and other persons in the course of a disciplinary or Client Assistance Office investigation.
- (3) Investigative reports and summaries concerning pending Client Assistance Office, disciplinary and reinstatement matters prepared by Client Assistance Office Counsel, Disciplinary Counsel, the SPRB or a bar investigator, to the extent they cover purely factual materials.

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- (4) The completed minutes of SPRB meetings.
 - (5) The formal complaint against a member of the bar, the accused lawyer's answer and all other documents in formal proceedings filed with the Disciplinary Board Clerk pursuant to the Rules of Procedure or statute.
 - (6) Letters of admonition issued by the SPRB when offered to an accused by Disciplinary Counsel.
- (b) The following records are exempt from disclosure and will not be open to public inspection except as might otherwise be required by law:
- (1) Investigative assignments made by Disciplinary Counsel or the SPRB to an investigator, to the extent they cover other than purely factual materials.
 - (2) Investigative reports or summaries concerning pending Client Assistance Office, disciplinary or reinstatement matters prepared by the Client Assistance Office, Disciplinary Counsel's Office, a bar investigator or the SPRB prior to a finding of probable cause in the matter, to the extent that they cover other than purely factual materials.
 - (3) The work product of bar counsel or Disciplinary Counsel.
 - (4) Communications between the Client Assistance Office and Disciplinary Counsel's Office, between bar counsel and Disciplinary Counsel's Office and between Disciplinary Counsel and the SPRB, regarding the merits of a prosecution or

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relating to matters of strategy to the extent they are privileged under OEC 503.

(5) Information of a personal nature submitted to the bar during a Client Assistance Office or disciplinary investigation, a reinstatement proceeding, pursuant to BR 3.2, 3.3 and 3.4 or otherwise, if the requirements of ORS 192.502(2) have been met. "Information of a personal nature" includes but is not limited to physical and mental health records, tax returns, trust and other bank account numbers, social security numbers, fingerprint cards, and credit reports.

(6) Communications between General Counsel's Office and the board, individual board members, the Chief Executive Officer or bar staff that are protected by the attorney-client privilege.

[36] (7) Other records that the bar deems exempt from disclosure under the Public Records Law.

(c) The Board of Governors may direct that member discipline histories be posted on the bar's web site or otherwise electronically. The nature of the information included and the period covered will be as determined by the Board of Governors from time to time.

Section 8.2 Public Meetings

All regular and special meetings of the Board of Governors, Board of Bar Examiners, committees, sections, and subcommittees or subsections thereof, are subject to the Public Meetings Law (ORS 192.610-192.690).

Subsection 8.201 Judicial Proceedings

(a) Disciplinary and contested reinstatement hearings and hearings conducted pursuant to Title 3 of the Rules of Procedure, are open to the public, subject to the authority of the presiding official to maintain proper decorum and to exclude witnesses at the request of the Bar, an accused or applicant. Panels of the Disciplinary Board and any presiding official will comply with UTCR 3.180 when presented with requests to allow media coverage of proceedings.

(b) Meetings of the SPRB₇ and the deliberations of Disciplinary Board trial panels are closed to the public, pursuant to the exemption set forth in ORS 192.690(1) for judicial proceedings.

(c) Meetings of the Board of Governors relating to disciplinary and reinstatement matters are closed to the public, pursuant to the exemption set forth in ORS 192.690(1) for judicial proceedings. Meetings of the Board of Governors may also be closed to the public in whole or part for consideration of any matter for which a closed session is authorized under ORS 192.660.

(d) The Board of Bar Examiners' consideration of individual applicants' qualifications are judicial proceedings for purposes of the Public Meetings Law, pursuant to ORS 9.210(4).

Article 9 Election Procedures

Section 9.1 Date of Elections

The election for members of the Board of Governors will be held annually on the third Monday in October. Bar members who wish to appear on the ballot must present a candidate statement to the Chief Executive Officer of the Bar at least 160 days before the election.

In the case of an uncontested election for the Board of Governors, a candidate will be declared elected thirty-one days after the final day on which candidate statements for the Board are required to be filed, provided that a challenge has not been filed pursuant to ORS 9.042. If a challenge has been filed, the candidate will be declared elected at the end of that process unless the challenge is successful.

The election for members of the OSB House of Delegates will be held annually on the third Monday in April. Bar members who wish to appear on the ballot must present [37] candidate statement to the Chief Executive Officer of the Bar at least 30 days before the election.

The election for representatives to the ABA House of Delegates will be held annually on the third Monday in April in conjunction with the election to the OSB House of Delegates. Bar members who wish to appear on the ballot must present a candidate statement to the Chief Executive Officer of the Bar at least 30 days before the election. Only members with a principle

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office address in Oregon will be eligible to vote for the ABA House of Delegates representatives.

The Board of Governors may take reasonable and necessary actions, including extending the deadline for candidate statements or the date of the annual election, if national or statewide events occur that severely disrupt the normal course of business.

Section 9.2 Ballots

The Chief Executive Officer will prepare ballots whenever a contest exists and the ballots will be accompanied by the candidate statement that includes the candidate's name, law firm, principal office address, current full-face photograph, law school from which graduated, date of admission in Oregon, state and local bar activities, offices and other pertinent information. The statement must be submitted on a form prepared by the Bar, which will also indicate that the information supplied by the candidate has not been edited or verified by the Bar. A request for a candidate statement or the submission thereof will be considered public information. Ballots will be electronic.

Section 9.3 Voting

Members eligible to vote will be provided a secure link to the candidate statements and an online ballot. Ballots will be tabulated electronically using a secure voting system to assure no duplicate entries. Voting must be completed on or before 5:00 p.m. on the day of the

election. The Chief Executive Officer will announce the results of the balloting and will notify each candidate of the results of the election.

Article 10 Diversity

The Bar respects the diversity of its membership and its employees. Bar entities, including, but not limited to standing committees, section executive committees and Continuing Legal Education programs and publications, should reflect this diversity. "Reflect," as used in this article, does not require the application of strict quotas, but requires a good faith attempt to achieve representative participation. Reports of such efforts may be required of bar entities. In addition, no bar entity may discriminate on the basis of race, religion, color, gender, sexual orientation, geographic location, age, handicap or disability, marital, parental or military status or other classification protected by law. No professional, business or social functions of the Bar, or any of its sections, committees, affiliates or other authorized entities may be held at any private or public facility, which discriminates, based upon the terms listed above. Furthermore, advertisements or solicitations for employment must offer equal employment opportunities. The United States Armed Forces are exempt from this policy as it regards advertisements in the bar's communications.

[38] Article 11 Communications

Section 11.1 General Policy

Communications of the Bar and its constituent groups and entities, including printed material and electronic communications, should be germane to the law, lawyers, the practice of law, the courts and the judicial system, legal education and the Bar in its role as a mandatory membership organization. Communications, other than permitted advertisements, should advance public understanding of the law, legal ethics and the professionalism and collegiality of the bench and Bar.

Section 11.2 Editorial Policy

Subsection 11.201 Editorial Advisory Committee Policy

The Board will appoint an Editorial Advisory Committee. The Editorial Advisory Committee will review and recommend editorial policies for bar communications to the Board for approval. Periodically, the committee will meet to review and provide feedback on the planned content for The Bulletin to the editorial staff.

Subsection 11.202 Editorial Policies

All editorial policies will be approved by the Board. Editorial policies may address such matters as advertising, political communication, profanity and obscenity, letters to the editor, use of artwork, photographs and illustrations, story placement, headlines and scheduling, advertising content and rates and similar topics.

Editorial policies must be consistent with Article 10 Diversity and Article 12.1 Guidelines.

Subsection 11.203 Review by Chief Executive Officer

The Chief Executive Officer has sole discretion to determine whether material submitted for publication meets the standards set forth in or adopted pursuant to this section and to accept or reject material submitted to the Bar for publication based on that determination.

Section 11.3 Media Relations

The Bar will be responsive to the needs of the media and will identify persons to speak for the Bar. All statements made to the media, whether oral or by news release, must be informational in nature and must avoid statements of personal opinion or positions not considered or adopted by the Board. The President is the official chief spokesperson for the Bar. If public appearances or statements by the chairperson or other officer or member of any bar committee are deemed necessary, prior authority must be obtained in advance from the President.

Section 11.4 Campaign Advertisements

Judicial candidates and candidates for Board of Governors, House of Delegates and American Bar Association positions may advertise at standard charges in the

Bar Bulletin, but partisan political advertising is not allowed. Partisan political announcements or endorsements will not be accepted for publication as letters to the editor or feature articles.

[39] Section 11.5 Membership Surveys and Questionnaires

(A) Any survey or questionnaire to all members of the Bar from a section or non-bar person or group must have the prior approval of the Board regarding purpose and content.

(B) A survey to specific groups of the membership from bar staff must have the prior approval of the President or President-elect. A survey to all members of the Bar must have the prior approval of the President or President-elect.

(C) A section may survey its own membership without prior approval. Article 12 Legislation and Public Policy

Section 12.1 Guidelines

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.

Section 12.2 Initiation of Legislation

Subsection 12.200 House of Delegates and Membership

The Bar must sponsor legislative proposals approved by the House of Delegates or through a membership initiative to the Legislative Assembly directly following the House or membership action. Legislation not enacted may not be sponsored in the following session unless resubmitted by one of the methods set forth above or by action of the Board.

Subsection 12.201 Board of Governors

The Board may sponsor legislative proposals to the Legislative Assembly on its own initiative. The Board and its Public Affairs Committee has the authority between meetings of the House of Delegates to act on legislative and public policy matters pursuant to the guidelines established.

Section 12.3 Legislative Process

Because of the nature of the legislative process, the Board or its Public Affairs Committee retains the right to set priorities regarding the enactment of legislation, to propose amendments or consent to amendments to legislation and to sponsor or take positions on appropriate legislation. In so doing, the Board will make a reasonable effort to do the following:

Encourage as wide a participation of the membership as possible in formulating positions on legislative issues; inform members, especially sections and committees, [40] of the Bar's legislative positions; respect divergent opinions of subgroups within the legal profession; provide assistance to bar sections and committees; avoid committing bar funds to issues that are divisive or result in creating factions within the profession; present major issues to the House of Delegates for approval; ensure that the Public Affairs Committee encompasses a balance of interest within the Bar and ensure that the Public Affairs Committee consults frequently with the Board.

Section 12.4 Committees and Sections

Any committee or section wishing to sponsor legislation or take a position on any rule or public policy issue will inform the Public Affairs Program, and through that office, the Board, of the exact nature of the legislation proposed. A copy of the bill, proposed rule or policy will be presented for consideration and approval of the Board. A committee or section of the Bar may not

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represent to the legislature or any individual, committee or agency thereof, a position or proposal or any bill or act, as the position of that committee or section of the Bar without the majority approval of the members of that committee or, in the case of a section, the executive committee and the prior approval of the Board, except as follows. During a legislative session or during the interim, a bar committee or the executive committee of any section must contact the Bar's Public Affairs Program before taking any position on a bill, rule or public policy issue within its general subject area. The chair of the Board's Public Affairs Committee will determine, within 72 hours of notice of the issue, whether it is appropriate for the Bar to take an official position or to allow the section or committee to take a position as requested. The full Public Affairs Committee or the full Board may be consulted before a final decision is made. Bar staff and the Public Affairs Committee of the Board will make every effort to accommodate committees and sections that wish to express positions on relevant issues. The Public Affairs Program shall be kept informed about the status of such positions and related activities.

Section 12.5 Professional Liability Fund Legislation

The Professional Liability Fund ("PLF") may not present to the legislature or any individual, committee or agency thereof, a position or proposal or any bill or act, as the position of the PLF without the majority approval of the Board of Directors of the PLF and the

prior approval of the Board of Governors, except as is provided in Section 12.4 of the Bar's Bylaws.

Section 12.6 Objections to Use of Bar Dues

Subsection 12.600 Submission

A member of the Bar who objects to the use of any portion of the member's bar dues for activities he or she considers promotes or opposes political or ideological causes may request the Board to review the member's concerns to determine if the Board agrees with the member's objections. Member objections must be in writing and filed with the Chief Executive Officer of the Bar. The Board will review each written objection received by the Chief Executive Officer at its next scheduled board meeting following receipt of the objection. The Board will respond through the Chief Executive Officer in writing to each objection. The Board's response will include an explanation of the Board's reasoning in agreeing or disagreeing with each objection.

[41] *Subsection 12.601 Refund*

If the Board agrees with the member's objection, it will immediately refund the portion of the member's dues that are attributable to the activity, with interest paid on that sum of money from the date that the member's fees were received to the date of the Bar's refund. The statutory rate of interest will be used. If the Board disagrees with the member's objection, it will immediately offer the member the opportunity to submit the

matter to binding arbitration between the Bar and the objecting member. The Chief Executive Officer and the member must sign an arbitration agreement approved as to form by the Board.

Subsection 12.602 Arbitration

If an objecting member agrees to binding arbitration, the matter will be submitted to the Oregon Senior Judges Association (“OSJA”) for the designation of three active-status retired judges who have previously indicated a willingness to serve as volunteer arbitrators in these matters. The Bar and the objecting member will have one peremptory challenge to the list of arbitrators. The Bar and the objecting member must notify one another of a peremptory challenge within seven days after receiving the list of proposed arbitrators. If there are no challenges or only one challenge, the OSJA will designate the arbitrator. The arbitrator will promptly arrange for an informal hearing on the objection, which may be held at the Oregon State Bar Center or at another location in Oregon that is acceptable to the parties and the arbitrator. The hearing will be limited to the presentation of written information and oral argument by the Bar and the objecting member. The arbitrator will not be bound by rules of evidence. The presentation of witnesses will not be a part of the hearing process, although the arbitrator may ask the state bar representative and the objecting member and his or her lawyer, if any, questions. The hearing may be reported, but the expense of reporting must be borne by the party requesting it. The Bar and the

objecting member may submit written material and a legal memorandum to the arbitrator no later than seven days before the hearing date. The arbitrator may request additional written material or memoranda from the parties. The arbitrator will promptly decide the matter, applying the standard set forth in *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990), to the expenditures to which the member objected. The scope of the arbitrator's review must solely be to determine whether the matters at issue are acceptable activities for which compulsory fees may be used under applicable constitutional law. In making his or her decision, the arbitrator must apply the substantive law of Oregon and of the United States Federal Courts. The arbitrator must file a written decision with the Chief Executive Officer within 14 days after the hearing. The arbitrator's decision is final and binding on the parties. If the arbitrator agrees with the member's objection, the Bar will immediately refund the portion of the member's dues that are reasonably attributable to the activity, with interest at the statutory rate paid on the amount from the date that the member's fees were received to the date of the Bar's refund. If the arbitrator agrees with the Bar, the member's objection is denied and the file in the matter closed. Similar or related objections, by agreement of the parties, may be consolidated for hearing before one arbitrator.

Article 13 Pro Bono

Section 13.1 Aspirational Standard

Pro bono publico or pro bono service includes all uncompensated services performed by lawyers for the public good. Such service includes civic, charitable and public service activities; as well as activities that improve the law, the legal system and the legal profession. The direct provision of legal services to the poor, without an expectation of compensation, is one type of pro bono service. Each lawyer in Oregon should endeavor annually to perform 80 hours of pro bono services. Of this total, the lawyer should endeavor to devote 20 to 40 hours or to handle two cases involving the direct provision of legal services to the poor, without an expectation of compensation. If a lawyer is unable to provide direct legal services to the poor, the lawyer should endeavor to make a comparable financial contribution to an organization that provides or coordinates the provision of direct legal services to the poor.

Section 13.2 Program Certification

Subsection 13.200 Procedure

In order for a pro bono program to obtain bar certification, the program must submit an application and meet the applicable criteria set forth below. The Bar's Chief Executive Officer determines whether a program is eligible for certification and this determination is final.

Subsection 13.201 Criteria

(a) Purpose:

The pro bono program must be sponsored by a national, state or local bar association, a court with jurisdiction in Oregon or an incorporated, non-profit or governmental organization, and must provide legal services without fee, or expectation of fee, or for a substantially reduced fee to one or more of the following:

- (1) Persons of limited means.
- (2) Underserved populations with special legal needs.
- (3) Charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means or underserved populations with special legal needs.

(b) Compensation:

The pro bono program must not provide any compensation to the participating lawyers, except to cover filing fees or other out-of-pocket expenses or to provide professional liability insurance for the pro bono activity.

(c) Fees:

The pro bono program must deliver legal services to clients at no fee or for a substantially reduced fee. Nominal administrative fees are allowed. Donations from clients, whether encouraged or not, are not

considered fees. The pro bono program should prohibit or limit the handling of cases that are clearly fee-generating, and provide for the referral of such cases.

(d) Quality Control:

The program must demonstrate that it has the necessary expertise and quality control to administer a program involving volunteer lawyers. This should include appropriate matching of pro bono lawyers to cases, an effective grievance procedure and adequate tracking and record keeping systems regarding pro bono involvement.

(e) Diversity:

The program must comply with Article 10 of the Bar's Bylaws (Diversity), both in regard to participating lawyers and clients.

(f) Professional Liability Coverage

The program will provide professional liability coverage for otherwise uncovered attorney volunteers when those attorneys provide legal services to pro bono clients.

Subsection 13.202 Volunteer Recognition

Recognition under this paragraph is intended to provide encouragement, in tangible form, to those Oregon Pro Bono programs and their volunteer lawyers, who help meet the need for legal services by providing direct representation to low-income individuals. As part of its annual planning process, the Board will consider

the ways in which the Bar can acknowledge the volunteer efforts of Oregon lawyers, particularly those lawyers who provided at least 40 hours of pro bono services through programs certified under this policy. In so doing, the Board will seek input from bar staff and appropriate bar committees.

Article 14 Committees

Section 14.1 Standing and Special Committees

Standing or special committees of the Bar or any member or officer of those committees may be appointed or discharged by the President or the Board.

Section 14.2 Joint Committees

The Board has from time to time agreed to create joint committees between the Bar and other professional groups to develop better understanding between the two groups and to assist in resolving problems of mutual concern. These joint committees comprise a certain number of bar members and a certain number of members of other professional associations. All Bar By-laws relating to committees apply to these joint committees. Lawyer members who participate in these joint committees are prohibited from engaging in any activity that seeks to restrain other groups of professionals from engaging in lawful professional activities.

Section 14.3 Committee Responsibilities

Committees are established so that members can study issues within the committee's charge and make recommendations to the Board. Before January 1 of each year the Board will forward a committee charge to the chair of each committee. This charge outlines the committee's ongoing general activities as well as specific issues to be considered for the year. The Board will consult with the previous committee members before adopting the committee charge. Committees may also recommend issues to the Board to be included in the charge at any time.

Section 14.4 Membership

All members of standing committees must be active members of the Bar. All members of standing committees typically serve on a three-year rotating basis. The Board may reappoint members to a committee, if the Board makes a finding of extraordinary circumstances that warrant a reappointment. Each year the Board appoints new members constituting one third of each committee. Terms begin on January 1. The Board will solicit member preference for serving on committees throughout the year. The Board appoints members to fill vacancies that occur throughout the year. These vacancies occur because members resign or are unable to participate fully in the committee. The board may appoint advisory members or public members, as it deems appropriate.

Section 14.5 Financial Issues

Committees have no budget; although they may make recommendations regarding the expenditure of funds already budgeted in a particular program area. A committee cannot incur any expense without prior authorization from the Chief Executive Officer.

Section 14.6 Legislation

Each committee must designate a member of the committee as a contact for legislative information and involvement. This member is to work with and coordinate all activities with the Director of Public Affairs and the Public Affairs Committee of the Board.

Section 14.7 Administrative Services

The Bar's meeting rooms will be available on a first-come first-served basis. All committees are encouraged to use the Bar's meeting rooms whenever possible. The Bar will assist committees with providing meeting notices in accordance with the requirements of the Public Meetings Law. If the Bar does not produce the meeting notice, the committee member who produces the notice must provide a copy to the Bar. The Bar will assign a bar liaison to each committee. The bar liaison serves as a resource of information for the committee. Each committee will have a contact person who is a member of the Board. It is not anticipated that the board member will attend the meetings of the committee on a regular basis.

Section 14.8 Committee Reports

Each committee must file an annual report of its activities with the Chief Executive Officer for the preceding year by December 1 of each year. Other reports may be required from time to time.

Section 14.9 Quorum for Meetings

A quorum, consisting of a majority of the committee members, is required for the transaction of committee business. No recommendation of a committee to the Board of Governors is valid if made without a quorum present, but the absence of a quorum does not preclude a committee from studying or discussing any issue within the committee's charge. Action of the committee will be by majority vote of those voting.

Article 15 Sections

Section 15.1 Purpose

Sections are an integral and important part of the Bar. Sections are intended to provide bar members who share particular interests an opportunity to develop and improve skills and to provide a forum for communication and action in matters of common interest.

Section 15.2 Formation

Any 100 members of the Bar who wish to form a section in a particular area of law may submit a petition to the Board to create a section. The petition must

state that the signators are committed to becoming members of the section, if the Board approves forming the section. The Board must consider creating a section when it receives the petition and determines that the proposed section does not duplicate another section's activities or area of legal interest. The Board may merge, reorganize or abolish sections at the request of affected sections or as the Board deems appropriate. Factors that the Board must consider include, but are not limited to, the requirements outlined in Standard Section Bylaws, Article XII, Section 2.

Section 15.3 Bylaws

Sections are governed by the Standard Section Bylaws adopted by the Board. Sections may propose and the Board may approve, modified bylaws commensurate with the section's needs.

Section 15.4 Finances

Subsection 15.400 Dues

(A) The Bar will assess and collect section dues at the same time that bar membership dues are collected. Section dues will be assessed and collected together with bar dues by the Bar. The Board must approve the dues for each section. Each section should set dues at an appropriate level to pay for programs and activities. The Bar charges each section a per capita fee. This fee is recalculated periodically as determined by the Chief Executive Officer.

(B) A section with a fund balance as of December 31 exceeding two years of section membership fees will be charged the full per capita fee for the following year. By October 15 a section may request a waiver from the BOG to maintain a larger fund balance by submitting a written request outlining the specific event or program for which the funds are needed. A section with a fund balance as of December 31 equal to or less than two years of section membership fees will be charged a fee equal to 50 percent of the per capita fee.

(C) No section may maintain a separate bank account. Each section's receipts and expenditures are handled by the Bar and accounted for in the section's monthly financial statement provided by the Bar. Interest on section accounts accrues to the Bar's General Fund and is used to offset the calculation of the per capita fee.

Subsection 15.401 Donations

Sections may make donations to charitable causes or organizations only with prior approval of the Chief Executive Officer. The Chief Executive Officer will allow such donations on a showing by the section that the donation is germane to the Bar's purposes as set forth in Section 12.1 of these Bylaws. The Chief Executive Officer will maintain a list of approved recipients.

Section 15.5 Administrative Services

Special services of the Bar that are not included in the calculation of the per capita assessment may be made available at cost to the sections upon adequate notification to and negotiation with the Bar. Sections must give the Bar the first opportunity to provide the necessary publications production support services before contracting with outside organizations or individuals. Sections seeking to contract for any goods or services with outside organizations or individuals must contact the General Counsel's office of the Bar for preparation of appropriate contract documents and must obtain the Chief Executive Officer's prior approval of all such contracts.

Section 15.6 Continuing Legal Education Activities

Subsection 15.600 CLE Seminars Scheduling

The Bar is the informational clearinghouse for the CLE activities of each section. To allow the Bar to perform its role, each section must advise the Bar's CLE Seminars Department of all proposed section CLE activities at the earliest possible date.

Subsection 15.601 CLE Event Co-sponsorship with Bar

Sections that provide CLE programs of four MCLE credit hours or more must cosponsor such a program with the Bar's CLE Seminars Department at least once

out of every three years. The CLE Seminars Department will establish policies sections must adhere to when co-sponsoring CLE events. These policies will address issues such as the division of event revenues and expenses between the section and the CLE Seminars Department, as well as the CLE topic, speakers, date and location.

Subsection 15.602 CLE Event Registration

The Bar's CLE Seminars Department will provide registration services for all section CLE programs not co-sponsored by the CLE Seminars Department. The CLE Seminars Department will determine the cost to provide registration services and establish policies sections must follow. A section that plans a seminar without the CLE Seminars Department's co-sponsorship is responsible for applying for Minimum Continuing Legal Education credit for the seminar and paying any associated fees.

Subsection 15.603 Oregon State Bar Logo

A section that plans a seminar or a publication without the co-sponsorship by a bar department must indicate clearly on all publicity, printed seminar materials and publications that the seminar or publication is a section endeavor and list the name of the sponsoring section. The section must not use the Oregon State Bar logo or the phrase Oregon State Bar CLE.

Section 15.7 Grants

Sections may apply for grants only with prior approval of the Board of Governors. The board will allow grant applications only upon a showing that the grant activity is consistent with the section's purposes and the mission of the bar. The board may disallow any application that the board does not believe is in the best interests of the bar. The grant application must be reviewed and approved by OSB General Counsel before submission to the grant-making organization. Any grant funds received by a section shall be deposited with the bar and will be distributed only upon request of the section treasurer and in accordance with the grant specifications. The section must periodically report to OSB General Counsel regarding the status of the grant project and any reports to the granting organization must be reviewed and approved by OSB General Counsel in advance of submission.

Article 16 Continuing Legal Education

Section 16.1 Purpose

The mission of the Bar's CLE Seminars and Legal Publications programs is to produce high quality, practical CLE Seminars, books, and resources on Oregon law in a timely manner, with a goal of ensuring a competent bar by enhancing the knowledge and skills of Oregon lawyers.

Except as otherwise provided herein, participating members of the Bar will not receive compensation for services on behalf of CLE Seminars or Legal

Publications, beyond a modest memento or other recognition and payment of expenses within board guidelines.

Section 16.2 OSB Continuing Legal Education Seminars Program

Subsection 16.200 Reduced and Complimentary Registrations; Product Discounts

(a) Complimentary registration for CLE seminars and scheduled video replays where the CLE Seminars Department is the content provider is available to the following OSB lawyer members: Active Pro Bono members, lawyer-legislators, 50-year members, judges, and judicial clerks.

(b) Complimentary registration does not include the cost of lunch, materials in hard copy for which a separate fee is charged, any fee-based activities held in conjunction with a CLE seminar, or any other item not included in the registration fee.

(c) Reduced registration for webcasts where the CLE Seminars Department is the content provider is available for the following lawyer members: Active Pro Bono members, lawyer-legislators, 50-year members, judges, and judicial clerks.

(d) For purposes this policy, “judges” means full or part-time paid judges and referees of the Circuit Courts, the Court of Appeals, the Tax Court, the Supreme Court, and of tribal and federal courts within Oregon. Complimentary registration at any event for

judicial clerks will be limited to one clerk for each trial court judge and two clerks for each appellate court judge.

(e) Complimentary registration for Active Pro Bono members is limited to eight (8) hours of programming in any one calendar year, which may be used in increments.

(f) Reduced registration, tuition assistance and complimentary copies of programs may be available to certain other attendees, at the sole discretion of the CLE Seminars Director.

(g) Discounts for and complimentary copies of archived CLE Seminars products in any format where the CLE Seminars Department is the content provider may be available at the sole discretion of the CLE Seminars Director.

(h) Seminars and seminar products in any format where the CLE Seminars Department is not the content provider are not subject to any discounts, complimentary registration or complimentary copies except at the sole discretion of the CLE Seminars Director.

Subsection 16.201 Expenses of Speakers and Planners

CLE seminar speakers and planners will be admitted free to the seminar and receive seminar materials without charge. CLE seminar speakers and planners are eligible for reimbursement for necessary travel

expenses subject to the Bar's travel reimbursement policies.

Section 16.3 OSB Legal Publications Program

Subsection 16.300 Benefit of Membership

The BarBooks™ online library comprises all Legal Publications products as well as other materials as the Bar deems appropriate to include from time to time. BarBooks™ is a benefit of active membership in the Oregon State Bar and is available for purchase by inactive members, non-members, and libraries.

Subsection 16.301 Discounts on Print Books

Discounts on the purchase of OSB print legal publications, when available, will be allowed to the following: Law school bookstores, law professors when teaching a course using the particular publication, libraries, and members of the Bar within one year following their admission.

Subsection 16.302 Volunteer Copyright Agreement

Each volunteer author of a legal publication will sign a Volunteer Copyright Agreement under which the author retains the copyright in his or her chapter, and grants to the Oregon State Bar a nonexclusive right to include the chapter within the Publication as a collective work; to use, distribute, or sell the collective work in any manner the OSB deems appropriate; to revise the collective work, including his or her chapter, for

use, distribution or sale as a subsequent edition of the collective work, a revision of the collective work, or as an entirely new publication; with the Oregon State Bar and its licensees having similar rights to use, distribute, or sell the collective work in any manner they deem appropriate.

Article 17 Member Services

Section 17.1 Administrative Services

Administrative services, such as mailing services, mailing lists and labels and photocopying will be provided to member and nonmember groups at the cost of providing the service or product. Priority is given to official bar business.

Section 17.2 Bar-sponsored Tours

The Bar may not enter into any agreement concerning, nor may it sponsor or cosponsor, any travel or tour arrangement, by charter or otherwise, without the prior approval of the Board.

Article 18 Discipline

Section 18.1 State Professional Responsibility Board

Subsection 18.100 Duties

The State Professional Responsibility Board (“SPRB”) is authorized to exercise its powers and authority pursuant to statute, the rules of procedure and the Bar’s

bylaws. The SPRB will meet regularly pursuant to the call of the chairperson to consider complaints and other matters within its jurisdiction. The SPRB will receive the counsel and advice of the Office of Disciplinary Counsel of the Bar. Disciplinary Counsel will regularly report to the Board of Governors regarding actions taken by the SPRB. The SPRB may proceed with business if a quorum of six members is present at any meeting and act by a vote of a majority of those present.

Subsection 18.101 Composition

The SPRB will consist of eight resident active members of the Bar and two at large public members nominated by the Board of Governors and appointed by the Supreme Court. The Board of Governors annually will nominate and request the Supreme Court to appoint one attorney member of the SPRB to act as its chairperson. All lawyer members of the SPRB are appointed for terms of not more than four years from the following regions: two members from region five and one member from each of the other Board of Governors regions located within the state of Oregon. The two public members are appointed for terms of not more than four years. No member may serve more than four years consecutively. Members are eligible for reappointment to a nonconsecutive term not to exceed four years. The Board of Governors may nominate and request the Supreme Court to appoint replacement members of the SPRB as the need arises.

Subsection 18.102 Expenses

All members of the SPRB will receive the same reimbursement of expenses as is accorded the members of the Board of Governors.

Subsection 18.103 Notice to the Respondent

Disciplinary Counsel will notify the respondent as soon as possible after the SPRB has directed the institution of a formal disciplinary proceeding against the respondent. The notice will contain a statement that all communications on the merits of the matter must be restricted to the lawyers in Disciplinary Counsel's office and with appointed counsel for the Bar and that an accused must not contact a member of the Board of Governors, the SPRB, or any other employee, agent or representative of the Bar regarding the matter.

Subsection 18.104 Disclosure of Contacts

If a complainant, respondent or their representatives contact a SPRB member concerning the merits of a disciplinary complaint, the SPRB member contacted must make a full disclosure of the nature of the contact before the SPRB takes action on the complaint.

Section 18.2 Letters of Admonition

(A) A disciplinary investigation, whether in response to a complaint filed with the Bar or otherwise instituted as authorized by law, may be terminated after

investigation by the SPRB's issuing a letter of admonition.

(B) An admonition does not constitute the imposition of formal discipline. An admonition is, however, a public statement that the lawyer's conduct, in the opinion of the SPRB, violated the Rules of Professional Conduct of the Bar.

(C) An admonition may be issued, at the discretion of the SPRB, only when a Rule of Professional Conduct has been violated and if in light of all circumstances, the violation was not aggravated, but was of sufficient concern that dismissal would be inappropriate.

(D) The procedure for issuing letters of admonition is provided in the Rules of Procedure. If accepted, a letter of admonition will be placed in the lawyer's personal file maintained by the Bar.

Section 18.3 Recovery of Costs/Collection of Judgments

The bar will pursue, as feasible, collection of those costs and disbursements for which a judgment was awarded to the Bar in a disciplinary or reinstatement proceeding.

Section 18.4 Disciplinary Correspondence

Members of the Board of Governors or other bar officials may receive occasional correspondence related to disciplinary matters. All such correspondence,

including letters from complainants or accused lawyers, must be forwarded to Disciplinary Counsel for response. Disciplinary Counsel need not send a copy of any response to the board member or bar official to whom the initial correspondence was addressed. Any correspondence alleging an ethics complaint about Disciplinary Counsel or General Counsel must be sent directly to the chairperson of the SPRB pursuant to BR 2.6(gf), with a copy to the staff member named in the complaint.

Section 18.5 Removing Lawyers from the Lawyer Referral Service Panel of Lawyers

Members of the Bar against whom charges of misconduct have been approved for filing will be removed from the Lawyer Referral Service panel of lawyers until those charges have been resolved. If a member is suspended as a result thereof, the member may not be reinstated to the panel until the member is authorized to practice law again. Charges of misconduct include those authorized to be filed pursuant to BR 3.4.

Section 18.6 Suspension of Service

Subsection 18.600 Applicability to SPRB

The service of members of the State Professional Responsibility Board against whom charges of misconduct have been approved for filing by the State Professional Responsibility Board is suspended until the charges filed against them have been resolved. If a member is suspended as a result thereof, the member

may not resume service on the board until the member is once again authorized to practice law. Charges of misconduct include those authorized to be filed pursuant to BR 3.4.

Section 18.601 SPRB Replacements

The Board of Governors may nominate and request the Supreme Court to appoint a temporary replacement to serve until the member suspended under this bylaw is again able to serve. The temporary replacement will have the same rights and responsibilities as any other member of the entity.

Section 18.7 Adjudicator

The Adjudicator is the Disciplinary Board statewide adjudicator, who is authorized to exercise his or her powers and authority pursuant to statute, the rules of procedure and the Bar's bylaws. The Adjudicator is appointed by and serves at the pleasure of the Oregon Supreme Court, and is an employee of the Oregon State Bar.

Article 19 Legal Ethics Questions and Opinions

Section 19.1 General Counsel's Office

Subsection 19.100 Submission and Questions

All legal ethics questions regarding the propriety of a proposed 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 or by telephone.

Subsection 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 the inquirer has provided facts sufficient to permit the formulation of an opinion. 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.

Subsection 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. General Counsel will not offer an ethics opinion on past conduct by other members, except to assist a member to determine whether conduct described implicates the inquiring member's duty to report another lawyer's misconduct under Oregon RPC 8.3. Ethics questions and responses 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 should submit ethics questions in a

hypothetical form that does not disclose client confidences, or obtain their client's informed consent prior to disclosure. Materials submitted to General Counsel in connection with ethics inquiries are public records, and may be disclosed by General Counsel to the public, the Client Assistance Office or Disciplinary Counsel's Office.

Subsection 19.103 Application of Oregon RPC 8.6

For Oregon RPC 8.6 to apply to a request for ethics assistance, a member must put his or her ethics question in writing. General Counsel's office will respond in writing 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.

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 in writing by the inquirer.

Section 19.3 Legal Ethics Committee

Subsection 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.

Subsection 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 Oregon RPC 8.6 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 2005) and on the Bar's website.

Article 20 Unlawful Practice of Law

Section 20.1 Definitions

For the purpose of this Article, the following definitions apply:

(A) "Administrator" means the Bar employee assigned to provide administrative support to the Committee and Bar Counsel.

(B) “Committee” means the Unlawful Practice of Law Committee of the Oregon State Bar.

(C) “Unlawful practice of law” means (1) the practice of law, as defined by the Oregon Supreme Court, in Oregon, by a person who is not an active member of the Oregon State Bar and is not otherwise authorized by law to practice law in Oregon; or (2) holding oneself out, in any manner, as authorized to practice law in Oregon when not authorized to practice law in Oregon.

(D) “Investigator” means a member of the Unlawful Practice of Law Committee assigned to investigate a complaint of unlawful practice of law.

(E) “Agency” means any federal, state or local agency having an interest in or responsibility for the investigation of conduct related to the unlawful practice of law.

(F) “Accused” means the person or persons who are the subject of a complaint to the committee.

(G) “Complaint” means the matter or occurrence that causes the Committee to open a file for the investigation of the accused’s alleged unlawful practice of law.

Section 20.2 Unlawful Practice of Law Committee

The Board may nominate and request the Supreme Court to appoint as many members as it deems necessary to carry out the Committee’s functions, pursuant to BR 12.1. At least two members of the Committee must be members of the general public and no more

than one-quarter of Committee members may be lawyers engaged in the private practice of law.

Section 20.3 Investigative Authority

Pursuant to ORS 9.164 and BR 12.2, the Committee shall investigate complaints of the unlawful practice of law. The Committee may decline to investigate allegations of unlawful practice of law when: the allegations are not made to the Committee in writing; the administrator determines the allegations do not involve the unlawful practice of law, or; the allegations consist only of printed or electronic materials, advertisements or other solicitations describing services that cannot reasonably be construed as legal services.

Section 20.5 Processing Unlawful Practice of Law Complaints

Subsection 20.500 Investigation

On receiving a complaint of unlawful practice of law, the Administrator will give the complaint a case number and assign it to a committee member for investigation. The committee member may only employ methods in his or her investigation that comply with the Rules of Professional Conduct. Upon completion of the investigation, the investigator will submit a written report to the Committee with an analysis of the relevant facts and law and a recommendation for disposition.

Subsection 20.501 Dispositions

Upon receipt and review of the investigator's report, the Committee may either continue the matter for further investigation and revisions to the report or make one of the following dispositions:

(a) Closure.

This disposition is appropriate when the Committee has insufficient evidence to prove that the accused engaged in the unlawful practice of law. The Committee may reopen a closed matter if it receives additional information or evidence of the unlawful practice of law by the accused.

(b) Informational Letter.

This disposition is appropriate when the Committee has insufficient facts evidence to prove that the accused has engaged in the unlawful practice of law, and believes that that the accused would benefit from receiving additional information about what the Court has determined constitutes the unlawful practice of law. The letter will notify the accused that the investigation is concluded, and state that the accused may wish to seek legal advice about whether any specific practice constitutes the unlawful practice of law.

(c) Referral to Board of Governors for initiation of proceedings under ORS 9.166.

(1) Filing suit for injunctive relief is appropriate when (i) the Committee has clear and convincing evidence to establish that the accused engaged in the unlawful practice of law, (ii) the practice is

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ongoing or likely to recur, and (c) a member of the public has been harmed or is likely to be harmed as a result of the accused's unlawful practice of law.

(2) Filing suit for contempt relief is appropriate when a) a court has entered an injunction against the accused b) the Committee has clear and convincing evidence to establish that the accused continues to engage in the unlawful practice of law and c) a member of the public has been harmed or is likely to be harmed as a result of the accused's unlawful practice of law.

(3) The Committee may decline to request authorization from the Board to initiate proceedings allowed under to ORS 9.166 in favor of other resolutions provided in these rules.

(d) Referral to or Cooperation with Other Agency or Bar Department.

This disposition is appropriate when the Committee determines that another agency or department is better positioned to investigate or address the complaint, including but not limited to when:

(1) The allegations involve activity prohibited by law, ordinance or statute within the jurisdiction of a federal, state or local agency;

(2) The accused is or has been the subject of an investigation, action, injunction or review by a federal, state or local agency;

- (3) An agency, on review of the allegations before the Committee as to an accused, indicates a desire to pursue further investigation;
- (4) The agency has or is likely to have, information regarding the complaint, the accused or parties acting with the accused, or;
- (5) The complaint concerns conduct by a lawyer or bar applicant, or implicates the rules of professional conduct.

Section 20.6 Bar Counsel

Subsection 20.600 Role of Bar Counsel

After authorization by the Board to pursue an action under ORS 9.166, the Administrator may retain counsel to represent the Bar in the action and will report periodically to the Committee and Board on the status of the litigation. To the extent necessary, the Committee and Administrator will assist bar counsel with preparing and continuing investigation of matters approved for action under ORS 9.166.

Subsection 20.601 Settlement Authority

After authorization by the Board to pursue an action under ORS 9.166, the Administrator may negotiate a settlement of the unlawful practice litigation before or after the filing of a circuit court complaint by way of agreement with the accused to discontinue the unlawful practice of law. The agreement is subject to and does not become effective until approved by the Committee.

Subsection 20.602 Referral to Bar Counsel

When a new complaint of unlawful practice of law involves an accused against whom the Board has already authorized suit, the administrator refer the matter directly to bar counsel without obtaining prior authorization from the Committee or the Board. The administrator and Bar counsel may ask the Committee to conduct an investigation into the new complaint and have discretion to determine whether to include the facts alleged in the new complaint in the prosecution against the accused.

Section 20.7 Public Outreach and Education

Subsection 20.700 Public Outreach

The Committee may engage in public outreach to educate the public about the potential harm caused by the unlawful practice of law, pursuant to BR 12.3(a). The Committee may cooperate in its education efforts with federal, state and local agencies tasked with preventing consumer fraud

Subsection 7.701 Informal Advisory Opinions

The Committee may write informal advisory opinions on questions relating to what activities may constitute the practice of law, pursuant to BR 12.3(b). Opinions must be approved by the Board before publication. The published opinions are not binding, but are intended only to provide general guidance to lawyers and members of the public about activities that Oregon

Supreme Court precedent and Oregon law indicate may constitute the unlawful practice of law.

Section 20.8 Records

When the investigation of a complaint is concluded, the investigator must deliver all records and documents created or obtained in the investigation to the Bar. Records will be kept in accordance with the Bar's records retention policy.

Article 21 Client Security Fund

The Chief Executive Officer or General Counsel of the Bar will continue, as feasible, collection efforts in each instance in which Client Security Fund ("CSF") money is paid out. In each of these cases, the Bar will obtain an assignment of judgment in the amount paid out. The status of any such outstanding judgments shall be reviewed at least annually by the CSF Committee and the Board.

Article 22 Fee Arbitration

(A) The Bar may provide for a fee arbitration procedure whereby fee disputes between attorneys maintaining offices in Oregon and their clients or other attorneys are submitted to arbitration panels for resolution. Such a procedure shall be administered through General Counsel, pursuant to rules approved by the Board.

(B) The Bar's fee arbitration procedure is a private, contract dispute resolution mechanism and not the transaction of public business.

(C) Except as provided in (E) below, or unless all parties to an arbitration agree otherwise: all records, documents, papers, correspondence and other material submitted by the parties to General Counsel or to an arbitration panel during the course of an arbitration proceeding and any award rendered by an arbitration panel is not subject to public disclosure.

(D) Arbitration hearings conducted pursuant to the Bar's fee arbitration procedure will be closed to the public unless all parties to an arbitration agree otherwise. Witnesses who will offer testimony on behalf of a party may, however, attend the arbitration hearing.

(E) Notwithstanding subsection (B), (C) and (D), arbitrators must disclose to Disciplinary Counsel any knowledge obtained during the course of an arbitration proceeding of an apparent violation of the Rules of Professional Conduct or ORS Chapter 9 committed by an attorney and all records, documents, papers, correspondence and other material submitted to General Counsel or to the arbitration panel during the course of the proceeding and any award rendered by the panel must be made available to Disciplinary Counsel for the purpose of investigating alleged ethical violations.

Article 23 Professional Liability Fund

Section 23.1 Board of Directors

The Professional Liability Fund (“PLF”) will conduct its business through a Board of Directors appointed by the Board of Governors. The PLF Board consists of nine members, seven of which must be active, resident members of the Bar and two of which must be non-lawyers. The terms of office of PLF Board members is five years, as staggered by the Board of Governors, with the term of office of each board member beginning on January 1 of each year. The Board of Governors may remove any member of the PLF Board without cause and must fill the positions that become vacant as expeditiously as possible to ensure continuity in the governance of the PLF. Persons appointed to fill vacancies on the Board of Directors serve the unexpired term of the member who is replaced. If a replacement appointment to an unexpired term is for two (2) years or less, the Board of Governors may thereafter reappoint that person to a term of up to five years. In considering the length of the reappointment, the Board will take into account the experience level of the PLF Board of Directors and the effect on the rotation cycle of the Board of Governors. At the request of two-thirds of the members of the Board of Directors, the Board of Governors may appoint the immediate past PLF Chief Executive Officer to the Board of Directors for a period not to exceed one year following their resignation or retirement from the PLF CEO position. The former PLF CEO will be a non-voting, tenth member of the Board of Directors.

Section 23.2 Authority

The Board of Governors vests in the Board of Directors of the PLF the authority that is necessary and convenient to carry out the provisions of ORS 9.080 relative to the requirement that all active members of the Oregon State Bar in the private practice of law in Oregon carry professional liability coverage, the establishment of the terms of that coverage and the defense and payment of claims under that coverage. The Board of Directors of the PLF must recommend to the Board of Governors appropriate requirements for PLF coverage and amounts of money that active members in the private practice of law will be assessed for participation in the PLF.

Section 23.3 Operation

Subject to the authority of the Board of Governors to take the action that is authorized by ORS 9.080 and its authority to amend these policies to provide otherwise, the Board of Directors of the PLF has sole and exclusive authority and responsibility to operate and manage all aspects of the PLF. The Board of Directors of the PLF has authority to adopt its own bylaws and policies to assist it in conducting the business of the PLF. No PLF bylaw, coverage plan, or assessment, or amendment thereto, can take effect until approved by the Board of Governors. The policies of the PLF must be consistent with the Bar's Bylaws regarding the PLF and will be effective on approval by the PLF Board of Directors, subject to review and ratification by the

Board of Governors within 60 days after notice of the policies has been given to the Board of Governors.

Section 23.4 Reports

The PLF must present an annual report to the bar membership.

Section 23.5 Relationship with the Board of Governors

Subsection 23.500 Liaisons

(a) It is the goal of the Board of Governors that there be free, open, and informal communication between the Board of Governors and PLF Board of Directors. Constructive communication among Board of Governors members, bar management, PLF Board of Directors members and PLF management is encouraged; however, in such communication it is recognized that the authority to manage the PLF is vested in the PLF Board of Directors.

(b) Each year the President of the Bar appoints two lawyer members of the Board, and one public member of the Board to serve as liaisons with the PLF Board of Directors.

(c) At least one of the Board's PLF liaisons must be present at each meeting of the PLF Board of Directors and each attending Board of Governors PLF liaison must make every effort to attend those meetings in person rather than by telephone.

(d) The PLF CEO or the CEO's designee must make a report at each meeting of the Board of Governors regarding the significant activities of the PLF and any matters regarding the PLF requiring action by or the attention of the Board of Governors.

(e) The Board of Governors' PLF liaisons are responsible for keeping the Board advised of the activities of the PLF to ensure good communications between the Board of Governors and the PLF Board of Directors and to ensure that the Board is fully informed of the background and rationale for all PLF bylaw, policy, coverage plan, and assessment recommendations to it. The Board's PLF liaisons must not participate in the consideration of any specific PLF claim or other confidential PLF matter except as provided in PLF Policy 4.250(D) (Bar and/or Board of Governors is/are named parties in an action).

Subsection 23.501 Reports

The PLF must regularly provide to the BOG the following:

- (a) All financial statements when completed;
- (b) All minutes of meetings of the Board of Directors of the PLF or committees of the Board of Directors, excepting the parts that are made confidential by Oregon Revised Statutes;
- (c) All reports of investment performance and changes in investments;

- (d) All proposed changes in the primary and excess coverage plans with an explanation of the reasons for and effects of the changes;
- (e) On or before October 1 of each year, the proposed assessment for primary coverage along with the actuarial reports and the information described in Subsection 23.600 of the Bar's Bylaws to enable the Board of Governors to understand and evaluate the proposed assessments;
- (f) A report generally describing the previous year's excess enrollment, including total firms enrolled, total lawyers and gross premiums from the excess program;
- (g) All projections, forecasts, prospective financial statements and the like prepared by or for the PLF;
- (h) Any other information that the Board of Governors may request to assist it in discharging its responsibility to the membership of the Bar.

Subsection 23.502 Release of Information

All requests by the Board for confidential claim file information from the Professional Liability Fund must be directed by the President of the Board of Governors to the Chair of the PLF Board of Directors. No such material or information will be released by the Board of Governors without first receiving the approval for release from the Chair of the PLF Board of Directors. The Board of Governors must coordinate and consult with the Chair of the PLF Board of Directors before

releasing public statements regarding the PLF and its operations.

Subsection 23.503 BOG Members Participating in PLF Claims

A member of the Board of Governors who is representing either the plaintiff or the PLF in a PLF-covered claim shall not participate in any discussion of a PLF-related matter that comes before the Board of Governors. During the course of the representation, at any time that a PLF-related matter comes before the Board of Governors, the Board of Governors members shall announce the fact of the representation and recuse himself or herself from discussing or otherwise participating in the matter. The minutes of Board of Governors meetings shall reflect the announcement and the recusal.

Subsection 23.504 Annual Meeting

The Board of Governors will invite the PLF Board of Directors and the PLF management to meet annually with the Board of Governors to: Discuss the results of the business of the PLF for the preceding calendar year; discuss the PLF's long-range plans and goals; generally inform the Board of Governors of the condition of the PLF and discuss matters of common interest to the Board of Governors and the PLF. This meeting must occur as soon as practicable after completion of the year-end financial reports of the PLF, or by May 1st of each year, whichever is earlier.

Subsection 23.505 Audit

The Board of Governors may cause a special audit of the performance and financial statement of the PLF in addition to the statutory audit. Special audits are at the expense of the general membership of the Bar.

Subsection 23.506 Location of Office

The physical location of the PLF will be determined by the Board of Governors on recommendation of the PLF Board of Directors.

Subsection 23.507 Staff Responsibility

The Chief Executive Officer of the Bar and the bar staff have no responsibility or authority with respect to the management of the PLF. However, because the PLF is a function of the Bar, the Chief Executive Officer and bar staff will cooperate with the Board of Directors of the PLF, its Chief Executive Officer, and staff in all areas of the PLF's business and activities. Likewise, it is expected that the PLF Chief Executive Officer and staff will cooperate with the Bar, its Chief Executive Officer and staff in all areas of the Bar's business and activities. The Chief Executive Officer of the Bar will make the PLF aware of all personnel and other policies of the Bar so that there may be uniformity for all bar functions recognizing, however, that the nature of the PLF may justify deviations from such policies in certain circumstances.

Section 23.6 Assessment

Subsection 23.600 Principles

The Board of Governors recognizes that the assessment for coverage is derived by the prudent application of actuarial principles, responsible evaluation of past and present operations and investments of the PLF and judgments about future revenue and losses. Assessments vitally affect the members of the Bar and the public, which must rely on the general availability of a wide range of legal services. The PLF has the responsibility to submit to the Board of Governors its recommended assessment for the subsequent year (or any mid-year special assessment) supported by a report evidencing: The actuarial principles and assumptions used in the proposed assessment, the evaluations of the past and current operations and investments of the PLF with respect to their effect on the proposed assessment, the judgments and assumptions employed about future revenue and losses, and all other factors that the PLF believes will or may affect the adequacy and appropriateness of the proposed assessment. The Board of Governors must review the proposed assessment, the PLF's reports, and such other information as may be appropriate. On completion of the review, the Board of Governors must adopt an assessment that it reasonably believes to be actuarially prudent and reasonably believes will provide assurance of continued financial stability of the PLF.

Article 24 Attorney Assistance

Section 24.1 Creation and Purpose

There is hereby created, pursuant to ORS 9.568, the State Lawyers Assistance Committee (“SLAC”) and the Professional Liability Fund Personal and Practice Management Assistance Committee (“PLF-PPMAC”). The purpose of the SLAC is to supervise and assist lawyers whose performance or conduct may impair their ability to practice law or their professional competence. The purpose of the PLF-PPMAC is to provide voluntary personal and practice management assistance to lawyers.

Section 24.2 Authority

Subsection 24.200 State Lawyers Assistance Committee

The SLAC has authority:

- (a) To receive, review, investigate, process and resolve all complaints and referrals to SLAC regarding lawyers whose performance or conduct may impair their ability to practice law or their professional competence.
- (b) To require lawyers within SLAC’s jurisdiction to submit to a professional assessment and diagnosis and to comply with any remedial program that SLAC has established. A remedial program may include conditions on the law practice and other law-related activities of any lawyer found to be within SLAC’s jurisdiction. Conditions may include, but are not limited

to, requiring a lawyer to obtain medical or psychological treatment at his or her expense and to discontinue the practice of law and/or law-related activities pending completion of such treatment.

- (c) To monitor a lawyer's compliance with the recommended measures of a remedial program.
- (d) To maintain records regarding a lawyer's assistance referrals.
- (e) To prepare an annual report to the Board of Governors.
- (f) To recommend, for approval by the Board of Governors, such rules as may be necessary to properly operate SLAC.
- (g) To appoint local bar members as it may deem appropriate for carrying out the work and purpose of SLAC.

***Subsection 24.201 Professional Liability Fund
Personal and Practice Management Assistance
Committee***

The Professional Liability Fund Personal and Practice Management Assistance Committee ("PLF-PPMAC") has the authority to provide assistance to lawyers and judges who are suffering from impairment or other circumstances that may adversely affect professional competence or conduct and may also provide advice and training in law practice management. The PLF-PPMAC may provide this assistance through the PLF's

Oregon Attorney Assistance Program and the Practice Management Advisor Program and by the use of the PLF staff and volunteers.

Section 24.3 Composition

Subsection 24.300 State Lawyers Assistance Committee

The board may appoint members and public members as it deems appropriate.

Subsection 24.301 Professional Liability Fund Personal and Practice Management Assistance Committee

The PLF-PPMAC consists of the members of the PLF's Board of Directors. The PLF will have authority to promulgate rules concerning the provision of assistance by the PLF-PPMAC which, on approval by the Board of Governors, will govern its activities.

Section 24.4 State Lawyers Assistance Committee Review and Intake

Subsection 24.400 Complaints and Referrals

(a) Any person may submit directly to SLAC, either orally or in writing, the name of any lawyer whose performance or conduct appears to be impairing the lawyer's professional competence or ability to practice law. A referral of a lawyer to SLAC should include a description of the circumstances and copies of any relevant documents. SLAC members who are contacted

regarding a complaint or referral will obtain preliminary information and refer the matter to the chairperson. The chairperson will confirm receipt of a referral in a letter to the person making the referral. The letter must contain a disclosure substantially as follows:

“We appreciate your interest in bringing this matter to our attention. Our Committee will respond by contacting the lawyer to discuss the problem. It is important for you to understand, however, that the purpose of this Committee is to provide confidential assistance to lawyers who are impaired in the practice of law for reasons such as drug or alcohol problems, emotional problems or lack of competence.

For that reason, we focus our work on determining the specific assistance that the lawyer needs and making sure that the lawyer follows a treatment or assistance program. This Committee does not deal with lawyer discipline issues. All information we receive from you will be kept confidential and will not be reported to the bar disciplinary authorities. If you believe that this lawyer has acted improperly and you wish to make a complaint to the bar, you should write to Client Assistance Office, Oregon State Bar, P.O. Box 231935, Tigard, OR 97281.””

(b) If a referral is received from a member of the Bar, the letter required in paragraph (A) must also contain the following statement:

“If you are a member of the Bar, please review Oregon RPC 8.3(a) to determine whether you may have an independent obligation to contact the Bar.”

(c) The OSB Client Assistance Office and the OSB Disciplinary Counsel may refer to SLAC the name of any lawyer whose performance or conduct appears to be impairing the lawyer’s ability to practice law or professional competence. The referral will include a description of the circumstances and copies of any relevant documents. The State Professional Responsibility Board may refer to SLAC any lawyer whose performance or conduct may be impairing the lawyer’s ability to practice or professional competence whether or not the SPRB authorizes prosecution for misconduct. The chairperson will confirm in writing referrals from the Client Assistance Office, Disciplinary Counsel’s Office, or the SPRB.

Subsection 24.401 Designees

SLAC members, lawyers and other persons assisting SLAC and employees thereof working on a matter related to the Lawyers Assistance Program authorized by ORS 9.568 are designees of SLAC. Designees are subject to SLAC rules, including the confidentiality requirements set forth in Section 24.701. Appointment of a designee who is not a SLAC member will be at the discretion of the chairperson. Considerations for appointment of such a designee include, but are not limited to, the designee’s qualifications, the designee’s previous experience with the referred person or with a

situation similar to that of the referred person and the location of the referred person and designee. The chairperson will confirm the appointment of a designee. The chairperson will advise the designee of his or her authority and obligations and will include a copy of the SLAC's rules and other pertinent SLAC information. The designee will be notified of SLAC meetings while the referral is pending and must give regular progress reports to SLAC. Those reports may be given in person, in writing, by telephone or through the chairperson. The appointment of a designee will remain in effect until the case is concluded or SLAC otherwise provides.

Subsection 24.402 Preliminary Assessment and Intake

Upon receipt of a referral, the chairperson will assign the matter to one or more designees to conduct a preliminary assessment and make a recommendation to the committee. The Intake designee will gather relevant information regarding the referral including, but not limited to, interviewing the referred lawyers and the person who made the referral, and any other person who may have knowledge about the lawyer's ability to practice law or professional competence.

Prior to making initial contact with the referred lawyer, the SLAC designee will notify the Oregon Attorney Assistance Program (OAAP) of the referred lawyer's name. If the OAAP informs the SLAC designee that the referred lawyer poses a substantial and imminent risk of harm to the referred lawyer or others, the SLAC

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designee will wait a reasonable amount of time before contacting the referred lawyer and will coordinate and communicate with OAAP about how to make contact with the referred lawyer.

If, based on the preliminary assessment, the committee determines that the lawyer's professional competence or ability to practice law may be impaired, SLAC will have jurisdiction over the matter. Otherwise, the matter will be dismissed without further action.

Subsection 24.403 Notice to Referred Lawyer

Prior to assuming jurisdiction, SLAC will notify the referred lawyer and provide an opportunity to respond. If jurisdiction is assumed, the chairperson will assign the matter to a designee for case development, notify the referred lawyer of the matter and direct the lawyer to meet with the designee. Notices to the referred lawyer will include a reminder that failure to respond to or cooperate with SLAC is grounds for discipline under Oregon RPC 8.1(c) and may be reported to the proper authority. If a case is not opened, the chairperson will notify the source of the referral that the matter is being dismissed without further SLAC action.

Section 24.5 State Lawyers Assistance Committee Investigations

Subsection 24.500 Meeting with Referred Lawyer

Within 30 days after notice has been given as provided in Subsection 24.403 of the Bar's Bylaws, the designee,

either individually or with another designee, will meet with the referred lawyer to discuss the nature of the referral, SLAC's function, the general steps that will be taken, any questions that the referred lawyer may have about the process and the lawyer's explanation, opinion or questions about the referral.

Subsection 24.501 Release of Information

The designee may require the referred lawyer to authorize the release of relevant medical or other background information regarding the referred lawyer to SLAC or to a professional selected to evaluate the referred lawyer. Medical or background information is relevant, if it relates to the referred lawyer's professional competence or ability to practice law. The referred lawyer may voluntarily provide additional information.

Subsection 24.502 Professional Evaluation

The designee may require the referred lawyer to obtain a medical or other diagnostic evaluation from a professional or a panel of professionals selected by SLAC. The scope of the medical or other diagnostic evaluation will be limited to issues related to the referred lawyer's professional competence or ability to practice law. The designee may inform the medical or other professional of the general nature of SLAC's concerns but will not disclose to the professional the identity of the referral source or any other confidential information. The lawyer must bear the expenses of the medical or other

diagnostic evaluation, except that SLAC may advance the costs in cases of demonstrated financial hardship.

Subsection 24.503 Remedial Action Plan

(a) Based on all the information gathered by the designee, SLAC will consider and determine whether the referred lawyer's performance or conduct may be impairing the lawyer's professional competence or ability to practice law. If SLAC finds that the lawyer's performance or conduct may not impair the lawyer's professional competence or ability to practice law, the matter will be dismissed and the lawyer notified of the disposition of the matter. If SLAC finds that the lawyer's professional competence or ability to practice law is impaired, SLAC will so advise the referred lawyer in writing and require the lawyer to participate in a remedial program of monitoring, treatment, counseling or training.

(b) The referred lawyer will have the opportunity to participate in determining the nature and extent of the remedial program to be undertaken, but SLAC's decision regarding the program is final.

(c) SLAC will set forth the remedial measures to be undertaken in a written agreement to be signed by the lawyer. The agreement will contain the referred lawyer's acknowledgement that failure or refusal to cooperate in the remedial program is grounds for discipline under Oregon RPC 8.1(c) and may be reported to the proper authority.

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- (d) SLAC may require the lawyer to submit periodic reports from persons responsible for implementing the remedial program or who have information about the lawyer's compliance.
- (e) The referred lawyer must pay the costs of the remedial program that SLAC requires.
- (f) The designee will monitor the referred lawyer's participation in the remedial program and will report regularly to SLAC.
- (g) The remedial program may be revised from time to time, as SLAC deems appropriate, and may include an extended period of monitoring.
- (h) When SLAC determines that the referred lawyer has successfully completed the remedial program and that the lawyer's ability to practice law and professional competence is no longer impaired, the case will be closed.

Section 24.6 State Lawyers Assistance Committee Records

The chairperson will maintain an intake log as a permanent record of SLAC. In it will be noted each referral to SLAC, the date of the referral, the name of the person making the referral, the name of the referred lawyer, action taken on the referral and the ultimate disposition of the referral. Written materials regarding a referral which does not result in a case being opened, will be kept with the intake log. The designee to whom a case is assigned will create a file and will maintain

all reports, correspondence, records and other documents pertaining to the case. The designee is responsible for maintaining the confidentiality of the file and the information it contains while the file is in the designee's possession. The file on a case will be closed when the referral is dismissed, on notice to Disciplinary Counsel of noncooperation or as provided in Subsection 24.503(H) of the Bar's Bylaws. Closed files will be maintained for ten years in locked storage at the Bar's offices. SLAC will notify the referring person of the general disposition of the referral, but not of its detailed findings or the remedial measures taken.

Section 24.7 Other State Lawyers Assistance Committee Policies

Subsection 24.700 Non-cooperation

The failure or refusal of the referred lawyer to respond to SLAC's initial inquiry; to participate in interviews with designees during the course of SLAC's investigation; to respond to SLAC requests for information or for a professional evaluation; or to participate in and comply with a remedial program, may result in the lawyer being referred to Disciplinary Counsel for possible action under Oregon RPC 8.1(c).

Subsection 24.701 Confidentiality

SLAC records and any information provided to or obtained by it or its designees including, without limitation, medical information, is confidential. Those records and information are not subject to public

disclosure and are inadmissible as evidence in any disciplinary or civil proceeding. Pursuant to ORS 9.568(4), the confidentiality does not apply to information relating to a lawyer's non-cooperation with SLAC or its designees or to information obtained by the Bar from any other source not connected with the referral to SLAC. Pursuant to Subsection 24.402 of the Bar's Bylaws, the SLAC chairperson or designee may release the name of the referred lawyer to the OAAP. SLAC may also release statistical data, pursuant to Subsection 24.703 of the Bar's Bylaws.

Subsection 24.702 Duty to Report Unethical Conduct

SLAC and its designee are exempt from the reporting requirements of Oregon RPC 8.3(a) pursuant to Oregon RPC 8.3(c)(1).

Subsection 24.703 Statistical Data

SLAC will prepare a written annual report of its activities. The report will include statistical data such as: the total number of referrals received by SLAC, the number of direct referrals, the number of referrals received from the State Professional Responsibility Board, the number of referrals to the Client Assistance Office as a result of non-cooperation with SLAC, the number and types of cases in which assistance was provided through SLAC, the number of cases completed during the reporting period and other information that will assist the Bar in evaluating the

workload and effectiveness of the SLAC program. The report will not include any information that could jeopardize the confidentiality of persons participating in SLAC's programs. The report will be delivered to the Bar annually as an attachment to SLAC's annual report.

Subsection 24.704 Public Meetings

SLAC meetings are exempt from the provisions of ORS 192.610 to 192.690, pursuant to ORS 9.568(3)(b). OAAP staff may be invited to attend SLAC meetings, including case review of referred lawyers, if appropriate releases have been signed by the referred lawyers.

Article 25 Law Student Associates

Any student currently enrolled in an Oregon law school may become a Law Student Associate of the Bar. Law Student Associates are not members of the Bar and, except as provided in this article, do not have any of the rights and responsibilities of members. Law Student Associates must pay an annual fee established by the Chief Executive Officer in an amount sufficient to cover the cost of providing information and services to Law Student Associates. Services and information provided to Law Student Associates will be determined by the Chief Executive Officer.

Article 26 Sustainability

The Bar supports the goal of sustainability, generally defined as meeting present needs without compromising the ability of future generations to meet their own needs. Because Bar operations and the practice of law impact the environment and society generally, the Bar will be cognizant of sustainability in its internal operating practices as well as in its service to members. Internally, the Chief Executive Officer will designate a sustainability coordinator for Bar operations, will encourage continuous sustainability improvement in Bar operations, and will report to the Board of Governors at least annually on progress and impediments. In the practice of law, principles of sustainability may be important in addressing competing economic, social and environmental priorities that impact future generations. The Bar will encourage education and dialogue on how law impacts the needs and interests of future generations relative to the advancement of the science of jurisprudence and improvement of the administration of justice.

Article 27 Unclaimed Lawyer Trust Account Funds

Section 27.100 Purpose

This policy is established to provide direction and limits for the administration, disbursement, and claims adjudication of unclaimed lawyer trust account funds appropriated to the Bar. For the purposes of this section, “unclaimed lawyer trust account funds” are

defined to mean all funds allocated to the bar pursuant to ORS 98.386(2).

Section 27.101 Administration

- (a) All unclaimed lawyer trust account funds appropriated to the Bar shall be received and held in a separate fund in the manner authorized by Section 7.1.
- (b) All unclaimed lawyer trust account funds shall be invested in the manner described at Section 7.4. The Legal Services Committee may provide recommendations on the investment of unclaimed lawyer trust account funds to the Investment Committee.

Subsection 27.102 Disbursement

- (a) The Chief Executive Officer and the Chief Financial Officer are authorized and empowered to make disbursements of unclaimed lawyer trust account funds appropriated to the Bar to:
 - (1) Claimants for the payment of claims allowed under ORS 98.392(2), pursuant to Subsection 27.103; and
 - (2) The Bar, for expenses incurred by the Bar in the administration of the Legal Services Program, only if the Chief Executive Officer determines such disbursements will not impair the Bar's ability to make payments for claims allowed pursuant to Subsection 27.103 from unclaimed lawyer trust account funds.

(b) The Budget & Finance Committee, after seeking the advice of the Legal Services Committee, may recommend that the Board make disbursements of unclaimed lawyer trust account funds appropriated to the Bar to the Legal Services Program established under ORS 9.572 for the funding of legal services. The Board may authorize such disbursements only if the Board determines the disbursements will not impair the Bar's ability to make payments for claims allowed pursuant to Subsection 27.103 from unclaimed lawyer trust account funds.

Subsection 27.103 Claim Adjudication

(a) When the Oregon Department of State Lands forwards a claim for unclaimed lawyer trust account funds to the Bar for review, the Bar shall review the claim and approve or deny the claim within 120 days after the completed claim form and all necessary information to process the claim is received. If a claimant is requested to provide additional information and fails to do so within 90 days after the request is made, the Bar may close the file without further action. A claim shall be approved if a preponderance of the evidence proves the claimant is legally entitled to the unclaimed lawyer trust account funds. A claim shall be denied if the preponderance of the evidence does not prove the claimant is legally entitled to the property.

(b) The Chief Executive Officer or the Chief Executive Officer's designee shall decide whether to approve or deny all claims for amounts under \$5000. Claims for

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amounts of \$5000 or more must be reviewed and approved or denied by the Board.

(c) The Bar shall utilize claim forms published by the Oregon Department of State Lands. To evaluate whether to approve or deny a claim under Subsection 27.103(a), the Bar adopts the claim adjudication rules promulgated by the Oregon Department of State Lands at OAR 141-040-020; and OAR 141-040-0211 through OAR 141-0400213. Where the rules reference the "Department" they shall be deemed to refer to the Bar.

(d) If a claim is approved pursuant to this Subsection, the Chief Executive Officer or designee shall notify the claimant.

(e) If a claim is denied, the Chief Executive Officer or the Chief Executive Officer's designee shall notify the claimant. The notice of denial shall include the specific reason for denial and shall include a notice of an opportunity to appeal the denial to the Board.

(f) A claimant may appeal the denial of a claim by making a request in writing to the Chief Executive Officer within 60 days after the date of written notice of denial of the claim. A request for appeal shall be in writing and shall identify issues of law or fact raised by the denial and include a summary of the evidence of ownership on which the claim was originally submitted. The Board will review each request for appeal at its next scheduled board meeting following receipt of the request.

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(g) Additional evidence shall not be admissible on appeal to the Board, except by mutual consent of the Board, the claimant, and any other parties to the proceeding.

If such additional evidence is not admitted, the Board shall allow the claimant to resubmit the claim to the Chief Executive Officer with the new evidence.

(h) The Chief Executive Officer or designee shall notify the claimant of the Board's decision on appeal.

(i) A holder of property who has delivered unclaimed lawyer trust account funds to the Bar pursuant to ORS 98.386(2) may make payment to or delivery of property to an owner and file a claim with the Bar for reimbursement. The Bar shall reimburse the holder within 60 days of receiving proof that the owner was paid. The Bar may not assess any fee or other service charge to the holder. As a condition of receiving the funds from the Bar, the holder shall agree to assume liability for the claimed asset and hold the Bar harmless from all future claims to the property.

(j) On a quarterly basis, the Chief Executive Officer or designee shall provide a listing of the claims resolved to the Department of State Lands. The Chief Executive Officer shall also provide an annual report of the claims resolved to the Board.

Article 28 Admissions

Section 28.1 Board of Bar Examiners

Pursuant to ORS 9.210, the Supreme Court appoints a Board of Bar Examiners (BBX) to carry out the admissions function of the Oregon State Bar. The BBX recommends to the Supreme Court for admission to practice those who fulfill the requirements prescribed by law and the rules of the Court. The BBX's responsibilities include: investigating applicants' character and fitness, developing a bar examination, determining the manner of examination, determining appropriate accommodations for applicants, grading the bar examinations and setting standards for bar examination passage. The BBX may appoint co-graders to assist with the grading of examinations. The BBX may also recommend to the Court rules governing the qualifications, requirements and procedures for admission to the bar, by examination or otherwise, for law student appearance, and other subjects relevant to the responsibilities of the BBX.

Section 28.2 Nominations

The bar and the BBX will recruit candidates for appointment to the BBX and for appointment as co-graders. The BBX will solicit input from the Board of Governors before selecting co-graders and nominating candidates for appointment to the BBX.

Section 28.3 Liaisons

The Board of Governors shall appoint one of its members as a liaison to the BBX. The BBX may appoint one of its members as a liaison to the Board of Governors. The liaisons shall be entitled to attend all portions of the BBX and Board of Governor meetings, including executive and judicial sessions.

Section 28.4 Admissions Director

The Admissions Director shall report to and be supervised by the Director of Regulatory Services, under the overall authority of the Chief Executive Officer. The Chief Executive Officer and Director of Regulatory Services will make the hiring, discipline and termination decisions regarding the Admissions Director. The Chief Executive Officer and Director of Regulatory Services will solicit BBX's input into these decisions and give due consideration to the recommendations and input of the BBX. If the BBX objects to the final hiring decision for the Admission Director, recruitment will be reopened.

Section 28.5 Budget

With the approval of the Oregon Supreme Court, the BBX may fix and collect fees to be paid by applicants for admission. A preliminary annual budget for admissions will be prepared by the Admissions Director and Director of Regulatory Services in consultation with the BBX. Upon approval by the BBX, the budget will be submitted to the Board of Governors. The final

budget presented to the Board of Governors will be provided to the BBX. Upon adoption by the Board of Governors, the budget will be submitted to the Supreme Court in accordance with Bylaw 7.202, and the BBX may make a recommendation to the Supreme Court regarding adoption of the budget. The budget will align with bar policy generally after consideration of the policy goals and objectives of the BBX.

Section 28.6 Amendments

Any proposed amendment to Article 28 shall be submitted to the BBX and Supreme Court for consideration and the BBX shall make its recommendation to the Supreme Court regarding adoption of the proposed amendment. Upon Supreme Court approval, the Board of Governors may adopt such amendments in accordance with Article 29.

Article 29 Amendment of Bylaws

Any amendment of the Bar's Bylaws requires notice at a prior Board meeting unless two-thirds of the entire Board waives the notice requirement. The Bar's Bylaws may be amended by affirmative vote of a majority of the entire Board at any regular meeting or at any special meeting of the Board called for that purpose.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

**DANIEL Z. CROWE,
LAWRENCE K. PETERSON,
and OREGON CIVIL
LIBERTIES ATTORNEYS,**

Plaintiffs,

v.

**OREGON STATE BAR,
OREGON STATE BAR
BOARD OF GOVERNORS,
VANESSA A. NORDYKE,
CHRISTINE CONSTANTINO,
HELEN HIERSCHBIEL,
KEITH PALEVSKY, and
AMBER HOLLISTER,**

Defendants.

Case No. 3:18-cv-2139-JR

JUDGMENT

(Filed May 24, 2019)

Michael H. Simon, District Judge.

Based on the Court's Order,

IT IS ADJUDGED that this case is DISMISSED.

DATED this 24th day of May, 2019.

/s/ Michael H. Simon

Michael H. Simon

United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

DANIEL L. GRUBER,
et al.,

Plaintiffs,

v.

OREGON STATE BAR,
et al.,

Defendants.

Case No. 3:18-cv-1591-JR

DANIEL Z. CROWE, et al.,

Plaintiffs,

v.

OREGON STATE BAR,
et al.,

Defendants.

Case No. 3:18-cv-2139-JR

ORDER

(Filed May 24, 2019)

Michael H. Simon, District Judge.

On April 1, 2019, United States Magistrate Judge Jolie A. Russo issued a single Findings and Recommendation in these two related cases. Judge Russo recommended that the Court grant Defendants' motions to dismiss in each case.

Under the Federal Magistrates Act ("Act"), the Court may "accept, reject, or modify, in whole or in part,

the findings or recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1). If a party files objections to a magistrate judge’s findings and recommendations, “the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” *Id.*; Fed. R. Civ. P. 72(b)(3).

For those portions of a magistrate judge’s findings and recommendations to which neither party has objected, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474 U.S. 140, 152 (1985) (“There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate’s report to which no objections are filed.”); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that the court must review *de novo* magistrate judge’s findings and recommendations if objection is made, “but not otherwise”). Although in the absence of objections no review is required, the Magistrates Act “does not preclude further review by the district judge[] *sua sponte* . . . under a *de novo* or any other standard.” *Thomas*, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that “[w]hen no timely objection is filed,” the Court review the magistrate judge’s recommendations for “clear error on the face of the record.”

Neither party objected in Case No. 3:18-cv-01591-JR. In Case No. 3:18-cv-02139-JR, however, Plaintiffs timely filed an objection. In that objection, Plaintiffs argue that the Oregon State Bar is not entitled to

Eleventh Amendment immunity and that Plaintiffs have stated cognizable claims for violations of their rights under the First and Fourteenth Amendments. The Court has reviewed *de novo* those portions of Judge Russo's Findings and Recommendation to which Plaintiffs have objected, as well as Defendants' response. The Court agrees with Judge Russo that under the factors set forth in *Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198 (9th Cir. 1998), the Oregon State Bar is immune from suit under the Eleventh Amendment. The Court also agrees with Judge Russo that Plaintiffs have failed to raise any plausible constitutional violations. The Court therefore ADOPTS those portions of the Findings and Recommendation. Further, for those portions of Judge Russo's Findings and Recommendation to which neither party has objected, this Court follows the recommendation of the Advisory Committee and reviews those matters for clear error on the face of the record. No such error is apparent.

The Court adopts Judge Russo's Findings and Recommendation in Case No. 3:18-cv-1591-JR (ECF 44) and Case No. 3:18-cv-2139-JR (ECF 29) and grants Defendants' motions to dismiss in each case. The Court denies Plaintiffs' motion for partial summary judgment (ECF 18) in Case No. 3:18-cv-1591-JR.

IT IS SO ORDERED.

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DATED this 24th day of May, 2019.

/s/ Michael H. Simon _____
Michael H. Simon
United States District Judge

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

DIANE L. GRUBER
and MARK RUNNELS,

Plaintiffs,

v.

OREGON STATE BAR,
a public corporation;
CHRISTINE COSTANTINO,
President of the Oregon State
Bar; HELEN HIERSCHBIEL,
Chief Executive Officer
of the Oregon State Bar,

Defendants.

3:18-cv-1591-JR

**FINDINGS &
RECOMMENDATION**

(Filed Apr. 1, 2019)

DANIEL Z CROWE;
LAWRENCE K PETERSON;
OREGON CIVIL LIBERTIES
ATTORNEYS, an Oregon
Nonprofit Corporation,

Plaintiffs,

v.

OREGON STATE BAR, a
public corporation; OREGON
STATE BAR BOARD OF
GOVERNORS; VANESSA
NORDYKE, President of the
Oregon State Bar Board of
Governors; CHRISTINE
COSTANTINO, President-elect

3:18-cv-2139-JR

**FINDINGS &
RECOMMENDATION**

of the Oregon State Bar
Board of Governors; HELEN
HIERSCHBIEL, Chief Executive
Officer of the Oregon State
Bar, KEITH PALEVSKY,
Director of Finance and
Operations of the Oregon
State Bar; AMBER HOLLISTER,
General Counsel for the
Oregon State Bar,

Defendants.

RUSSO, Magistrate Judge:

In these two related cases, members of the Oregon State Bar (Bar) challenge the mandatory nature of the Bar's membership and compulsory fee structure. Both cases name the Bar as well as the Bar's president and chief executive officer as defendants. Case number 18-2139-JR, also names the Oregon State Bar Board of Governors, the Bar's director of finance and operations, and the Bar's general counsel as defendants.

In case number 18-1591-JR, plaintiffs Bar members Diane Gruber and Mark Runnels seek a declaration that compulsory Bar membership dues violate the First and Fourteenth Amendments of the United States Constitution. Alternatively, these plaintiffs seek damages to the extent the Bar failed to reduce the dues which plaintiffs are compelled to pay for the Bar's political or ideological activities in violation of the First and Fourteenth Amendments.

In case number 18-2139-JR, plaintiffs Bar members Daniel Crowe, Lawrence Peterson, and Oregon Civil Liberties Attorneys similarly assert claims that the Bar violates their constitutional rights by requiring membership in the Bar to practice law, using their membership fees for political speech without consent, and failing to implement safeguards to prevent the Bar from engaging in political advocacy.

Defendants move to dismiss the respective actions. Plaintiffs Gruber and Runnels move for partial summary judgment in case number 18-1591-JR. The Oregon Attorney General submitted an amicus curiae memorandum in support of the Bar's position that the cases should be dismissed. The court heard argument on March 13, 2019. The motions to dismiss should be granted and the motion for partial summary judgment should be denied.

ALLEGATIONS

A. Gruber v. Oregon State Bar (18-1591-JR)

Plaintiffs allege they are compelled to pay various fees, assessments, and dues as a condition of engaging in the State regulated legal profession. First Amended Complaint (doc. R) at ¶ 5. Plaintiffs further allege the Bar engages in political and ideological activities with which they do not agree such as issuing the following statement in the April 2018 Oregon State Bar Bulletin:

**Statement on White Nationalism
and Normalization of Violence**

As the United States continues to grapple with a resurgence of white nationalism and the normalization of violence and racism, the Oregon State Bar remains steadfastly committed to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians. As we pursue that vision during trines of upheaval, it is particularly important to understand current events through the lens of our complex and often troubled history. The leery of that history was seen last year in the streets of Charlottesville, and in the attacks on Portland's MAX train. We unequivocally condemn these acts of violence,

We equally condemn the proliferation of speech that incites such violence. Even as we celebrate the great beneficial power of our First Amendment, as lawyers we also know it is not limitless. A systemic failure to address speech that incites violence emboldens those who seek to do harm, and continues to hold historically oppressed communities in fear and marginalization.

As a unified bar, we are mindful of the breadth of perspectives encompassed in our membership. As such, our work will continue to focus specifically on those issues that are directly within our mission, including the promotion of access to justice, the rule of law, and a healthy and functional judicial system that

equitably serves everyone. The current climate of violence., extremism and exclusion. gravely threatens all of the above. As lawyers, we administer the keys to the courtroom, and assist our clients in opening doors to justice. As stewards of the justice system, it is up to us to safeguard the rule of law and to ensure its fair and equitable administration. We simply cannot lay claim to a healthy justice system if whole segments of our society are fearful of the very laws and institutions that exist to protect them.

In today's troubling climate, the Oregon State Bar remains committed to equity and justice for all, and to vigorously promoting the law as the foundation of a just democracy. The courageous work done by specialty bars throughout the state is vital to our efforts and we continue to be both inspired and strengthened by those partnerships. We not only refuse to become accustomed to this climate, we are intent on standing in support and solidarity with those historically marginalized, underrepresented and vulnerable communities who feel voiceless within the Oregon legal system.

Id at ¶ 6 and p. 8.

The Bar also published in the same issue the following statement by the Oregon Specialty Bar Associations:

**Joint Statement of the Oregon
Specialty Bar Associations Supporting
the Oregon State Bars Statement
on White Nationalism and
Normalization of Violence**

The Oregon Asian Pacific American Bar Association, the Oregon Women Lawyers, the Oregon Filipino American Lawyers Association, OGALLA-The LGBT Bar Association of Oregon, the Oregon Chapter of the National Bar Association, the Oregon Minority Lawyers Association, and the Oregon Hispanic Bar Association support the Oregon State Bar's Statement on White Nationalism and Normalization of Violence and its commitment to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians.

Through the recent events from the Portland MAX train attacks to Charlottesville, we have seen an emboldened white nationalist movement gain momentum in the United States and violence based on racism has become normalized. President Donald Trump, as the leader of our nation, has himself catered to this white nationalist movement, allowing it to make up the base of his support and providing it a false sense of legitimacy. He has allowed this dangerous movement of racism to gain momentum, and we believe this is allowing these extremist ideas to be held up as part of the mainstream, when they are not. For example, President Trump has espoused racist comments, referring to Haiti and African

countries as “shithole countries” and claiming that the United States should have more immigrants from countries like Norway. He signed an executive order that halted all refugee admissions and barred people from seven Muslim-majority countries, called Puerto Ricans who criticized his administration’s response to Hurricane Maria “politically motivated ingrates,” said that the white supremacists marching in Charlottesville, North Carolina in August of 2017 were “very fine people,” and called into question a federal judge, referring to the Indiana-born judge as Mexican,” when the race of his parents had nothing to do with the judge’s decision. We are now seeing the white nationalist movement grow in our state and our country under this form of leadership.

As attorneys who lead diverse bar associations throughout Oregon, we condemn the violence that has occurred as a result of white nationalism and white supremacy. Although we recognize the importance of the First Amendment of the United States Constitution and the protections it provides, we condemn speech that incites violence, such as the violence that occurred in Charlottesville. President Trump needs to unequivocally condemn racist and white nationalist groups. With his continued failure to do so, we must step in and speak up.

As attorneys licensed to practice law in Oregon, we took an oath to “support the Constitution and the laws of the United States and of

the State of Oregon.” To that end, we have a duty as attorneys to speak up against injustice, violence, and when state and federal laws are violated in the name of white supremacy or white nationalism, we must use all our resources, including legal resources, to protect the rights and safety of everyone. We applaud the Oregon State Bar’s commitment to equity and justice by taking a strong stand against white nationalism. Our bar associations pledge to work with the Oregon State Bar and to speak out against white nationalism and the normalization of racism and violence.

Plaintiffs assert collection of compulsory fees, although authorized by Oregon statute, violates their rights under the First and Fourteenth Amendments to free speech, petition, and association. *Id.* at ¶¶ 16-18. In the alternative, plaintiffs assert defendants violated their First and Fourteenth Amendment rights by failing to reduce their dues for political or ideological activities of the Bar.

B. Crowe v. Oregon State Bar (18-2139-JR)

Plaintiffs Crowe, Peterson, and the Oregon Civil Liberties Attorneys allege the State of Oregon requires attorneys to join and pay fees to the Bar association in order to practice law in the State. Complaint (doc. 1) at ¶2. Plaintiffs further allege a mandatory bar association such as Oregon’s must implement safeguards to ensure members’ dues are used only for the narrow purpose of improving the quality of legal services through the regulation of attorneys and not for political advocacy.

Id. at ¶ 3. Plaintiffs further assert mandatory bars must fund their political advocacy with money paid by individuals who affirmatively consent to having their money used for that purpose. Id. at ¶ 4

Plaintiffs allege the Bar uses mandatory member fees to fund political speech without first obtaining members' consent. Id. at ¶ 5. Plaintiffs assert the Bar does not publish information regarding the method for determining whether a given allocation of funds was used for purposes germane to "improving the quality of legal services and regulating attorneys." Id. at ¶34. Moreover, plaintiffs assert the Bar uses mandatory member fees to engage in legislative and policy advocacy which are not germane to the Bar's purpose. Id. at ¶¶ 35-40.

Plaintiffs specifically object to the Bar's April 2018 statement as noted above. Plaintiffs assert that statement constitutes political speech and they do not agree with the "explicit and implicit criticism of . . . President Trump" resulting from the inclusion of the Specialty Bars' subsequent statement. Id. at ¶¶ 41-44, 47. Plaintiffs assert they had no opportunity in advance to prevent their mandatory dues from being used to publish the April 2018 Bar Bulletin and if asked they would have declined to pay for publication of the statement. Id. at ¶ 45, 48. Plaintiffs Crowe and Peterson contacted the Bar's chief executive and objected to the use of their fees for that publication and received refunds in the amount of \$1.15 each. Id. at ¶¶ 49-51. Plaintiffs assert other Bar members similarly received refunds but

the Bar has not informed plaintiffs how it calculated the amounts of these partial refunds. Id. at ¶¶ 52-53.

Plaintiffs also allege the mandatory nature of the Oregon State Bar violates their freedom of association and asserts mandatory membership is not necessary to ensure quality legal services or to regulate attorneys. Id. at ¶ 7 Plaintiffs also allege the Bar's mandatory fees impinge on their right to free speech because the Bar fails to provide:

- (a) notice to members, including an adequate explanation of the basis for the dues and calculations of all non-chargeable activities, verified by an independent auditor;
- (b) a reasonably prompt decision by an impartial decision maker if a member objects to the way his or her mandatory dues are being spent; and
- (c) an escrow for the amounts reasonably in dispute while such objections are pending.

Id. at ¶ 62, 64. Plaintiffs further allege that refunding fees after an objection is made is insufficient. Id. at ¶ 65.

Finally, plaintiffs allege violation of their First and Fourteenth Amendment rights to free speech because the Bar has not implemented an "opt-in" system for members to pay for non-germane speech. Id. at ¶¶ 73-78. In addition, plaintiffs allege violation of their First and Fourteenth Amendment rights to associate due to compelled membership in the Bar. Id. at ¶¶ 80-88.

DISCUSSION

Plaintiffs Gruber and Runnels filed their complaint in the 18-1591-JR case on August 29, 2018. Defendants moved to dismiss on October 22, 2018. Plaintiffs responded to the motion and filed their own motion for summary judgment on November 5, 2018. Before the parties completed briefing on the motions, on December 13, 2018, plaintiffs Crowe, Peterson, and the Oregon Civil Liberties Attorneys filed their complaint in the 18-2139-JR case. Plaintiffs Gruber and Runnels then filed an amended complaint in the 18-1591-JR case and on January 9, 2018, defendants moved to dismiss in both actions. Accordingly, defendants first motion to dismiss (doc. 14) in 18-1591-JR case should be denied as moot.¹ The motions to dismiss in both cases involve the same issues and resolution of one motion necessarily resolves the other.

A. The Oregon State Bar

In 1935, the Oregon Legislature enacted the State Bar Act, Or. Rev. Stat. §§ 9.005-9.757. The Bar is a public corporation and an instrumentality of the Judicial Department of the State of Oregon. Or. Rev. Stat.

¹ Plaintiffs in the 18-1591-JR case did not respond to the second motion to dismiss. However, their First Amended Complaint only adds two defendants: the president and the chief executive officer of the Bar, but otherwise remains the same. The second motion to dismiss is made on the same grounds as the first. While the motion is technically unopposed, because the analysis is the same with respect to the motion to dismiss in the related 18-2139-JR case, the court applies that analysis in both cases for purposes of judicial economy.

§9.010(2). To practice law in the State of Oregon, a lawyer must join the Bar and pay an annual membership fee. Or. Rev. Stat. §§ 9.160(1); 9.191; 9.200. The State of Oregon is not responsible for the debts of the Bar and the financial needs of the Bar are met through the collection of membership fees. Or. Rev. Stat. §§ 9.010(6); 9.191(3).

The Bar's Board of Governors is required to advance the science of jurisprudence and the improvement of the administration of justice. Or. Rev. Stat. § 9.080(1).² To accomplish this mission, the Bar administers exams for admission to practice, examines a member's character and fitness, formulates and enforces rules of conduct, and requires continuing education and training of its members. Or. Rev. Stat. §§ 9.210; 9.490; 9.114. In addition, the Bar provides the public with general legal information and seeks to increase pro bono legal services. *See, e.g.*, <https://www.osbar.org/public/>; <https://www.osbar.org/lsp>; <https://www.osbar.org/probono/>.

² In addition, the Bar's mission 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. <https://www.osbar.org/docs/resources/OSBMissionStatement.pdf>. The court takes judicial notice of the Bar's bylaws, Mission Statement, and other official statements and documents for purposes of the motions to dismiss. *See Rhodes v. Sutter Health*, 2012 WL 662462, at *3 (E.D. Cal. Feb. 28, 2012) (The court took judicial notice of a foundations bylaws because judicial notice of facts not subject to reasonable dispute is appropriate where they are either generally known within the territorial jurisdiction of the trial court, or are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.).

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As part of its mission, the Bar publishes a monthly Bar Bulletin. The Bar's communications within the Bulletin:

should be germane to the law, lawyers, the practice of law, the courts and the judicial system, legal education and the Bar in its role as a mandatory membership organization. Communications, other than permitted advertisements, should advance public understanding of the law, legal ethics and the professionalism and collegiality of the bench and Bar.

Oregon State Bar Bylaws, Art. 11, Sec. 1 (<http://www.osbar.org/docs/rulesregs/bylaws.pdf>) (Bylaws). In addition:

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.

Id. at 12.1.

Defendants assert the complaints should be dismissed for the following reasons: the Bar is immune from suit under the Eleventh Amendment to the United States Constitution; integrated bars are constitutional and may use mandatory fees for political speech germane to regulating attorneys and improving legal services; affirmative consent is not necessary before a bar engages in speech germane to legal services; the individual defendants are entitled to qualified immunity from claims for damages; and the Oregon State Bar Board of Governors is not a legal entity capable of being sued.

B. Eleventh Amendment Immunity

The Eleventh Amendment provides:

“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

The Amendment affirms the fundamental principle of sovereign immunity which limits the grant of judicial authority in Article III of the Constitution. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 98 (1984). A State’s Eleventh Amendment protection

from suit has been extended to suits brought by a State's own citizens, Hans v. Louisiana, 134 U.S. 1, 10 (1890), and suits invoking the federal question jurisdiction of Article III. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73 (1996).

A suit against a State agency is considered to be a suit against the State, and is also barred by the Eleventh Amendment. Shaw v. California Dept. of Alcoholic Beverage Control, 788 F.2d 600, 603 (9th Cir. 1986). In addition, "[w]hen suit is commenced against state officials, even if they are named and served as individuals, the State itself will have a continuing interest in the litigation whenever State policies or procedures are at stake." Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 269 (1997).

Defendants assert the Bar is an arm of the State and thus is immune from suit.

To determine whether a governmental agency is an arm of the state, the following factors must be examined: whether a money judgment would be satisfied out of state funds, whether the entity performs central governmental functions, whether the entity may sue or be sued, whether the entity has the power to take property in its own name or only the name of the state, and the corporate status of the entity. . . . To determine these factors, the court looks to the way state law treats the entity.

Mitchell v. Los Angeles Cmty. Coll. Dist., 861 F.2d 198, 201 (9th Cir. 1988).

The judges of this court have repeatedly and consistently held that the Bar is immune from suit under the Eleventh Amendment. See, e.g., Hartfield v. Or. State Bar, 2016 WL 9225978, at *1 (D.Or. Jan. 15, 2016), report and recommendation adopted, 2016 WL 9226386 (D.Or. Feb. 16, 2016), aff'd, 671 F.App'x 456 (9th Cir. 2016); Coultas v. Payne, 2012 WL 6725845, at *3 (D.Or. Nov. 27, 2012), report and recommendation adopted, 2012 WL 6726247, at *1 (D Or. Dec. 27, 2012); Weidner v. Albertazzi, 2006 WL 2987704, at *1 (D.Or. Oct. 13, 2006); Erwin v. Oregon ex rel. Kitzhaber, 231 F.Supp.2d 1003, 1007 (D.Or. 2001), aff'd, 43 F.App'x 122 (9th Cir. 2002)); see also Eardley v. Garst, 232 F.3d 894 (9th Cir. 2000) (claims against Oregon State Bar appropriately dismissed under Eleventh Amendment immunity). An analysis of the Mitchell factors again demonstrates the Bar is immune from suit in this case.

1. The Mitchell Factors

a. State Funds at Risk

As noted above, the Bar is a public corporation and an instrumentality of the Judicial Department of the State of Oregon. Or. Rev. Stat. §9.010(2). However, under the first Mitchell factor, a money judgment against the Bar would not be satisfied out of State funds. Or. Rev. Stat. § 9.010(6). Nonetheless, this factor is not necessarily critical in determining whether immunity applies in the cases at bar.³ The “Eleventh Amendment

³ Despite the Ninth Circuit has referring to this factor as “most important,” cases so finding primarily involve claims for

does not exist solely to ‘prevent federal court judgments that must be paid out of a State’s treasury.’” Seminole Tribe of Fla., 517 U.S. at 58. As noted above, the Eleventh Amendment not only bars suits at law, but suits at equity as well and thus “the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment.” Id. Here, plaintiffs primarily seek injunctive relief. Despite the fact the Bar alone is responsible for any money damages it may incur, the Bar performs essential governmental functions including the collection of fees to perform those functions. Any money judgment would come from the Bar’s collection of fees that is made possible because the State authorized the

money damages whereas the cases at bar primarily involve requests for equitable relief. See e.g., Durning v. Citibank, N.A., 950 F.2d 1419, 1426 (9th Cir. 1991); see also Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa Cty., 343 F.3d 1036, 1039 (9th Cir. 2003) (seeking compensatory and punitive relief); Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 48-49 (1994) (in action seeking recovery under Federal Employers’ Liability Act, recognizing majority of circuit courts find the vulnerability of the State’s purse as the most salient factor in Eleventh Amendment determinations). The Seventh Circuit in a suit involving the Wisconsin State Bar stated, “even without any impact on the state’s treasury, the district court must consider whether the Bar occupies the position of a public agency or official, necessarily forbidding any suit in federal court.” Crosetto v. State Bar of Wisconsin, 12 F.3d 1396, 1402 (7th Cir. 1993). The Seventh Circuit later determined that the effect on the state treasury was the least important factor. Thiel v. State Bar of Wisconsin, 94 F.3d 399, 401 (7th Cir. 1996), overruled on other grounds by Kingstad v. State Bar of Wis., 622 F.3d 708 (7th Cir. 2010).

Bar to collect those fees.⁴ Accordingly, the money judgment sought by the plaintiffs, which is, the return of fees already paid, is not a dispositive element militating against a finding of immunity under the Mitchell factors.

b. Central Government Functions

The Oregon Legislature, through the State Bar Act, has delegated traditional functions of the judiciary to the Bar. See, e.g., Ramstead v. Morgan, 219 Or. 383, 399, 347 P.2d 594, 601 (1959) (noting the delegation of traditional function of the judiciary in disciplining the members of the bar serving under it through the former Or. Rev. Stat. § 9.550). As noted above, the State Bar Act broadly provides for the regulation of the practice of law in the State of Oregon.

The Bar regulates admission to the practice of law as well as the conduct of practicing attorneys in Oregon. See, e.g. Or. Rev. Stat. §§ 9.080; 9.114; 9.210; 9.490. The Oregon Supreme Court oversees the Bar's

⁴ If the Bar were unable to collect mandatory fees, its ability to regulate attorneys would be impacted. As discussed in the next section, the Oregon Supreme Court would be left to carry out the regulatory function which would certainly impact the State's funding. Thus, as a practical matter, plaintiffs' success in these actions will impact the State treasury. See Alaska Cargo Transp., Inc. v. Alaska R.R. Corp., 5 F.3d 378, 381, 382 (9th Cir. 1993) (even though sued entity and not the State is liable for a judgment against it, the entity's finances are "in substantial respects . . . dependent upon and controlled by the will of the governor and the legislature," and the State has a "strong interest in keeping [the entity operational] and fiscally sound.").

regulatory activities, retaining original jurisdiction to review decisions concerning admissions, reinstatement, and attorney discipline. Or. Rev. Stat. § 9.536. The Supreme Court appoints the Bar's presiding disciplinary adjudicator, as well as members of the Bar's Disciplinary Board, State Professional Responsibility Board, Unlawful Practice of Law Committee, and the Board of Bar Examiners. See Or. Rev. Stat. §§ 9.210, 9.532; B.R. 1.1, 2.3, 2.4, 12.1 (<https://www.osbar.org/docs/rulesregs/rulesofprocedure.pdf>); Bylaws §§ 18.100, 28.1 (<http://www.osbar.org/docs/rulesregs/bylaws.pdf>). The Supreme Court approves any changes to the Bylaws that apply to admission to practice law in Oregon. See Or. Rev. Stat. § 9.542; Bylaws § 28.6. The Supreme Court also reviews all rules of procedure relating to the admission to practice law, discipline, resignation, and reinstatement of Bar members, and reviews the eligibility of candidates for the Board of Governors. Or. Rev. Stat. §§ 9.005(7); 9.042. The Chief Justice reviews annual statements of the Bar's financial position. Or. Rev. Stat. § 9.100. The Supreme Court also approves the Bar's budget for admissions, discipline, and continuing legal education programs in conjunction with the budgets of other Bar activities. Bylaws § 7.202.

The statutory structure of the State Bar Act and various implementing regulations demonstrate that the function of the Bar is to assume responsibilities otherwise within the domain of the Oregon Supreme Court. That statute further demonstrates that the Bar

serves quintessential government functions.⁵ See, e.g., O'Connor v. State of Nev., 686 F.2d 749, 750 (9th Cir. 1982) (Nevada State bar is the investigative arm of the Supreme Court of Nevada, charged with investigating and disciplining the legal profession of the state, and as such an agency, it too is immune from suit in federal court under the Eleventh Amendment).

c. Sue or Be Sued

The third Mitchell factor, whether the purported arm of the state may sue or be sued, militates somewhat against immunity. The Bar may sue or be sued. Or. Rev. Stat. § 9.010(5). However, the State Bar Act limits the ability to sue the Bar in certain respects. See Or. Rev. Stat. § 9.537 (providing absolute immunity to the Bar, Bar officers, and other Bar entities from civil liability in the performance of their duties relative to proposed or pending admission, professional licensing requirements, reinstatement, or disciplinary proceedings); Or. Rev. Stat. § 9.657 (providing immunity from

⁵ Plaintiffs assert the “advisory nature of the Bar’s relationship with the State Supreme Court undercuts a finding that the Bar performs central government functions” citing Keller v. State Bar of California, 496 U.S. 1, 11 (1990) (noting the functions of the California State Bar are actually reserved by California law to the State Supreme Court). The fact that decisions of the Bar are reviewed by the Oregon Supreme Court does not make those functions any less governmental in form. State administrative agencies’ decisions are often subject to review without stripping the agency of their governmental duties. Moreover, such argument neglects to consider the State Legislature’s choice to relieve the Supreme Court of these functions which may otherwise impinge on its ability to perform its other duties.

civil liability for the performance of duties relative to proposed or pending client security fund claims). Thus, this factor does not argue against immunity from suit in federal court.

d. Power to Take Property in its Own Name

Pursuant to the fourth Mitchell factor, the court considers whether the Bar has the power to take property in its own name or in the name of the State. The Bar “may, in its own name, for the purpose of carrying into effect and promoting its objectives, enter into contracts and lease, acquire, hold, own, encumber, insure, sell, replace, deal in and with and dispose of real and personal property.” Or. Rev. Stat. § 9.010. As such, this factor somewhat weighs against immunity See Beentjes v. Placer Cty. Air Pollution Control Dist., 397 F.3d 775, 784 (9th Cir. 2005) (California law authorizes County Pollution Control District to “take by grant, purchase, gift, devise, or lease, to hold, use, and enjoy, and to lease or dispose of any real or personal property within or without the district necessary to the full exercise of its powers” weighed in favor finding district not an arm of the state). Nonetheless, the Bar’s power to take property in its own name is in furtherance of its objectives which are classified as governmental functions to aid the Supreme Court in regulating attorneys. See Belanger v. Madera Unified Sch. Dist., 963 F.2d 248, 254 (9th Cir. 1992) (because beneficial ownership of public schools’ property held in a district’s own name enures to the State, this factor is entitled to little weight in the overall balance). Moreover, the

Bar's ability to hold property in its own name is limited in some respects. For instance, while the Bar may take possession of abandoned client funds held in trust accounts, those funds belong to the State. Or. Rev. Stat. §§ 98.386(2); 98.304. Accordingly, this factor also fails to demonstrate lack of immunity.

e. Corporate Status

As to the fifth Mitchell factor, “the Oregon State Bar is a public corporation and an instrumentality of the Judicial Department of the government of the State of Oregon.” Or. Rev. Stat. 9.010. This again demonstrates the central governmental role the Bar plays in concert with the Oregon Supreme Court. Indeed, the Oregon Supreme Court has determined that this language establishes the Bar is itself a State agency. State ex rel. Frohnmayer v. Oregon State Bar, 307 Or. 304, 309, 767 P.2d 893, 895 (1989).

Despite the independent financial status vested in the Bar through the State Bar Act, the legislature intended it to perform central government functions in concert with the Oregon Supreme Court and as such it is an arm of the state entitled to Eleventh Amendment Immunity.

However, the individual defendants, to the extent plaintiffs seek prospective injunctive relief, do not enjoy similar immunity. See Coeur d'Alene Tribe of Idaho, 521 U.S. at 276-77 (“where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in

most cases, is not a bar.”). Nonetheless, as the law currently stands with respect to integrated bars, compulsory fees and mandatory membership do not violate the First and Fourteenth Amendments. This is true even if the Bar engages in political speech so long as the speech is germane to regulating the legal profession and improving the quality of legal services. In addition, to the extent the Bar has proper procedural safeguards in place to ensure members are not required to fund non-germane speech, the First Amendment is not violated.

C. Compulsory Bar Membership and Mandatory Fees

1. Integrated Bar Specific Case Law

In 1961, a plurality of the Supreme Court determined:

that the Supreme Court of Wisconsin, in order to further the State’s legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find

any impingement upon protected rights of association.

Lathrop v. Donohue, 367 U.S. 820, 843 (1961). However, the Court provided no opinion as to the correctness of the Wisconsin Supreme Court's conclusion that the appellant may be constitutionally compelled to contribute financial support to political activities which he opposes. Id. at 847-48.

In 1990, the Supreme Court affirmed the requirement that lawyers admitted to practice in a State may be required to join and pay dues to the State Bar. Keller v. State Bar of California, 496 U.S. 1, 4 (1990). However, the specific issue before Keller was the scope of permissible dues-financed activities in which the State Bar may engage. The Court noted that in Abood v. Detroit Board of Education, 431 U.S. 209, 235-36 (1977), a public union could not use a dissenting union member's dues for ideological activities not "germane" to the purpose for which compelled association was justified: collective bargaining. Keller, 496 U.S. at 9, 13. Accordingly, Keller determined that a State Bar

may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

Id. at 14.

In 1994, the Ninth Circuit recognized that Lathrop and Keller upheld the constitutionality of integrated

bars and that an integrated bar may constitutionally fund activities germane to regulating the legal profession and improving the quality of legal services. O'Connor v. State of Nev., 27 F.3d 357, 361 (9th Cir. 1994).

In 2014, the Supreme Court determined non-union home health care workers (who were not full-fledged public employees) represented by a public union in collective bargaining could not be compelled to pay dues unless the fee provision passes exacting First Amendment scrutiny. Harris v. Quinn, 573 U.S. 616, 648 (2014). The Court then addressed whether:

a refusal to extend Abood to cover the situation presented in this case will call into question our decisions in Keller v. State Bar of Cal., 496 U.S. 1, . . . (1990). . . . [It does not].

In Keller, we considered the constitutionality of a rule applicable to all members of an “integrated” bar, i.e., “an association of attorneys in which membership and dues are required as a condition of practicing law.” 496 U.S., at 5. . . . We held that members of this bar could not be required to pay the portion of bar dues used for political or ideological purposes but that they could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members. Id. at 14. . . .

This decision fits comfortably within the framework applied in the present case. Licensed attorneys are subject to detailed ethics rules, and the bar rule requiring the payment of dues was part of this regulatory scheme.

The portion of the rule that we upheld served the “State’s interest in regulating the legal profession and improving the quality of legal services.” *Ibid.* States also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices. Thus, our decision in this case is wholly consistent with our holding in Keller.

Harris at 655-56.

To date, neither the Ninth Circuit nor the Supreme Court has recognized that Lathrop or Keller have been abrogated and in fact, the Ninth Circuit has affirmed the continuing application of these cases as recently as March 13, 2018. See Caruso v. Washington State Bar Ass’n 1933, 716 F. App’x 650, 651 (9th Cir. 2018) (district court properly dismissed the action citing Keller and Lathrop). Nonetheless, plaintiffs assert the Supreme Court’s recent decision in Janus v. Am. Fed’n of State, Cty., & Mun. Employees, Council 31, 138 S. Ct. 2448 (2018) now controls the analysis of First Amendment issues as applied to integrated bars.

2. The Janus Decision

On June 27, 2018, the Court issued its decision in Janus overruling Abood, 431 U.S. 209. Specifically, the Court held:

Neither an agency fee nor any other payment to the union may be deducted from a nonmember’s wages, nor may any other attempt be

made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. . . . Rather, to be effective, the waiver must be freely given and shown by “clear and compelling” evidence. . . . Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Id. at 2486. The Court found the State’s interest in “labor peace,” while compelling, could be achieved through less restrictive means. Id. at 2465-66.

Accordingly, plaintiffs assert not only does mandatory bar membership and compulsory fees fail the exacting scrutiny standard described in Janus,⁶ but because the Bar does not obtain members’ affirmative consent before using their fees for political or ideological speech, the compulsory nature of the Bar’s membership and fees further violates their First Amendment rights. However, because Keller has not been abrogated, this court is bound to follow its dictates as it is directly applicable to the cases at bar.

The Supreme Court has determined that exacting scrutiny is wholly consistent with the holding in Keller Harris at 655-56. With respect to affirmative consent before using compulsory Bar dues for political speech,

⁶ Under exacting scrutiny, a compelled subsidy must “serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms. Janus, 138 S.Ct. at 2465.

the Supreme Court has made no such proclamation and therefore this court is prohibited from assuming that Janus impliedly overruled Keller:

We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that “[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”

Agostini v. Felton, 521 U.S. 203, 237, 117 S. Ct. 1997, 2017, 138 L. Ed. 2d 391 (1997).

The district court properly dismissed Eugster’s claims relating to his compulsory membership in the WSBA because an attorney’s mandatory membership with a state bar association is constitutional. See Keller v. State Bar of Cal., 496 U.S. 1, 13, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990) (“[T]he compelled association and integrated bar are justified by the State’s interest in regulating the legal profession and improving the quality of legal services.”); Lathrop v. Donohue, 367 U.S. 820, 843, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961) (Brennan, J, plurality opinion) (state bar association may constitutionally require compulsory membership and payment of dues without impinging on protected rights of association). Contrary to Eugster’s contentions, this court cannot overrule binding authority because

“[a] decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it.” Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001).

Eugster v. Washington State Bar Ass’n, 684 F. App’x 618, 619 (9th Cir.), cert. denied, 137 S. Ct. 2315 (2017).

Accordingly, this court should decline to apply Janus and must apply Keller to the cases at bar.⁷ Applying Keller demonstrates that plaintiffs’ claims fail as a matter of law and should be dismissed.

3. Keller Application

As noted above, Keller permits the use of compulsory membership dues to fund speech germane to regulating the legal profession and improving the quality of legal services. Arguably, the statement attributed to the Bar in the April 2018 Bar Bulletin is germane to that purpose. Plaintiffs assert the statement is non-germane political speech that condemns the proliferation of speech that incites violence and advocates taking action to stop such speech. But to the extent such an interpretation is reasonable, it was made within the

⁷ The fact that the Supreme Court recently remanded to the Eighth Circuit a case involving mandatory bar membership for further consideration in light of Janus does not alter the requirement that this court follow direct Supreme Court precedent. See Fleck v. Wetch, 139 S. Ct. 590 (2018) (remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of Janus, 138 S.Ct. 2448). The remand does not indicate the Supreme Court will ultimately overrule Keller.

specific context of promotion of access to justice, the rule of law, and a healthy and functional judicial system that equitably serves everyone (“the [Bar] remains committed to equity and justice for all, and to vigorously promoting the law as the foundation of a just democracy”). This is germane to improving the quality of legal services. See Gardner v. State Bar of Nevada, 284 F.3d 1040, 1043 (9th Cir. 2002) (statements “to advance understanding of the law, the system of justice, and the role of lawyers, as opposed to nonlawyers, to make the law work for everyone” are germane to improving of the legal profession).

The Specialty Bars’ Statement appearing alongside the Bar’s statement in the April 2018 Bar publication is not a statement by the Bar, but instead a statement authored by seven affinity bars announcing their support of the Bar’s statement, among other statements. Although the Specialty Bars’ Statement included rhetoric critical of the President, the Bar Bulletin routinely publishes statements from a variety of authors with differing political viewpoints and creates a forum for the exchange of ideas pertaining to the practice of law. This service also is germane to improving the quality of legal services. However, even assuming the Specialty Bars’ Statement includes political speech that is not germane to a permissible topic, and it is a statement made on behalf of the Bar and consequently compelled speech of its members, it still would not violate the First Amendment because the Bar has adequate safeguards in place to protect members’ use of dues in this manner.

As noted above, communications within the Bulletin:

should be germane to the law, lawyers, the practice of law, the courts and the judicial system, legal education and the Bar in its role as a mandatory membership organization. Communications, other than permitted advertisements, should advance public understanding of the law, legal ethics and the professionalism and collegiality of the bench and Bar.

Bylaws, 11.1 (<http://www.osbar.org/docs/rulesregs/bylaws.pdf>).⁸

To the extent such communications fail to adhere to this policy, the Bylaws provide a framework for addressing those communications:

Section 12.6 Objections to Use of Bar Dues

Subsection 12.600 Submission

A member of the Bar who objects to the use of any portion of the member's bar dues for activities he or she considers promotes or opposes political or ideological causes may request the Board to review the member's concerns to determine if the Board agrees with the member's objections. Member objections must be in writing and filed with the Chief Executive Officer of the Bar. The Board will

⁸ Plaintiffs also challenge the Bar's general legislative policy. However, the Bylaws also provide that the Bar's legislative or policy activities must be reasonably related to topics related to the legal profession. See Bylaws 12.1. Accordingly, this claim fails as a matter of law.

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review each written objection received by the Chief Executive Officer at its next scheduled board meeting following receipt of the objection. The Board will respond through the Chief Executive Officer in writing to each objection. The Board's response will include an explanation of the Board's reasoning in agreeing or disagreeing with each objection.

Subsection 12.601 Refund

If the Board agrees with the member's objection, it will immediately refund the portion of the member's dues that are attributable to the activity, with interest paid on that sum of money from the date that the member's fees were received to the date of the Bar's refund. The statutory rate of interest will be used. If the Board disagrees with the member's objection, it will immediately offer the member the opportunity to submit the matter to binding arbitration between the Bar and the objecting member. The Chief Executive Officer and the member must sign an arbitration agreement approved as to form by the Board.

Subsection 12.602 Arbitration

If an objecting member agrees to binding arbitration, the matter will be submitted to the Oregon Senior Judges Association ("OSJA") for the designation of three active-status retired judges who have previously indicated a willingness to serve as volunteer arbitrators in these matters. The Bar and the objecting member will have one peremptory challenge to the list of arbitrators. The Bar and the

objecting member must notify one another of a peremptory challenge within seven days after receiving the list of proposed arbitrators. If there are no challenges or only one challenge, the OSJA will designate the arbitrator. The arbitrator will promptly arrange for an informal hearing on the objection, which may be held at the Oregon State Bar Center or at another location in Oregon that is acceptable to the parties and the arbitrator. The hearing will be limited to the presentation of written information and oral argument by the Bar and the objecting member. The arbitrator will not be bound by rules of evidence. The presentation of witnesses will not be a part of the hearing process, although the arbitrator may ask the state bar representative and the objecting member and his or her lawyer, if any, questions. The hearing may be reported, but the expense of reporting must be borne by the party requesting it. The Bar and the objecting member may submit written material and a legal memorandum to the arbitrator no later than seven days before the hearing date. The arbitrator may request additional written material or memoranda from the parties. The arbitrator will promptly decide the matter, applying the standard set forth in *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990), to the expenditures to which the member objected. The scope of the arbitrator's review must solely be to determine whether the matters at issue are acceptable activities for which compulsory fees may be used under applicable constitutional

law. In making his or her decision, the arbitrator must apply the substantive law of Oregon and of the United States Federal Courts. The arbitrator must file a written decision with the Chief Executive Officer within 14 days after the hearing. The arbitrator's decision is final and binding on the parties. If the arbitrator agrees with the member's objection, the Bar will immediately refund the portion of the member's dues that are reasonably attributable to the activity, with interest at the statutory rate paid on the amount from the date that the member's fees were received to the date of the Bar's refund. If the arbitrator agrees with the Bar, the member's objection is denied and the file in the matter closed. Similar or related objections, by agreement of the parties, may be consolidated for hearing before one arbitrator.

Oregon State Bar Bylaws, Art. 12, Sec. 6_ (<http://www.osbar.org/docs/rulesregs/bylaws.pdf>).

To comply with Keller's safeguard requirements for the collection of fees, the Bar must include an adequate explanation of the basis for the fee, provide a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and provide an escrow account for the amounts reasonably in dispute while such challenges are pending. Keller 496 U.S. at 16 (citing Teachers v. Hudson, 475 U.S. 292 (1986)). Because the Bar specifically mandates that all communications must be germane to the law, it has instituted the above procedure only when a member

believes the Bar has violated that mandate. As Keller noted,

We believe an integrated bar could certainly meet its Abood obligation by adopting the sort of procedures described in Hudson. Questions whether one or more alternative procedures would likewise satisfy that obligation are better left for consideration upon a more fully developed record.

Id. at 17.

The Bar's Bylaws procedure provides adequate safeguards as contemplated by Keller. The basis for the fee does not present itself until a Bar member objects and if the Bar agrees, it immediately refunds the fee attributable to the activity including any interest earned on that fee. Such procedure satisfies the escrow requirement of the safeguards and the opportunity to promptly challenge the fee. If the Bar member disagrees with the decision he or she may then seek arbitration where, if the Bar has not already explained its decision, the member will receive an explanation of the fee decision and have the opportunity to resolve the issue before an impartial decisionmaker.

Nothing in Hudson's procedures mandate affirmative consent prior to collecting the fee. This is especially true where the Bar's policy already mandates that all communications must be germane to the legal profession. Moreover, the Bar provides all members with an annual accounting of both projected and actual expenses, allowing a member an opportunity to object

if they believe an upcoming expense fails to comply with the Bylaws regarding germane communications. See Or. Rev. Stat. § 9.100 (requiring financial statement submission to the Chief Justice); Bylaws § 7.2 (Board of Governors' review of proposed budget during public meetings).

Certain plaintiffs challenge the lack of explanation concerning their refunds upon objecting to the statements in the April 2018 Bar Bulletin. However, plaintiffs did not avail themselves of the very procedures that would have provided that explanation and thus they cannot now allege a set of facts that would demonstrate the Bar, in its application of its Bylaws, violated their constitutional rights to procedural safeguards concerning the use of their fees for compelled speech.

Because the Bar has adequate procedural safeguards in place to protect against compelled speech and because mandatory Bar membership and compulsory fees do not otherwise violate the First Amendment, plaintiffs' claims necessarily fail as a matter of law based on the face of the pleadings and judicially noticed facts. Accordingly, all claims should be dismissed.

E. Qualified Immunity

Plaintiffs concede the individual defendants are immune from suit for damages and thus the motion to dismiss based on qualified immunity is moot.

F. Board of Governors

Plaintiffs also concede the claims against the Board of Governors should be dismissed.

G. Motion for Partial Summary Judgment (18-1591, Doc. 18)

Plaintiffs' motion relies on Janus overruling Keller and as noted above, this court cannot make that determination. Accordingly, the motion for partial summary judgment should be denied.

CONCLUSION

A. Gruber v. Oregon State Bar, 18-cv-1591-JR

Defendants' motion to dismiss (doc. 14) should be denied as moot. Defendants' motion to dismiss (doc. 41) should be granted. Plaintiffs' motion for partial summary judgment (doc. 18) should be denied. The case should be dismissed and a judgment should be entered.

B. Crowe v. Oregon State Bar, 18-cv-2139-JR

Defendants' motion to dismiss (doc. 15) should be granted. The case should be dismissed and a judgment should be entered.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

DANIEL Z. CROWE;
LAWRENCE K. PETERSON;
and OREGON CIVIL
LIBERTIES ATTORNEYS,
an Oregon Nonprofit
Corporation,

Plaintiffs,

v.

OREGON STATE BAR, a
Public Corporation; OREGON
STATE BAR BOARD OF
GOVERNORS; VANESSA
NORDYKE, President of the
Oregon State Bar Board of
Governors; CHRISTINE
CONSTANTINO, President-
elect of the Oregon State
Bar Board of Governors;
HELEN HIERSCHBIEL,
Chief Executive Officer of
the Oregon State Bar;
KEITH PALEVSKY, Director
of Finance and Operations
of the Oregon State Bar;
AMBER HOLLISTER,
General Counsel for the
Oregon State Bar,

Defendants.

Case No. 3:18-cv-02139

**CIVIL RIGHTS
COMPLAINT FOR
INJUNCTIVE AND
DECLARATORY
RELIEF AND
DAMAGES**

42 U.S.C. § 1983
(Freedom of Speech)

42 U.S.C. § 1983
(Freedom of
Association)

42 U.S.C. § 1988
(Attorney Fees)

(Filed Dec. 13, 2018)

1. This civil rights lawsuit seeks to protect the First and Fourteenth Amendment rights of Oregon attorneys who have been forced to join the Oregon State Bar (“OSB”) and to pay for political advocacy by the OSB that they do not wish to support.

2. The State of Oregon requires attorneys to join and pay fees to a bar association, the Oregon State Bar (“OSB”), to be allowed to practice law in the state. ORS 9.160, 9.191.

3. Under U.S. Supreme Court precedent, a mandatory bar association such as the OSB must implement safeguards to ensure that members’ dues are used only for the narrow purpose of improving the quality of legal services through the regulation of attorneys—not for political advocacy. *See Keller v. State Bar of Cal.*, 496 U.S. 1 (1990).

4. Supreme Court precedent also requires a mandatory association such as the OSB to fund its political advocacy with money paid by people who affirmatively consented to having their money used for that purpose. *See Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018).

5. The OSB, however, has not implemented procedures to ensure that members’ mandatory fees are not used for political advocacy, and it has used mandatory fees to fund political speech without obtaining members’ affirmative consent in advance.

6. For example, the OSB used mandatory member fees to publish statements in the April 2018 issue

of its *Bar Bulletin* that criticized President Donald Trump. Plaintiffs Daniel Crowe and Lawrence Peterson, who are Oregon attorneys, would not have chosen to fund that criticism but had no opportunity to prevent their mandatory dues from being used to pay for it.

7. In addition, Oregon's statute requiring attorneys to become OSB members is unconstitutional because it violates attorneys' First Amendment right to freedom of association and is not necessary to ensure the quality of legal services and regulate attorneys.

8. This lawsuit therefore asks this Court to declare Oregon's mandatory bar membership unconstitutional, or to order Defendants to adopt procedures to prevent members' mandatory fees from being used for political speech and other activities unrelated to improving the quality of legal services and regulating attorneys without the members' affirmative consent.

JURISDICTION AND VENUE

9. This action is brought under 42 U.S.C. §§ 1983 and 1988.

10. This Court has subject matter jurisdiction over Plaintiffs' claims under 28 U.S.C. §§ 1331 and 1343.

11. This Court has authority to grant declaratory and other relief under 28 U.S.C. §§ 2201 and 2202.

12. Venue is appropriate under 28 U.S.C. § 1391 and LR 3-2 because a substantial part of the events giving rise to the claim occurred in this District, and because Defendants operate or do business in this judicial District.

13. Divisional venue lies with the Portland Division as a substantial part of the events giving rise to the claim occurred within the Portland Division, Plaintiff Peterson resides in the Portland Division, and Plaintiff Oregon Civil Liberties Attorneys has its principal place of business in the Portland Division.

PARTIES

14. Plaintiff Daniel Z. Crowe is a citizen of the United States and resides in Marion County, Mt. Angel, Oregon. Plaintiff Crowe is a duly licensed attorney under the laws of Oregon and is a member of OSB because membership is a mandatory prerequisite to practice law in the State of Oregon under ORS 9.160.

15. Plaintiff Crowe has paid annual dues to the OSB since approximately 2014.

16. Plaintiff Lawrence K. Peterson is a citizen of the United States and resides in Clackamas County, Lake Oswego, Oregon. Plaintiff Peterson is a duly licensed attorney under the laws of Oregon and is a member of OSB because membership is a mandatory prerequisite to practice law in the State of Oregon under ORS 9.160.

17. Plaintiff Peterson has paid annual dues to the OSB since 1984.

18. Plaintiff Oregon Civil Liberties Attorneys (“ORCLA”) is a domestic nonprofit corporation with its principal place of business in Clackamas County, Lake Oswego, Oregon. All members of ORCLA are citizens of the United States, duly licensed attorneys under the laws of Oregon, and members of OSB because membership is a mandatory prerequisite to practice law in the State of Oregon pursuant to ORS 9.160.

19. Defendant Oregon State Bar is a public corporation established under ORS 9.010.

20. Defendant Oregon State Bar Board of Governors (the “Board”) is charged with the executive functions of OSB and with “direct[ing] its power to the advancement of the science of jurisprudence and the improvement of the administration of justice.” ORS 9.080(1). The Board has authority to “adopt, alter, amend and repeal bylaws and to adopt new bylaws containing provisions for the regulation and management of the affairs of the state bar not inconsistent with law.” *Id.* The Board governs OSB, determines the general policies of OSB, approves OSB’s annual budget, and appoints OSB’s Executive Director. The Board is a final policy maker regarding how OSB functions.

21. Defendant Vanessa Nordyke is President of the Board and, in that position, is responsible for creating and implementing procedural safeguards required to ensure member dues are used only for

“chargeable” activities—meaning only those germane to improving the quality of legal services through the regulation of attorneys. Defendant Nordyke also participates in determining OSB positions on legislation and ballot measures as a member of both the Board and OSB’s Legislative Committee. Defendant Nordyke is responsible for enforcing the laws requiring membership and funding of OSB as a prerequisite to practicing law in the State of Oregon. Defendant Nordyke is implementing and enforcing the unconstitutional practices and policies complained of in this action, acting under the color of state law.

22. Defendant Christine Constantino is President-elect of the Board and a member of the OSB’s Budget and Finance Committee. The Budget and Finance Committee is tasked with overseeing the Board’s financial operations, making recommendations to the Board regarding annual budgets and assessments, managing OSB’s reserves and investments, receiving biennial audits, and providing guidance on long-range forecasts, operating expenses and capital purchases. Defendant Constantino is implementing and enforcing the unconstitutional practices and policies complained of in this action, acting under the color of state law.

23. Defendant Helen Hirschbiel is the Chief Executive Officer and Chief Executive Director of OSB. In that position, appointed by and acting under the supervision of the Board, Defendant Hirschbiel implements, administers, and supervises OSB’s operation and program activities, managing a staff of

approximately 90 individuals and an \$11 million annual budget. Defendant Hirschbiel is implementing and enforcing the unconstitutional practices and policies complained of in this action, acting under the color of state law.

24. Defendant Keith Palevsky is OSB's Director of Finance and Operations and a member of OSB's Budget and Finance Committee. Defendant Palevsky is implementing and enforcing the unconstitutional practices and policies complained of in this action, acting under the color of state law.

25. Defendant Amber Hollister is OSB's General Counsel and, in that position, is responsible for providing legal advice to the OSB and the Board. Defendant Hollister is implementing and enforcing the unconstitutional practices and policies complained of in this action, acting under the color of state law.

FACTS

OSB's Mandatory Membership and Fee Collection

26. Oregon law compels every attorney licensed in Oregon to join OSB in order to earn a living practicing law in the state. ORS 9.160.

27. Oregon law authorizes OSB to charge annual membership fees to its mandatory members. ORS 9.191.

28. As Oregon attorneys, Plaintiffs Crowe and Peterson, and Plaintiff ORCLA's members, are compelled

to join OSB and to pay membership fees to Defendants as a condition of engaging in their profession. ORS 9.160, 9.191.

29. Defendants enforce laws requiring membership in and funding of OSB as a prerequisite to practicing law in the State of Oregon. ORS 9.160, 9.191.

30. Defendants act under color of state law when collecting, disbursing, and spending mandatory dues.

OSB's Disbursement of Mandatory Fees

31. The OSB places the mandatory fees it collects into three separate funds: (1) a general fund, which provides funding for mandatory and discretionary services for members and the public; (2) a client security fund, which awards money to clients of Oregon attorneys who have lost money or property due to misappropriation or embezzlement by their lawyers; and (3) a diversity and inclusion department.

32. In 2018, OSB disbursed mandatory fees in the following manner client security fund (2%); diversity and inclusion (8%); loan repayment assistance program (2%); disciplinary counsel and client assistance office (34%); other regulatory programs: governance, general counsel, new lawyer monitoring (19%); and other bar programs and services (35%).

33. In 2019, OSB has proposed to disburse mandatory fees in the following manner client security fund (2%); diversity and inclusion (8%); loan repayment assistance program (2%); disciplinary counsel

and client assistance office (34%); other regulatory programs: governance, general counsel, new lawyer monitoring (19%); and other bar programs and services (35%).

34. Although OSB publishes this general information about its allocation of membership fees, it does not publish information about whether or how it determines whether a given allocation of funds was for purposes germane to improving the quality of legal services and regulating attorneys.

OSB's Use of Mandatory Fees for Legislative and Policy Advocacy

35. OSB uses mandatory member fees to engage in legislative and policy advocacy in accordance with "Legislative Policy Guidelines" that were approved by the Board.

36. OSB's Legislative Policy Guidelines state: "OSB's legislative or policy activities shall be limited to those reasonably related to any of the following subjects: regulating and disciplining lawyers; improving the function 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 rules of practice,

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procedure and evidence in federal, state or local court 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.”

37. OSB’s Legislative Policy Guidelines do not distinguish between germane and non-germane activities.

38. OSB’s Legislative Policy Guidelines do not articulate what, if any, tests or procedures are in place to ensure OSB’s classification of expenditures as germane is proper.

39. OSB’s legislative and policy activities include political speech.

40. Through its legislative and policy activities, OSB expends member dues for political and ideological activities that are not germane to OSB’s purpose.

The April 2018 *Bar Bulletin*

41. The OSB uses member dues to publish a periodical called the *Bar Bulletin*.

42. The April 2018 issue of the *Bar Bulletin* included, on opposing pages, two statements on alleged “white nationalism,” one of which specifically criticized President Donald Trump.

43. A true and accurate copy of these two statements is attached as Exhibit A and incorporated herein by reference.

44. These statements constituted political speech.

45. Plaintiffs Crowe and Peterson, and Plaintiff ORCLA's members, had no opportunity in advance to prevent their mandatory member dues from being used to publish the April 2018 *Bar Bulletin* statements.

46. Plaintiffs Crowe and Peterson learned of OSB's publication of these statements when they received the *Bar Bulletin* by mail in April 2018.

47. Plaintiffs Crowe and Peterson disagree with the statements' allegations against, and explicit and implicit criticism of, President Trump.

48. If given a choice, Plaintiffs Crowe and Peterson would not have voluntarily paid for publication of the statements.

49. On April 25, 2018, Plaintiff Peterson contacted Defendant Hirschbiel to inform OSB of his objections to the use of bar fees to publish the statements, and he requested a refund of his annual membership fees.

50. On April 26, 2018 Plaintiff Crowe contacted Defendant Hirschbiel to inform OSB of his objections to the use of bar dues to publish the statements, and he requested a refund of his annual membership fees.

51. In response to their objections, Plaintiffs Crowe and Peterson each received a partial dues

refund from OSB in the amount of \$1.15 (\$1.12 plus statutory interest from the date bar fees were due).

52. Other OSB members also objected to the statements in the April 2018 *Bar Bulletin* and then received partial dues refunds.

53. OSB has not informed Plaintiffs of how it calculated the amounts of these partial dues refunds.

Plaintiffs' Injuries

54. Plaintiffs Crowe and Peterson, and Plaintiff ORCLA's members, do not wish to have their OSB membership dues used to fund OSB's legislative and policy advocacy and, if given a choice, would not fund that activity.

55. Plaintiffs Crowe and Peterson, and Plaintiff ORCLA's members, did not wish to have their OSB membership dues used to publish the two statements in the April 2018 *Bar Bulletin* and, if given a choice, would not have funded the statements' publication.

56. Plaintiffs Crowe and Peterson, and Plaintiff ORCLA's members, do not wish to have their OSB membership dues used for any other political speech or activity and, if given a choice, would not fund any political speech or activity by OSB.

57. Plaintiffs Crowe and Peterson, and Plaintiff ORCLA's members, object to being required to be members of OSB to be allowed to practice law in Oregon.

58. Plaintiffs Crowe and Peterson, and Plaintiff ORCLA's members, object to being required to pay dues or fees to OSB to be allowed to practice law in Oregon.

59. Plaintiffs Crowe and Peterson, and Plaintiff ORCLA's members, have suffered irreparable harm from being required to join and pay dues to OSB as a condition of practicing law in Oregon.

60. Plaintiffs Crowe and Peterson, and Plaintiff ORCLA's members will suffer irreparable harm if the State of Oregon continues to require them to be members of, and pay dues to, OSB as a condition of practicing law in Oregon.

FIRST CLAIM FOR RELIEF
(Compelled Speech and Association)
(First and Fourteenth Amendments)

61. The allegations contained in the preceding paragraphs are incorporated by reference as if fully set forth here.

62. Mandatory bar fees inherently impinge on the First Amendment rights of freedom of association and freedom of speech.

63. To limit mandatory fees' impingement on First Amendment rights, the Supreme Court has required bar associations such as OSB to use mandatory fees only for activities germane to improving the quality of legal services. *See Keller*, 496 U.S. at 14.

64. To protect the rights of OSB members and ensure mandatory member fees are utilized only for chargeable expenditures, *Keller* requires the OSB to institute safeguards that provide, at a minimum: (a) notice to members, including an adequate explanation of the basis for the dues and calculations of all non-chargeable activities, verified by an independent auditor; (b) a reasonably prompt decision by an impartial decision maker if a member objects to the way his or her mandatory dues are being spent; and (c) an escrow for the amounts reasonably in dispute while such objections are pending. *Keller*, 496 U.S. at 14.

65. Refunding mandatory fees after a member's objection is resolved is insufficient to protect members' First Amendment rights. A remedy that merely offers dissenters the possibility of a refund does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose.

66. OSB does not provide Plaintiffs Crowe and Peterson, and Plaintiff ORCLA's members, an adequate explanation for the basis of their mandatory dues.

67. OSB does not afford Plaintiffs Crowe and Peterson, and Plaintiff ORCLA's members, any constitutionally adequate procedure to dispute the way their dues are spent.

68. OSB has taken the position that it may use member dues for non-chargeable activities as long as it refunds a portion of dues back to members who object to the non-chargeable activity.

69. As a result of its insufficient safeguards and procedures, OSB has used mandatory member dues for non-chargeable activities, including political speech, without receiving members' affirmative consent, both through its publication of the April 2018 *Bar Bulletin* and through its legislative and policy advocacy generally.

70. By failing to provide the minimum safeguards required by the First and Fourteenth Amendments before collecting and expending mandatory member dues, Defendants maintain and enforce a set of laws, practices, procedures and policies that deprive Plaintiffs of their First and Fourteenth Amendment rights.

71. This deprivation of constitutional rights is causing Plaintiffs to suffer irreparable injury for which there is no adequate remedy at law. Unless enjoined by this Court, Plaintiffs will continue to suffer irreparable harm.

72. Plaintiffs are entitled to declaratory and injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional laws, practices, procedures and policies, and are entitled to an award of attorney fees. *See* 28 U.S.C. §§ 2201, 2202; 42 U.S.C. §§ 1983, 1988.

SECOND CLAIM FOR RELIEF
(Right to Affirmatively Consent)
(First and Fourteenth Amendments)

73. The allegations contained in the preceding paragraphs are incorporated by reference as if fully set forth here.

74. Under the First and Fourteenth Amendments, a mandatory bar association may not use a member's mandatory dues or fees to engage in political activities or other activities not germane to the bar association's purpose of improving the quality of legal services through the regulation of attorneys unless the member affirmatively consents to having his or her dues or fees used for that purpose.

75. To protect members' First Amendment rights, a mandatory bar association such as OSB must create an "opt-in" system for members to pay for the bar association's non-germane speech and activities; it cannot require members to opt out to avoid paying for non-germane activities. *See Janus*, 138 S. Ct. at 2486.

76. The OSB has used mandatory member fees for non-chargeable activities, including political speech, without receiving members' affirmative consent, both through its publication of the April 2018 Bar Bulletin and through its legislative and policy advocacy generally.

77. OSB maintains and enforces a set of laws, practices, procedures, and policies that are not adequate to ensure that mandatory member fees will not

be used for non-chargeable activities, including political speech, without members' affirmative consent.

78. Accordingly, Defendants are maintaining and actively enforcing a set of laws, practices, procedures and policies that deprive Plaintiffs of their rights of free speech and free association, in violation of the First and Fourteenth Amendments.

79. Plaintiffs are entitled to declaratory and injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional laws, practices, procedures and policies, and are entitled to an award of attorney fees. See 28 U.S.C. §§ 2201, 2202; 42 U.S.C. §§ 1983, 1988.

THIRD CLAIM FOR RELIEF
(Compelled Membership)
(First and Fourteenth Amendments)

80. The allegations contained in the preceding paragraphs are incorporated by reference as if fully set forth here.

81. The First and Fourteenth Amendments protect not only the freedom to associate, but also the freedom not to associate.

82. The First and Fourteenth Amendments protect the freedom to avoid subsidizing group speech with which an individual disagrees.

83. By its very nature, the OSB, as a mandatory bar association, violates these rights.

84. Mandatory associations are permissible only when they serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.

85. The only state interest possibly served by a mandatory bar association is improvement of the quality of legal services through the regulation of attorneys.

86. The state can readily use means that are significantly less restrictive of associational freedoms to improve the quality of legal services through the regulation of attorneys.

87. This is evidenced by the 18 states that regulate the legal profession without requiring attorneys to join and pay a bar association.

88. By failing to utilize means significantly less restrictive of associational freedoms than a mandatory association, Defendants maintain and actively enforce a set of laws, practices, procedures and policies that deprive Plaintiffs of their rights of free speech and free association, in violation of the First and Fourteenth Amendments.

89. Plaintiffs are entitled to declaratory and injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional laws, practices, procedures and policies, and are entitled to an award of attorney fees. See 28 U.S.C. §§ 2201, 2202; 42 U.S.C. §§ 1983, 1988.

REQUEST FOR RELIEF

Wherefore, Plaintiffs respectfully request that this Court enter judgment in Plaintiffs' favor and:

A. Declare that Plaintiffs' rights to freedom of speech and association under the First and Fourteenth Amendments are violated by Defendants' failure to implement the minimum safeguards required by *Keller v. State Bar of California*;

B. Declare that Defendants may not use the mandatory fees of OSB members, including Plaintiffs, for non-chargeable activities unless the members have affirmatively consented to having their dues used for those purposes, as required by *Janus v. AFSCME*;

C. In the alternative, declare that Defendants violate Plaintiffs' rights to freedom of speech and association under the First and Fourteenth Amendments by enforcing Oregon statutes that make membership in OSB a prerequisite to practicing law in Oregon and by imposing mandatory dues as a condition of membership;

D. Preliminarily and permanently enjoin Defendants and all persons in active concert or participation with them from enforcing ORS 9.160, which mandates membership in the Oregon State Bar, and ORS 9.191, which requires payment of membership fees to the Oregon State Bar.

E. Award Plaintiffs Crowe and Peterson damages in the amount of all dues they have paid to the

Oregon State Bar within the applicable limitations period, plus interest;

F. Award Plaintiffs their costs, attorneys' fees, and other expenses in accordance with law, including 42 U.S.C. § 1988; and

G. Order such additional relief as may be just and proper.

Dated this 13th day of December, 2018.

**DANIEL Z. CROWE,
LAWRENCE K. PETERSON,
and OREGON CIVIL
LIBERTIES ATTORNEYS**

By: /s/ Luke D. Miller

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EXHIBIT A

Oregon State Bar

Feb. 23, 2018

**Statement on White Nationalism and
Normalization of Violence**

As the United States continues to grapple with a resurgence of white nationalism and the normalization of violence and racism, the Oregon State Bar remains steadfastly committed to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians. As we pursue that vision during times of upheaval, it is particularly important to understand current events through the lens of our complex and often troubled history. The legacy of that history was seen last year in the streets of Charlottesville, and in the attacks on Portland's MAX train. We unequivocally condemn these acts of violence.

We equally condemn the proliferation of speech that incites such violence. Even as we celebrate the great beneficial power of our First Amendment, as lawyers we also know it is not limitless. A systemic failure to address speech that incites violence emboldens those who seek to do harm, and continues to hold historically oppressed communities in fear and marginalization.

As a unified bar, we are mindful of the breadth of perspectives encompassed in our membership. As such, our work will continue to focus specifically on those issues that are directly within our mission, including the promotion of access to justice, the rule of law, and a healthy and functional judicial system that equitably serves everyone. The current climate of violence, extremism and exclusion gravely threatens all of the above. As lawyers, we administer the keys to the courtroom, and assist our clients in opening doors to justice. As stewards of the justice system, it is up to us to safeguard the rule of law and to ensure its fair and equitable administration. We simply cannot lay claim to a healthy justice system if whole segments of our society are fearful of the very laws and institutions that exist to protect them.

In today's troubling climate, the Oregon State Bar remains committed to equity and justice for all, and to vigorously promoting the law as the foundation of a just democracy. The courageous work done by specialty bars throughout the state is vital to our efforts and we continue to be both inspired and strengthened by those partnerships. We not only refuse to become accustomed to this climate, we are intent on standing in support and solidarity with those historically marginalized, underrepresented and vulnerable communities who feel voiceless within the Oregon legal system.

/s/ Vanessa A. Nordyke
Vanessa A. Nordyke
2018 President
Board of Governors

/s/ Jonathan Puente
Jonathan Puente
Director of Diversity
& Inclusion

/s/ Helen Hierschbiel
Helen Hierschbiel
Chief Executive Officer

/s/ <u>Christine R. Costantino</u> Christine R. Costantino 2018 President-elect Board of Governors	/s/ <u>Liani Reeves</u> Liani Reeves Board of Governors Liaison to the Advisory Committee on Diversity & Inclusion
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/s/ Jonathan Patterson
Jonathan Patterson
Chairperson
Advisory Committee on
Diversity & Inclusion

**Joint Statement of the Oregon Specialty Bar
Associations Supporting the Oregon State
Bar's Statement on White Nationalism and
Normalization of Violence**

The Oregon Asian Pacific American Bar Association, the Oregon Women Lawyers, the Oregon Filipino American Lawyers Association, OGALLA-The LGBT Bar Association of Oregon, the Oregon Chapter of the National Bar Association, the Oregon Minority Lawyers Association, and the Oregon Hispanic Bar Association support the Oregon State Bar's Statement on White Nationalism and Normalization of Violence and its commitment to the vision of a justice system that

operates without discrimination and is fully accessible to all Oregonians.

Through the recent events from the Portland MAX train attacks to Charlottesville, we have seen an emboldened white nationalist movement gain momentum in the United States and violence based on racism has become normalized. President Donald Trump, as the leader of our nation, has himself catered to this white nationalist movement, allowing it to make up the base of his support and providing it a false sense of legitimacy. He has allowed this dangerous movement of racism to gain momentum, and we believe this is allowing these extremist ideas to be held up as part of the mainstream, when they are not. For example, President Trump has espoused racist comments, referring to Haiti and African countries as “shithole countries” and claiming that the United States should have more immigrants from countries like Norway. He signed an executive order that halted all refugee admissions and barred people from seven Muslim-majority countries, called Puerto Ricans who criticized his administration’s response to Hurricane Maria “politically motivated ingrates,” said that the white supremacists marching in Charlottesville, North Carolina in August of 2017 were “very fine people,” and called into question a federal judge, referring to the Indiana-born judge as “Mexican,” when the race of his parents had nothing to do with the judge’s decision. We are now seeing the white nationalist movement grow in our state and our country under this form of leadership.

As attorneys who lead diverse bar associations throughout Oregon, we condemn the violence that has occurred as a result of white nationalism and white supremacy. Although we recognize the importance of the First Amendment of the United States Constitution and the protections it provides, we condemn speech that incites violence, such as the violence that occurred in Charlottesville. President Trump needs to unequivocally condemn racist and white nationalist groups. With his continued failure to do so, we must step in and speak up.

As attorneys licensed to practice law in Oregon, we took an oath to “support the Constitution and the laws of the United States and of the State of Oregon.” To that end, we have a duty as attorneys to speak up against injustice, violence, and when state and federal laws are violated in the name of white supremacy or white nationalism. We must use all our resources, including legal resources, to protect the rights and safety of everyone. We applaud the Oregon State Bar’s commitment to equity and justice by taking a strong stand against white nationalism. Our bar associations pledge to work with the Oregon State Bar and to speak out against white nationalism and the normalization of racism and violence.

/s/ Derily Bechthold
Derily Bechthold
President, Oregon
Asian Pacific American
Bar Association

/s/ Angela Franco Lucero
Angela Franco Lucero
President, Oregon
Women Lawyers

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<u>/s/ Julia Markley</u> Julia Markley President, Oregon Filipino American Lawyers Association	<u>/s/ Kamron Graham</u> Kamron Graham Co-Chair, OGALLA- The LGBT Bar Associaton of Oregon
<u>/s/ Alysia Harris</u> Alysia Harris President, Oregon Chapter of the National Bar Association	<u>/s/ Chase Morinaka</u> Chase Morinaka Chair, Oregon Minority Lawyers Association
<u>/s/ Ivan Resendiz Gutierrez</u> Ivan Resendiz Gutierrez President, Oregon Hispanic Bar Association	

**RELEVANT CONSTITUTIONAL
AND STATUTORY PROVISIONS**

U.S. Constitution, amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Oregon Revised Statute § 9.010
Attorneys deemed officers of court;
statutes applicable to Oregon State Bar

- (1) An attorney, admitted to practice in this state, is an officer of the court.
- (2) The Oregon State Bar is a public corporation and an instrumentality of the Judicial Department of the government of the State of Oregon. The bar is authorized to carry out the provisions of ORS 9.005 to 9.757.

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(3) The bar is subject to the following statutes applicable to public bodies:

- (a) ORS 30.210 to 30.250.
- (b) ORS 30.260 to 30.300.
- (c) ORS 30.310, 30.312, 30.390 and 30.400.
- (d) The Oregon Rules of Civil Procedure.
- (e) ORS 192.311 to 192.478.
- (f) ORS 192.610 to 192.690.
- (g) ORS 243.401 to 243.507.
- (h) ORS 244.010 to 244.040.
- (i) ORS 297.110 to 297.230.
- (j) ORS chapters 307, 308 and 311.
- (k) ORS 731.036 and 737.600.

(4) Except as provided in subsection (3) of this section, 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.

(5) The Oregon State Bar has perpetual succession and a seal, and may sue and be sued. Notwithstanding the provisions of ORS 270.020 and 279.835 to 279.855 and ORS chapters 278, 279A, 279B and 279C, the bar may, in its own name, for the purpose of carrying into effect and promoting its objectives, enter into contracts and lease, acquire, hold, own, encumber, insure, sell,

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replace, deal in and with and dispose of real and personal property.

(6) No obligation of any kind incurred or created under this section shall be, or be considered, an indebtedness or obligation of the State of Oregon.

Oregon Revised Statute § 9.080

Duties of board; professional liability fund; quorum

(1) The state bar shall be governed by the board of governors, except as provided in ORS 9.136 to 9.155. The state bar has the authority to adopt, alter, amend and repeal bylaws and to adopt new bylaws containing provisions for the regulation and management of the affairs of the state bar not inconsistent with law. The board is charged with the executive functions of the state bar and shall at all times direct its power to serve the public interest by:

- (a) Regulating the legal profession and improving the quality of legal services;
- (b) Supporting the judiciary and improving the administration of justice; and
- (c) Advancing a fair, inclusive and accessible justice system.

(2)(a)(A) The board has the authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance and is empowered, either by itself or in conjunction with other bar organizations, to do whatever is necessary and

convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a lawyer's professional liability fund. This fund shall pay, on behalf of active members of the state bar engaged in the private practice of law whose principal offices are in Oregon, all sums as may be provided under such plan which any such member shall become legally obligated to pay as money damages because of any claim made against such member as a result of any act or omission of such member in rendering or failing to render professional services for others in the member's capacity as an attorney or caused by any other person for whose acts or omissions the member is legally responsible.

(B) The board has the authority to assess each active member of the state bar engaged in the private practice of law whose principal office is in Oregon for contributions to the professional liability fund and to establish the date by which contributions must be made.

(C) The board has the authority to establish definitions of coverage to be provided by the professional liability fund and to retain or employ legal counsel to represent the fund and defend and control the defense against any covered claim made against the member.

(D) The board has the authority to offer optional professional liability coverage on an underwritten basis above the minimum required coverage limits provided under the

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professional liability fund, either through the fund, through a separate fund or through any insurance organization authorized under the laws of the State of Oregon, and may do whatever is necessary and convenient to implement this provision. Any fund so established shall not be subject to the Insurance Code of the State of Oregon.

(E) Records of a claim against the professional liability fund are exempt from disclosure under ORS 192.311 to 192.478.

(b) For purposes of paragraph (a) of this subsection, an attorney is not engaged in the private practice of law if the attorney is a full-time employee of a corporation other than a corporation incorporated under ORS chapter 58, the state, an agency or department thereof, a county, city, special district or any other public or municipal corporation or any instrumentality thereof. However, an attorney who practices law outside of the attorney's full-time employment is engaged in the private practice of law.

(c) For the purposes of paragraph (a) of this subsection, the principal office of an attorney is considered to be the location where the attorney engages in the private practice of law more than 50 percent of the time engaged in that practice. In the case of an attorney in a branch office outside Oregon and the main office to which the branch office is connected is in Oregon, the principal office of the attorney is not considered to be in Oregon unless the attorney engages in the private practice

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of law in Oregon more than 50 percent of the time engaged in the private practice of law.

(3) The board may appoint such committees, officers and employees as it deems necessary or proper and fix and pay their compensation and necessary expenses. At any meeting of the board, two-thirds of the total number of members then in office shall constitute a quorum. It shall promote and encourage voluntary county or other local bar associations.

(4) Except as provided in this subsection, an employee of the state bar shall not be considered an “employee” as the term is defined in the public employees’ retirement laws. However, an employee of the state bar may, at the option of the employee, for the purpose of becoming a member of the Public Employees Retirement System, be considered an “employee” as the term is defined in the public employees’ retirement laws. The option, once exercised by written notification directed to the Public Employees Retirement Board, may not be revoked subsequently, except as may otherwise be provided by law. Upon receipt of such notification by the Public Employees Retirement Board, an employee of the state bar who would otherwise, but for the exemption provided in this subsection, be considered an “employee,” as the term is defined in the public employees’ retirement laws, shall be so considered. The state bar and its employees shall be exempt from the provisions of the State Personnel Relations Law. No member of the state bar shall be considered an “employee” as the term is defined in the public employees’ retirement laws, the unemployment compensation laws and the

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State Personnel Relations Law solely by reason of membership in the state bar.

Oregon Revised Statute § 9.160
Practice of law by persons other
than active members prohibited

- (1) Except as provided in this section, a person may not practice law in this state, or represent that the person is qualified to practice law in this state, unless the person is an active member of the Oregon State Bar.
- (2) Subsection (1) of this section does not affect the right to prosecute or defend a cause in person as provided in ORS 9.320.
- (3) An individual licensed under ORS 696.022 acting in the scope of the individual's license to arrange a real estate transaction, including the sale, purchase, exchange, option or lease coupled with an option to purchase, lease for a term of one year or longer or rental of real property, is not engaged in the practice of law in this state in violation of subsection (1) of this section.
- (4) A title insurer authorized to do business in this state, a title insurance agent licensed under the laws of this state or an escrow agent licensed under the laws of this state is not engaged in the practice of law in this state in violation of subsection (1) of this section if, for the purposes of a transaction in which the insurer or agent provides title insurance or escrow services, the insurer or agent:

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- (a) Prepares any satisfaction, reconveyance, release, discharge, termination or cancellation of a lien, encumbrance or obligation;
- (b) Acts pursuant to the instructions of the principals to the transaction as scrivener to fill in blanks in any document selected by the principals;
- (c) Presents to the principals to the transaction for their selection any blank form prescribed by statute, rule, ordinance or other law; or
- (d) Presents to the principals to the transaction for their selection a blank form prepared or approved by a lawyer licensed to practice law in this state for one or more of the following:
 - (A) A mortgage.
 - (B) A trust deed.
 - (C) A promissory note.
 - (D) An assignment of a mortgagee's interest under a mortgage.
 - (E) An assignment of a beneficial interest under a trust deed.
 - (F) An assignment of a seller's or buyer's interest under a land sale contract.
 - (G) A power of attorney.
 - (H) A subordination agreement.
 - (I) A memorandum of an instrument that is to be recorded in place of the instrument that is the subject of the memorandum.

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(5) In performing the services permitted in subsection (4) of this section, a title insurer, a title insurance agent or an escrow agent may not draft, select or give advice regarding any real estate document if those activities require the exercise of informed or trained discretion.

(6) The exemption provided by subsection (4) of this section does not apply to any acts relating to a document or form that are performed by an escrow agent under subsection (4)(b), (c) or (d) of this section unless the escrow agent provides to the principals to the transaction a notice in at least 12-point type as follows:

YOU WILL BE REVIEWING, APPROVING AND SIGNING IMPORTANT DOCUMENTS AT CLOSING. LEGAL CONSEQUENCES FOLLOW FROM THE SELECTION AND USE OF THESE DOCUMENTS. THESE CONSEQUENCES AFFECT YOUR RIGHTS AND OBLIGATIONS. YOU MAY CONSULT AN ATTORNEY ABOUT THESE DOCUMENTS. YOU SHOULD CONSULT AN ATTORNEY IF YOU HAVE QUESTIONS OR CONCERNS ABOUT THE TRANSACTION OR ABOUT THE DOCUMENTS. IF YOU WISH TO REVIEW TRANSACTION DOCUMENTS THAT YOU HAVE NOT YET SEEN, PLEASE CONTACT THE ESCROW AGENT.

(7) The exemption provided by subsection (4) of this section does not apply to any acts relating to a document or form that are performed by an escrow agent under subsection (4)(b), (c) or (d) of this section for a real estate sale and purchase transaction in which all

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or part of the purchase price consists of deferred payments by the buyer to the seller unless the escrow agent provides to the principals to the transaction:

- (a) A copy of any proposed instrument of conveyance between the buyer and seller to be used in the transaction;
- (b) A copy of any proposed deferred payment security instrument between the buyer and seller to be used in the transaction; and
- (c) A copy of any proposed promissory note or other evidence of indebtedness between the buyer and seller to be used in the transaction.

(8) The notice and copies of documents that must be provided under subsections (6) and (7) of this section must be delivered in the manner most likely to ensure receipt by the principals to the transaction at least three days before completion of the transaction. If copies of documents have been provided under subsection (7) of this section and are subsequently amended, copies of the amended documents must be provided before completion of the transaction.

(9) Failure of any person to comply with the requirements of subsections (3) to (8) of this section does not affect the validity of any transaction and may not be used as a basis to challenge any transaction.

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Oregon Revised Statute § 9.191

Annual fees; professional liability assessments

(1) Except as provided in subsection (2) of this section, the annual membership fees to be paid by members of the Oregon State Bar shall be established by the Board of Governors of the Oregon State Bar, and each year notice of the proposed fees for the coming year shall be published and distributed to the membership not later than 20 days before the annual meeting of the house of delegates. Any increase in annual membership fees over the amount established for the preceding year must be approved by a majority of delegates of the house of delegates voting thereon at the annual meeting of the house of delegates. The board shall establish the date by which annual membership fees must be paid.

(2) The board shall establish prorated membership fees payable for the year that a member is admitted to the practice of law in this state. If the new member is admitted on or before the date established by the board for the payment of annual membership fees under subsection (1) of this section, the new member must pay the full annual membership fees established under subsection (1) of this section.

(3) In establishing annual membership fees, the board shall consider and be guided by the anticipated financial needs of the state bar for the year for which the fees are established, time periods of membership and active or inactive status of members. Annual membership fees may include any amount assessed under

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any plan for professional liability insurance for active members engaged in the private practice of law whose principal offices are in Oregon as provided in ORS 9.080(2).
