

Oregon State Bar
2022 House of Delegates Meeting
Friday, October 28, 2022
9:00 a.m. in person at the OSB Center
Remote attendance option available

Oregon State Bar

October 7, 2022

Dear Oregon State Bar Member:

I am pleased to invite you to the 2022 OSB House of Delegates meeting, which will begin at **9:00 a.m. on Friday, October 28, at the Oregon State Bar Center in Tigard, Oregon.**

We are excited to be back in person and to offer the option of remote attendance at the HOD meeting as well. This will be the first “hybrid” HOD meeting in the history of the Oregon State Bar. There will undoubtedly be kinks to work out, but two years of remote HOD meetings has made us realize that we can do this. We are hopeful that the hybrid options will mean even better attendance at the meeting.

The preliminary agenda for the HOD meeting includes, among other things, resolutions to increase the 2023 active member fee by \$75; amend Oregon RPC 1.8(e) to allow attorneys representing indigent clients pro bono to gift modest living expenses to them; support adequate funding for the judicial branch; approve the OSB Administrative Law Section Final Agency Order Work Group Report & Recommendations; appoint a workgroup to study the possibility of providing judicial review by circuit courts of agency final orders; advance a fair, inclusive, and accessible justice system; support public defense providers; support adequate funding for legal services to low-income Oregonians; and enhance cybersecurity in the legal community through outreach, assessment, and education.

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

If you have questions concerning the meeting, contact Cassandra Dyke, executive assistant, by email at cdyke@osbar.org or by phone at (503) 431-6386 or (800) 452-8260 ext. 386. Remember that delegates are eligible for reimbursement of round-trip mileage to and from the meeting. Reimbursement is limited to 400 miles, and expense reimbursement forms must be submitted within 30 days after the meeting.

I look forward to seeing you at the HOD meeting on Friday, October 28, and I thank you in advance for your thoughtful consideration and debate of these items.

Kamron Graham
OSB President

OREGON STATE BAR
2022 House of Delegates Meeting AGENDA
October 28, 2022, at 9:00 a.m.
OSB Center
16037 SW Upper Boones Ferry Road, Tigard, OR

Reports

- | | |
|--|---|
| <p>1. Call to Order
<i>Kamron Graham, OSB President</i></p> <p>2. Adoption of Final Meeting Agenda
<i>Kamron Graham, OSB President</i></p> <p>3. Report of the President
<i>Kamron Graham, OSB President</i></p> <p>4. Report from the Court
<i>Chief Justice Martha Walters,
Oregon Supreme Court</i></p> | <p>5. Report of the Board of Governors Budget & Finance Committee and Notice of 2023 Annual Fees
<i>Katherine Denning, Chair
BOG Budget & Finance Committee</i></p> <p>6. Overview of Parliamentary Procedure
<i>Lori L. Brocker, Parliamentarian</i></p> |
|--|---|
-

Resolutions

- | | |
|---|--|
| <p>7. Increase active member fees by \$75
(BOG Resolution No. 1)
<i>Katherine Denning, Chair
BOG Budget & Finance Committee</i></p> <p>8. Amend Oregon RPC 1.8(e) to allow attorneys representing indigent clients pro bono to gift modest living expenses to them
(BOG Resolution No. 2)
<i>Ankur Doshi, OSB General Counsel</i></p> <p>9. Support adequate funding for the Oregon Judicial Branch
(BOG Resolution No. 3)
<i>Lee Ann Donaldson, BOG, Region 5</i></p> <p>10. Approve the OSB Administrative Law Section Final Agency Order Work Group Report and Recommendations
(BOG Resolution No. 4)
<i>Gabriel Chase, BOG, Region 5</i></p> <p>11. Appeals to Circuit Court of Administrative Agency Final Orders
(Delegate Resolution No. 1)
<i>Danny Lang, Ex-Officio Delegate</i></p> | <p>12. Advance a Fair, Inclusive, and Accessible Justice System
(Delegate Resolution No. 2)
<i>John E. Grant, HOD, Region 5
Vanessa Nordyke, HOD, Region 6
David Dorfman, HOD, Region 8
James Klonoski, HOD, Region 8
Christopher Rounds, HOD, Region 8</i></p> <p>13. Support for Public Defense Providers
(Delegate Resolution No. 3)
<i>Keiler Beers, HOD, Region 5
Amy Bingham, HOD, Region 6
Jenny Cooke, BOG, Region 7
Shannon Flowers, HOD, Region 6
Justin Morton, Ex-Officio Delegate
John Schlosser, HOD, Region 5
Norah Van Dusen, Ex-Officio Delegate</i></p> <p>14. Support of Adequate Funding for Legal Services to Low-Income Oregonians
(Delegate Resolution No. 4)
<i>Peter A. Werner, HOD, Region 1
Kristi Gibson, HOD, Region 2
Elizabeth Knight, HOD, Region 5
Vanessa Nordyke, HOD, Region 6
Heather Decker, HOD, Region 7</i></p> |
|---|--|

15. Enhancing Cybersecurity in the Legal
Community through Outreach, Assessment,
and Education
(Delegate Resolution No. 5)

David Dorfman, HOD, Region 8

James Klonoski, HOD, Region 8

16. Veterans Day Remembrance
(BOG Resolution No. 5)

Rob Milesnick, BOG, Region 8

17. In Memoriam

(BOG Resolution No. 6)

Apolinar Montero-Sánchez, BOG, Region 2

Joe Piucci, BOG, Region 5

Candace Clarke, BOG, Public Member

7. Increase active member fee by \$75
(Board of Governors Resolution No. 1)

Whereas, the OSB Board of Governors is charged by ORS 9.080(1) with the executive functions of the Oregon State Bar, which include ensuring there are adequate resources for bar operations; and

Whereas, the annual membership fee is established by the Board of Governors and any increase over the amount established for the prior year must be approved by a majority of delegates voting thereon at the annual meeting of the House of Delegates, pursuant to ORS 9.191(1); and

Whereas, the Board of Governors has determined that an increase is required to maintain the current level of programs and services; now, therefore, be it

Resolved, that the 2022 Oregon State Bar active member fees be increased by \$75 to the following in 2023:

Active Member Fees	2022	2023
CSF Assessment	\$20	\$20
LRAP Assessment	\$10	\$10
Member Fee (incl. D&I)	\$583	\$658
Total	\$613	\$688

Background

The Board of Governors takes seriously its obligation to use the bar's resources wisely, especially since over two-thirds of the bar's annual revenue comes from the mandatory annual membership fees. From 2016 through 2020, there was no member fee increase, even though we were beginning to feel the effects of flat member growth during that period. Over the past two years, management and the BOG have continued to improve operations with a minimal member fee increase despite the challenges of continued flat member growth, revenue losses due to the pandemic, and the rise of inflation.

The chart below shows a ten-year history of the base and total member fee.

Historical Active Member Fees	2014	2015	2016	2017	2018	2019	2020	2021	2022 [^]	2023 [^]	10 Year % Chg
CPI/Inflation %	1.40%	2.20%	2.70%	3.40%	3.20%	2.60%	1.50%	6.80%	8.30%	3.50%	29.7%
Active Members	14,874	14,888	14,784	14,891	14,865	14,898	14,903	14,972	14,980	14,975	0.7%
CSF Assessment	\$ 45.00	\$ 45.00	\$ 15.00	\$ 15.00	\$ 10.00	\$ 15.00	\$ 50.00	\$ 30.00	\$ 20.00	\$ 20.00	-55.6%
LRAP Assessment	5.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	100.0%
Base Active Member Fee*	487.00	482.00	532.00	532.00	532.00	532.00	532.00	577.00	583.00	658.00	35.1%
Total Base Fee \$ Change	15.00	(5.00)	50.00	-	-	-	-	45.00	6.00	75.00	171.00
Total Base Fee % Change	3.2%	-1.0%	10.4%	0.0%	0.0%	0.0%	0.0%	8.5%	1.0%	12.9%	35.1%
Total OSB Active Member Fee	\$ 537.00	\$ 537.00	\$ 557.00	\$ 557.00	\$ 552.00	\$ 557.00	\$ 592.00	\$ 617.00	\$ 613.00	\$ 688.00	28.1%
Total Fee \$ Change	15.00	-	20.00	-	(5.00)	5.00	35.00	25.00	(4.00)	75.00	\$ 151.00
Total Fee % Change	2.9%	0.0%	3.7%	0.0%	0.0%	0.9%	6.3%	4.2%	-0.6%	12.2%	28.1%

[^] Projected 2022 and 2023 inflation as of August 31, 2022

Despite the accomplishments of the past two years, it has become clear to the BOG that the current level of programs and services simply cannot be maintained without a significant increase in the annual membership fee. Projections show that membership will remain relatively flat—we expect a slight uptick in 2024, but forecasts show continued flat growth for the next five years based on Oregon law school enrollments and other demographic data.

Inflation over the past two years has nearly doubled from the prior four-year period, with no certainty about when we will see relief.¹ It would be difficult to overstate the impact this inflationary pressure has placed on the bar's budget. As we see across the economy, virtually all of our operating expenses have increased dramatically over a two-year period. This ranges from the cost of maintaining our IT hardware and software systems, facilities, and travel costs, to the cost of paper and other basic office supplies.

We face similar pressure in our compensation structure. A recent compensation study has shown that several positions that are critical to the bar's core regulatory functions are well below market, making it increasingly challenging to attract and retain employees. In order for the bar to continue to fulfill its regulatory obligations, salary and benefit adjustments must be made.

In an effort to avoid annual increases in the member fees, the BOG is recommending a \$75 increase in the active member fee, which we project will allow us to maintain existing bar programs and services for three to five years without another fee increase. Without a significant fee increase in 2023, the Board of Governors may have to cut programs and services to bar members so that it can meet its regulatory and other statutory obligations.

The following schedule shows the 2023 fees for all categories if this resolution passes:

Category	2023 Fee through January 31st	2023 Fee effective February 1 st
Active	\$688.00	\$788.00
Active Under \$45k Income *	\$557.00	\$657.00
Active Pro-Bono	\$150.00	\$200.00
Inactive	\$150.00	\$200.00
Retired	\$150.00	\$200.00

Financial Impact

A \$75 increase in the base active member fee will result in an estimated \$1,123,000 in additional revenue to the bar in 2023.

Presenter:

*Katherine Denning, Chair
BOG Budget & Finance Committee*

¹ Inflation according to the Bureau of Labor Statistics from July 31, 2020, through July 31, 2022, was 14.35%. For the period from July 31, 2016, through July 31, 2020, it was 7.68%, so inflation has almost doubled in half the time.

**8. Amend Oregon RPC 1.8(e) to allow attorneys representing indigent clients pro bono to gift modest living expenses to them
(Board of Governors Resolution No. 2)**

Whereas, the Legal Ethics Committee and the Board of Governors formulated the following amendment to the Oregon Rules of Professional Conduct 1.8(e);

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

Resolved, that the amendment of Oregon Rules of Professional Conduct 1.8(e) as set forth below is approved and shall be submitted to the Oregon Supreme Court for adoption:

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

Background

Oregon RPC 1.8(e)(1) and (2) strictly limit financial assistance to clients in connection with a pending or contemplated litigation with two exceptions. First, the lawyer may advance court costs and litigation expenses, the repayment of which may be contingent on the outcome of the matter. Second, for indigent clients, the lawyer may pay the court costs and expenses of litigation. Under the current RPC 1.8(e), attorneys may not give money or things of value to clients in litigation who need help with the basic necessities of life.

Oregon RPC 1.8(e) is directly adopted from ABA Model Rule 1.8(e)(1) and (e)(2). Both rules were enacted with the intent of preventing champerty and maintenance, instances where lawyers would provide material support to clients in exchange for consideration in the outcome of the litigation. Comment [10] of ABA Model Rule 1.8 further explains the reason for this limitation: “Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation.” Comment [10] does provide an exception for court costs and expenses of litigation, noting that “these advances are virtually indistinguishable from contingent fees and help ensure access to the courts.” *Id.*; see *a/so* OSB Formal Ethics Op. No. 2005-4 (lawyer cannot advance client living expenses).

In 2020, the ABA adopted a third subsection to ABA Model Rule 1.8(e) that provided an additional exception to providing financial assistance. ABA Model Rule 1.8(e)(3) reads:

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

* * *

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer:

- (i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;
- (ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and
- (iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

The ABA noted that this new rule was a narrow exception to ABA Model Rule 1.8(e) that provided increased access to justice to many vulnerable clients. The ABA further noted it was a humanitarian rule, allowing attorneys to help indigent clients with basic needs without running afoul of their ethical obligations. In many instances, the provision of relatively modest gifts can allow an indigent client to continue with their proceedings by providing food security or shelter security, or even simply having access to the courthouse by providing fare for transportation.

The ABA consulted with multiple legal aid providers and the Standing Committee on Legal Aid and Indigent Defendants to create a narrow exception that did not increase the risk of champerty or maintenance. Several national pro bono entities have sponsored the inclusion of this provision with the Model Rules, noting that the exception would help them to provide humanitarian assistance to their indigent clients in desperate times of need.

Model Rule 1.8(e) is a very narrow exception. Comment [10] to Model Rule 1.8 notes that this exception applies only for lawyers who represent an *indigent* client without fee, or pro bono through a nonprofit legal services or public interest organization, or through a law school clinical or pro bono program. Lawyers who charge clients for their services may not take advantage of this provision. Further, the client must be indigent. While indigent is not defined in the ABA Model Rules or the Comments, the ABA noted in its resolution that the word indigent has been in the Model Rules since 1983 without a need for defining its meaning.

Further limiting this rule are three qualifiers for any gift made by an attorney under Model Rule 1.8(e)(3). First, an attorney cannot promise, assure, or imply that any such gift is available prior to retention or use such gift to continue the client relationship. Second, the attorney cannot seek any reimbursement of the gift from the client, or anyone affiliated with the client. Third, the attorney cannot publicize their willingness to provide such gifts to clients. These three restrictions further limit these gifts so that they do not allow the attorney to obtain an interest in the litigation, or otherwise have their professional judgement compromised by providing a gift to the client.

The OSB Legal Ethics Committee reviewed this matter and discussed the importance of this amendment. It found that Model Rule 1.8(e)(3), as outlined by the ABA, is narrow enough to avoid many of the concerns related to attorneys providing financial assistance to clients in litigation. Of note, as the matter is pro bono, there is not a realistic concern about the attorney obtaining a financial interest in the litigation. The narrowness of the rule also seeks to avoid any potential for champerty and maintenance to occur under this exception. A review of past disciplinary matters under Oregon RPC 1.8(e) was conducted as well, and it was noted that the limited violations that occurred were in the context of attorneys providing assistance to fee-paying clients, and not in a pro bono context.

Financial Impact

None stated.

Presenter:

Ankur Doshi, OSB General Counsel

9. Support Adequate Funding for the Judicial Branch (BOG Resolution No. 3)

Whereas, the mission of the Oregon State Bar is to serve justice and the public interest by promoting respect for the rule of law, by improving the quality of legal services, and by increasing access to justice; and,

Whereas, the 2020–22 Strategic Campaign adopted by the Judicial Department focused on important shared goals, such as in improving services to vulnerable and marginalized people, expanding access to justice, assisting the Office of Public Defense Services in monitoring its attorney caseloads and performance, and expanding its efforts to support diversity, equity, and inclusion in court services and the legal profession; and

Whereas, the 2021 Legislative Assembly recognized the impact of court services in providing justice services as well as addressing urgent issues facing Oregon including housing, behavioral health, and

criminal justice reform, and provided additional funding to the Judicial Department to continue expanding its efforts under the Strategic Campaign, now, therefore, be it

Resolved, that we applaud the Legislative Assembly for its support for adequate funding in 2021–23 for Oregon’s Judicial Branch, and request that the Assembly continue to improve funding to provide needed court services, support suitable and sufficient court facilities, attract and retain high-quality judges, and support the goals of the Judicial Department Strategic Campaign; and further encourage all members of the Oregon State Bar to thank legislators for funding the Judicial Branch, recognizing the importance of continued support for a healthy state court system, and urging them to support the Chief Justice’s Recommended Budget for the Oregon Judicial Department.

Financial Impact

None stated.

Presenter:

Lee Ann Donaldson, BOG, Region 5

10. Approve the OSB Administrative Law Section Final Agency Order Work Group Report and Recommendations (BOG Resolution No. 4)

Whereas, in 2020 the House of Delegates directed the Administrative Law Section “to organize a work group of practitioners, administrative law judges, court staff, and others as appropriate to review and consider issues involving judicial review of final orders in contested case proceedings with the intent of making recommendations to the House of Delegates at its next meeting in 2021”;

Whereas, the Administrative Law Section’s Final Agency Order Work Group met during the spring of 2022 and considered issues regarding the Oregon Court of Appeals use of affirmances without opinion (AWOP) and, specifically, its use of AWOPs on its judicial review of final orders of administrative agencies in contested cases;

Whereas, the Final Agency Order Work Group adopted and submitted recommendations to the Board of Governors at the 2022 Board of Governors meeting; now, therefore be it

Resolved, that the House of Delegates approve the OSB Administrative Law Section Final Agency Order Work Group Report and Recommendations, as attached to this agenda.

Background

The Oregon Court of Appeals is one of the busiest intermediate appellate courts in the country. Counterintuitively, the size of its judicial staff is small compared to the staff sizes of similar state intermediate appellate courts. The increasing number and complexity of its cases, as well as its limited staff resources, have combined to dramatically delay disposition of its caseload.

In response, in 2021 the Oregon Court of Appeals redoubled its focus on issuing opinions, but given the Court’s limited resources, this meant an increase in the use of *per curiam* opinions while continuing to resort to AWOPs. Although the court successfully decreased its backlog of cases, it did not believe these actions would completely address the issue of decisional delay. Furthermore, the use of both *per curiam*

opinions (which generally recite few facts and include minimal analysis,) and AWOPs (which include no facts or analysis) leaves some lower tribunals, litigants, and bar members dissatisfied. Reliance on these quick methods for disposing of cases is particularly significant in the court's review of administrative agency cases; between 2017 and 2021, the percentage of administrative agency cases that the Court of Appeals resolved by AWOP ranged from 46.4% to 56.2%, with 2021's percentage at 52.5%.

In January 2022, the Oregon Court of Appeals published a draft of a proposed temporary rule amendment to the Oregon Rules of Appellate Procedure (ORAP). The proposed rule amendment would have allowed the Court of Appeals to issue a nonprecedential memorandum opinion. This new disposition option would allow the Court of Appeals to provide parties with an explanation of the case but without announcing new law for the entire state.

The adoption of the nonprecedential memorandum opinion was expected to reduce the court's use of affirmance without opinion. Along with its use of *per curiam* opinions, the Oregon Court of Appeals implementation of the nonprecedential memorandum opinion option is expected to reduce the court's decisional backlog.

A Court of Appeals panel's potential issuance of a nonprecedential memorandum opinion was not expected to change the process for "reviewing briefs, preparing for argument, analyzing cases, or reaching decisions but [would], in some cases, change how much [the court would] write in a particular opinion." The expectation was that the use of nonprecedential memorandum opinions would allow the Court of Appeals to issue more timely opinions, both precedential and nonprecedential, while providing more information to the bench, the bar, and members of the public.

The comment period for the proposed temporary rule authorizing nonprecedential memorandum opinions closed on March 31, 2022. Less than two months later, the Court of Appeals adopted the nonprecedential memorandum opinion rule in Chief Judge Order 22-02 on May 16, 2022.

The order implements the rule that was fashioned to reduce delay and to decrease the number of AWOPs. CJO 22-02 goes into effect on June 1, 2022, and will expire on December 31, 2024, if not permanently adopted or superseded by the adoption of other rules.

Financial Impact

None stated.

Presenter:

Gabriel Chaise, BOG, Region 5

11. Appeals to Circuit Court of Administrative Agency Final Orders (Delegate Resolution No. 1)

Whereas, the Oregon Court of Appeals, reportedly due to a lack of resources, issues an undesirable amount of "AWOP" decisions generally; and, specifically, more than should occur with regard to appeals of Agency "FINAL ORDERS";

Whereas, the Court of Appeals has begun experimenting with "Nonprecedential Opinions" in an effort to reduce the undesirable percentages of "AWOP" decisions;

Whereas, FINAL ORDERS in Administrative Agency “Contested Cases” may have serious consequences for Oregonians entitled to Access to Justice;

Whereas, the issuance of an “AWOP” represents a denial of Access to Justice;

Whereas, Jurisdiction for Judicial Review of certain Administrative Agency FINAL ORDERS to Circuit Court Jurisdiction already exists for Judicial Review of Implied Consent DMV FINAL ORDERS; now, therefore be it

Resolved, that the House of Delegates recommends the Board of Governors appoint a Volunteer Committee [i.e., Work Group] to work with the OSB Administrative Law Section to study and recommend providing Jurisdiction of Circuit Courts over Petitions for Judicial Review of Agency FINAL ORDERS for additional agencies, similar to the existing procedure for Judicial Review of DMV Implied Consent Cases.

Financial Impact

None stated.

Presenter:

Danny Lang, Ex-Officio Delegate

12. Advance a Fair, Inclusive, and Accessible Justice System (Delegate Resolution No. 2)

Whereas, ORS 9.080(1) directs the Oregon State Bar Board of Governors to “direct its power to serve the public interest by ... Advancing a fair, inclusive and accessible justice system”;

Whereas, equal access to justice plays a vital role in the public’s perception of fairness and inclusivity in the justice system;

Whereas, Oregon’s nonprofit legal services programs are instrumental in providing inclusive access to justice to large populations of underserved Oregonians, including those whose income is too high to qualify for legal aid programs but too low to afford the typical charges of lawyers in private practice, and those who have legal problems not within the capacity or capabilities of Oregon’s legal aid organizations;

Whereas, a 2021 report titled Justice Needs and Satisfaction in the United States of America, produced by the Hague Institute for Innovation in Law (HiIL) and the Institute for the Advancement of the American Legal System (IAALS), found that “Access to justice is a broad societal problem that exists across the spectrum of American society. No one age, income, or racial/ethnic group is unaffected by it”;

Whereas, Oregon’s nonprofit legal services programs provide important expertise in meeting the legal needs of their target populations, which may include members of a particular race, national origin, geographical region, primary language, status as a crime victim, color, sex, gender identity, sexual orientation, age, religion, physical or mental disability, military status, occupation, or marital or family status;

Whereas, Oregon’s nonprofit legal services programs further provide important education and empowerment to members of their target populations, equipping people to better understand and resolve certain legal problems without expensive intervention;

Whereas, Oregon’s nonprofit legal services programs are a source of training for legal services professionals, including exposure to concepts such as trauma-informed care and user-centered design, experience with community outreach and education, and practical training on legal concepts and law practice management;

Whereas, the Oregon State Bar already has a program allowing for Bar sections to make financial donations to qualified nonprofit legal services providers and a process for qualifying those providers;

Whereas, appropriate support from the Oregon State Bar and the legal community is critical to maintaining and developing resources that strive to provide all Oregonians with meaningful access to the justice system; and

Whereas, better measuring and understanding the fairness, inclusiveness, and accessibility of Oregon’s justice system is essential to developing and improving efforts to advance those goals; now, therefore, be it

Resolved, that the Oregon State Bar;

- (1) Strengthen its commitment and ongoing efforts to improve the availability of a full range of legal services to all citizens of our state, through the development and maintenance of adequate support for those Oregon nonprofit legal services programs that are qualified to receive Bar support;
- (2) Help Oregon’s qualified nonprofit legal services programs by supporting their efforts to seek visibility within the Bar, promote their services to Oregonians, and explore sources of funding;
- (3) Support Oregon’s qualified nonprofit legal services programs by developing relevant bar policies such as reduced or eliminated fees for the Bar’s Lawyer Referral Service; flexibility for participating in the Bar’s Modest Means program; reduced or eliminated advertising fees for the Bar Bulletin; pathways for participation in the Oregon Law+Connect portal project; and/or reduced or eliminated fees for nonprofit-employed legal professionals to attend bar-sponsored continuing legal education programs, conferences, and other events;
- (4) Actively participate in the efforts of qualified nonprofit legal services programs to increase financial contributions, volunteer participation, and other support from the Oregon legal community;
- (5) Support the broader fundraising efforts of qualified nonprofit legal services programs that provide civil legal services to low-income and modest-means Oregonians but which do not receive funding from the Campaign for Equal Justice; and
- (6) Develop and adopt formal metrics for the Bar to better measure and understand the (i) fairness, (ii) inclusivity, and (iii) accessibility of Oregon’s justice system, and report on those metrics at each annual HOD meeting — such report to include discussion of the Bar’s programs and efforts to improve these elements of its statutory charge and to include, where possible, the measurable impact of those programs and efforts.

Background

The mission of the Oregon State Bar is to serve justice and the public interest by promoting respect for the rule of law, by improving the quality of legal services, and by increasing access to justice. One of the three primary functions of the Bar, consistent with its statutory charge, is to “advance a fair, inclusive, and accessible justice system.”

The Board of Governors and the House of Delegates have adopted a series of resolutions supporting adequate funding for civil legal services in Oregon (Delegate Resolutions in 1996, 1997, 2002, 2005–2021). However, the specific language of those resolutions has largely limited the Bar’s support to Oregon’s Legal Aid Organizations and the Campaign for Equal Justice.

This resolution is similar to the resolution passed in 2021, and it expands the Bar’s commitment to civil legal services organizations to include nonprofit legal services programs beyond Legal Aid and CEJ. It formally recognizes Oregon’s rich ecosystem of nonprofit organizations that provide legal support to our communities in ways that expand upon and complement the work of our three outstanding Legal Aid organizations, but which have not historically seen as much formal support from the Bar.

The Bar currently allows its sections to donate funds to qualified charitable causes consistent with Bar Policy 14.401(b), and the Bar CEO maintains a list of qualified organizations that includes: the Campaign for Equal Justice, Clackamas Women’s Services Legal Empowerment Accelerator Program (LEAP), the Classroom Law Project, Guardian Partners, Legal Aid Services of Oregon (LASO), Lewis & Clark Law School’s Public Interest Law Project (PILP), Opportunity for Lawyers in Oregon (OLIO), the Oregon Lawyer Assistance Foundation (OLAF), the Oregon Minority Lawyers Association (OMLA), Oregon Volunteer Lawyers for the Arts (OVLA), St. Andrew Legal Clinic, Senior Citizens Council of Clackamas County, The Commons Law Center, the University of Oregon School of Law, the Oregon Law Students Public Interest Fund, Willamette Law School, and the Willamette Public Interest Law Project.

These organizations and others are instrumental in providing much needed legal help to individuals and communities that are not otherwise well served by existing service options. Nonprofit legal services programs also provide important community education that can help affected individuals manage their legal issue before it becomes major. And they provide training and experience to legal professionals and community members who work for and volunteer with these organizations.

The need is greater than ever. Although there is little specific data on access to justice for the modest means population, we can infer from the worsening of the A2J gap facing legal-aid-qualified people that our profession needs to do more.

The Legal Services Corporation’s 2022 Justice Gap Study found that “92% [of low income Americans] do not get any or enough legal help for their civil legal problems — and the cost of legal help stands out as an important barrier.” That is up from a reported 86% in the LSC’s 2017 Justice Gap Study, and is in spite of recent increases in funding to legal aid organizations and specific efforts to provide legal services to low-income populations during the pandemic.

In other words, despite everything the legal sector has done over the past several decades to close the access to justice gap, today it is wider than ever. And it continues to grow. As such, this resolution also directs the Bar to develop metrics for better understanding the fairness, inclusiveness, and accessibility

components of its mission and report those metrics at each annual HOD meeting. This will help raise awareness of the breadth and nature of challenges facing Oregonians in these areas and help the Bar understand the relevant impacts of its programs.

By increasing support for Oregon’s nonprofit legal services programs in addition to the important work of supporting Legal Aid, and by beginning to measure the impacts of that support, the Bar will affirm and extend its commitment to advancing a fair, inclusive, and accessible justice system.

Financial Impact

Impact stated by delegates: If passed, and if the Bar develops any of the potential policies suggested in Section 3 above, any discounts or subsidies that the Bar grants to nonprofit legal services providers may have a small impact on Bar revenues from any affected program. Such impacts may be offset by increased participation in the affected program(s) by nonprofit legal services providers.

Impact stated by Board of Governors pursuant to OSB Bylaw Section 3.3: The financial impact would be significantly more than nominal, depending on the number of nonprofit legal services providers seeking support and the type and level of support sought. Notably, “adequate support” is not defined and could include such things as, eliminating costs and fees currently charged (e.g., CLE program fees, advertising revenue, membership fees), providing financial sponsorship for events, and making donations. Moreover, the annual development and reporting of metrics will require personnel and other operational expenses.

Presenters:

John E. Grant, HOD, Region 5
Vanessa Nordyke, HOD, Region 6
David Dorfman, HOD, Region 8
James Klonoski, HOD, Region 8
Christopher Rounds, HOD, Region 8

13. Support for Public Defense Providers (Delegate Resolution No. 3)

Whereas, the Constitutions of both Oregon and the United States require that all people facing a possible deprivation of their physical liberty in court proceedings, such as those accused of criminal offenses, juveniles accused of conduct that would constitute crimes if committed by an adult, and those who are subjects of civil commitment proceedings, have the right to assistance by ethical and competent legal counsel;

Whereas, Oregon statutes guarantee a right to counsel for parents defending against a petition to terminate their parental rights, for parents in juvenile dependency proceedings in which parents may lose custody of their children whenever the nature of the proceedings and due process so require, and for children in juvenile dependency proceedings when requested;

Whereas, those same constitutions and statutes require that the counsel provided the person be paid for by the government, if the person is indigent and cannot afford their own legal counsel;

Whereas, the Sixth Amendment Center published in January 2019 a comprehensive study of Oregon’s indigent defense system and determined that Oregon’s fixed-fee contract system pits appointed counsels’ financial self-interest against the due process rights of their clients and is prohibited by national public defense standards;

Whereas, there is a salary and resource disparity between trial level legal counsel for the person and legal counsel for the State;

Whereas, trial level legal counsel for the person are government contractors and legal counsel for the State are government employees funded through direct appropriations;

Whereas, legal counsel for the person has an ethical and professional obligation pursuant to the state and federal constitutions, as well as Oregon Rules of Professional Conduct 1.1 (“A lawyer shall provide competent representation to a client”), 1.3 (“A lawyer shall not neglect a legal matter entrusted to the lawyer”) and 1.7 (“A lawyer shall not represent a client if the representation involves a current conflict of interest”) to provide adequate and conflict-free representation;

Whereas, the American Bar Association has acknowledged for over a decade that resource parity, salary parity, and caseload standards are essential to its “Ten Principles of Public Defense”;

Whereas, the House of Delegates has long supported a strong public defense system and increased financial resources for public defense providers; now, therefore, be it

Resolved, that the Oregon State Bar, through its Board of Governors and staff, continue to participate actively with the Oregon Judicial Department, prosecutors, the Oregon Department of Justice, the Legislative Assembly, the Public Defense Services Commission, the Office of Public Defense Services, the Oregon Criminal Defense Lawyers Association, and other public safety and child welfare stakeholders, to obtain equal resources and commensurate compensation for public defense providers, and work toward developing caseload standards that ensure those public defense providers can meet their constitutional and ethical obligations.

Financial Impact

None stated.

Presenters:

Keiler Beers, HOD, Region 5

Amy Bingham, HOD, Region 6

Jenny Cooke, BOG, Region 7

Shannon Flowers, HOD, Region 6

Justin Morton, Ex-Officio Delegate

John Schlosser, HOD, Region 5

Norah Van Dusen, Ex-Officio Delegate

14. Support of Adequate Funding for Legal Services to Low-Income Oregonians (Delegate Resolution No. 4)

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

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

Whereas, programs providing civil legal services to low-income Oregonians are a fundamental component of the Bar's effort to provide such access;

Whereas, since 1998, pursuant to ORS 9.572, the Oregon State Bar has operated the Legal Services Program to manage and provide oversight of funds allocated by the State of Oregon for legal aid. This is done in accordance with the Bar's Standards and Guidelines, which incorporate national standards for operating a statewide legal aid program;

Whereas, Oregon's legal aid programs do not have sufficient resources to meet the civil legal needs of Oregon's poor;

Whereas, the health and financial impacts of the COVID-19 pandemic are disparately impacting people from Black, Indigenous, and other people of color (BIPOC) communities, and low income communities;

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

Resolved, that the Oregon State Bar:

- (1) Strengthen its commitment and ongoing efforts to improve the availability of a full range of legal services to all citizens of our state, through the development and maintenance of adequate support and funding for Oregon's legal aid programs and through support for the Campaign for Equal Justice.
- (2) Request that Congress and the President of the United States make a genuine commitment to equal justice by adequately funding the Legal Services Corporation, which provides federal support for legal aid.
- (3) Work with Oregon's legal aid programs and the Campaign for Equal Justice to preserve and increase state funding for legal aid and explore other sources of new funding.
- (4) Actively participate in the efforts of the Campaign for Equal Justice to increase contributions by the Oregon legal community, by establishing goals of a 100% participation rate by members of the House of Delegates, 75% of Oregon State Bar Sections contributing, and a 50% contribution rate by all lawyers.
- (5) Support the Oregon Law Foundation and its efforts to increase resources through the Interest on Lawyers Trust Accounts (IOLTA) program, and encourage Oregon lawyers to bank with financial institutions that are OLF Leadership Banks, meaning that they pay the highest IOLTA rates.

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

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

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

Background

The mission of the Oregon State Bar is to serve justice by promoting respect for the rule of law, by improving the quality of legal services and by increasing access to justice. One of the three main functions of the bar is to advance a fair, inclusive, and accessible justice system.

The Board of Governors and the House of Delegates have adopted a series of resolutions supporting adequate funding for civil legal services in Oregon (Delegate Resolutions in 1996, 1997, 2002, 2005–2021). This resolution is similar to the resolution passed in 2020.

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

Oregon's legal aid program consists of three separate nonprofits that work together as part of an integrated service delivery system designed to provide high-priority, free, civil legal services to low-income Oregonians in all 36 Oregon counties through offices in 18 communities. There are two statewide programs, Legal Aid Services of Oregon (LASO) and the Oregon Law Center (OLC); and one county-wide program, the Center for Non-Profit Legal Services (Jackson County). Because the need is great and resources are limited, legal aid offices address high-priority civil legal issues such as safety from domestic violence, housing, consumer law, income maintenance (Social Security, unemployment insurance, and other self-sufficiency benefits), health, employment and individual rights. In 2021, about 24% of legal aid's cases were family law cases, usually helping victims of domestic violence. Another 37% of cases were related to maintaining housing. All of these programs work to stretch limited resources through pro bono programs and self-help materials. Last year legal aid directly served 15,556 clients. An additional 200,000 Oregonians were served through impact litigation. Furthermore, hundreds of thousands of Oregonians were served through administrative advocacy. Legal aid's website, www.oregonlawhelp.com received over 467,000 unique visitors a year. Additional Oregonians who were victims of wildfires received vital self-help information and referrals through legal aid's disaster service website, <https://oregondisasterlegalservices.org>.

Last year 13% of lawyers contributed to the Campaign for Equal Justice, but in some Oregon regions (Central Oregon, Jackson County, and Lane County, for example), participation is as high as 30%. Prior to the pandemic over 20% of Oregon lawyers contributed to the CEJ.

Financial Impact

None stated.

Presenters:

Peter A. Werner, HOD, Region 1

Kristi Gibson, HOD, Region 2

Elizabeth Knight, HOD, Region 5

Vanessa Nordyke, HOD, Region 6

Heather Decker, HOD, Region 7

15. Enhance Cybersecurity in the Legal Community through Outreach, Assessment, and Education (Delegate Resolution No. 5)

Whereas, attorneys are a prime target for hackers and cybercriminals, particularly given the vast troves of sensitive information legal professionals maintain in electronic form;

Whereas, the 2021 edition of the American Bar Association’s TechReport notes that “25% of respondents overall reported . . . that their firms had experienced a data breach at some time”;

Whereas, Rule 1.6(c) of the Oregon Rules of Professional Conduct provides that “a lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client”;

Whereas, successful hacks not only jeopardize client confidences, but as demonstrated by recent ransomware attacks against law firms, state and local governments, and courts, can impede critical private and public functions;

Whereas, a recent data breach even impacted the State Bar of California’s confidential recordkeeping system, resulting in unauthorized access to 260,000 nonpublic attorney discipline case records;

Whereas, despite these realities, law schools have yet to incorporate practical cybersecurity and data protection skills into their curriculums and, among current practitioners, recent American Bar Association reports suggest many do not employ basic cybersecurity safeguards;

Whereas, in August 2022, New York became the first state in the nation to incorporate a cybersecurity-specific component into its continuing legal education requirement for new members;

Whereas, two other states require technology training, which may include cybersecurity training, as part of their continuing legal education requirements; now therefore be it;

Resolved, that the Oregon State Bar shall:

- (1) Not later than 180 days after the date of passage of this resolution, establish and thereafter maintain a webpage on the website of the Oregon State Bar describing cybersecurity best

practices that attorneys should consider employing in order to better safeguard client information and ensure the continuity of their operations, including easy-to-understand instructions for how to implement such best practices, provided that –

- (a) no such recommendation shall be deemed a requirement or professional obligation solely by virtue of the recommendation’s inclusion on the aforementioned list of best practices; and
 - (b) the Oregon State Bar shall not incur expenses beyond those ordinarily incurred to produce the list of best practices, and may, as the Board of Governor determines appropriate, solicit the contributions of volunteers to help produce the list of recommendations;
- (2) At the next scheduled meeting of the House of Delegates, report to this body on the cybersecurity of the Oregon State Bar’s networks and any efforts undertaken to maintain the security of data entrusted to the Bar, provided that –
- (a) any public report shall not contain information that could increase the likelihood of a hacker targeting or successfully breaching the Bar’s data, and may be deferred to a subsequent meeting of the House of Delegates if the report would contain such information; and
 - (b) the Oregon State Bar shall not incur expenses beyond those ordinarily incurred to produce the report; and
- (3) Consider and assess other proposals to enhance cybersecurity in the legal community, including the potential establishment of a one-time, one-hour cybersecurity and data protection continuing legal education requirement for new members of the Oregon State Bar that would not result in an increase in the total number of hours of continuing legal education required of any attorney in any given cycle, and report on its deliberations regarding such proposals at the next scheduled meeting of the House of Delegates.

Financial Impact

None stated.

Presenters:

David Dorfman, HOD, Region 8

James Klonoski, HOD, Region 8

16. Veterans Day Remembrance

(Board of Governors Resolution No. 5)

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

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

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

Presenter:

Rob Milesnick, BOG, Region 8

17. In Memoriam

(Board of Governors Resolution No. 6)

Resolved, that the OSB House of Delegates and members assembled stand for a moment of silence in honor of the members of the Oregon State Bar who have died since the 2021 House of Delegates Meeting.

Robert Ackerman
J. Michael Alexander
Aloysius Auyeung
Ray Bassel
David Beach
Dennis Bean
J.B. Bedingfield
Frank Bocci
William Brandt
Bernard Brink
Donald Buss
Andrew Carter
O. Daniel Dearborn
Vincent Deguc
Gregory Dolinajec
Hon. James Donnell
Mary Duvall
Roy Dwyer
Donald Ford
Hon. Jackson Frost
Gary Georgeff

Giles Gibson
Ira Gottlieb
John Grove
Colin Hackett
Harry Hanna
Brien Hildebrand
Hon. Bryan Hodges
Arthur Johnson
Stephen Kantor
Jerry Kleen
Karen Knauerhase
John Krallman
J. David Kryger
Frederick Langer
John Langslet
Richard Levin
Adam Mayo
Hank McCurdy
Brenna Moore
Michael Mowrey
Scott Niebling

Sean O'Halloran
Milo Ormseth
Charles Paulson
Mark Peterman
Timothy Ramis
Frank Riebe
Hon. Richard Riggs
Robert Scanlon
Kenneth Searce
Chris Sielicky
Richard Sly
John Souther
BeaLisa Sydlík
Michael Tharp
Gerald Van Hoomissen
Michael Wasserman
Candace Weatherby
William Welch
Peter Wells
Carol Westendorf
John Winkelman

Presenters:

Joe Piucci, BOG, Region 5

Apolinar Montero-Sánchez, BOG, Region 4

Candace Clarke, BOG, Public Member



Judicial Review of Agency Final Orders Work Group

May 26, 2022

Recommendations of the Judicial Review of Agency Final Orders Work Group

May 26, 2022

Origin of the Work Group:

In early 2022, at the direction of House of Delegates, the Oregon State Bar's Administrative Law Section formed a work group to implement House of Delegates Resolution No. 5(2020) as amended.¹ The work group included Administrative Law Section Executive Committee members James Mountain (Harrang Long Gary Rudnick, P.C.) who chaired the committee, Jeffrey Dobbins (Willamette University College of Law) and Leah Feldon (Oregon Department of Environmental Quality).

Representatives from the Oregon Judicial Department, the Oregon Office of Administrative Hearings, and the original proponent of the resolution participated but did not vote. Thank you to Judge Jacqueline Kamins (Oregon Court of Appeals), Judge Alison Webster (Oregon Office of Administrative Hearings), Scott Kaplan and Daniel Parr (both from the Oregon Judicial Department), and Danny Lang (Law Office of Danny Lang).

Previously, at the 2020 House of Delegates meeting, Mr. Lang had submitted Delegate Resolution No. 5 for consideration. The resolution, as introduced, identified concerns about appellate court decisional practices and proposed that the Court of Appeals issue a fulsome appellate court opinion, rather than an affirmance without opinion (AWOP), on judicial review of final orders of administrative agencies in contested cases.

After discussion, the resolution was amended on the floor to direct:

“the Administrative Law Section to organize a work group of practitioners, administrative law judges, court staff, and others as appropriate to review and consider issues involving judicial review of final orders in contested case proceedings with the intent of making recommendations to the House of Delegates at its next meeting in 2021.”

Resolution No. 5, as amended, was adopted by the House of Delegates. The Administrative Law Section's Work Group met on April 26, 2022 and May 26, 2022 and considered issues regarding the Court of Appeals use of affirmances without opinion and, specifically, its use of AWOPs on its judicial review of final orders of administrative agencies in contested cases.

¹ <https://www.osbar.org/docs/leadership/hod/2020/20HODActions.pdf> (last visited 4/29/2022)

Background:

The Oregon Court of Appeals is one of the busiest intermediate appellate courts in the country. Counterintuitively, the size of its judicial staff is small compared to the staff sizes of similar state intermediate appellate courts. The increasing number and complexity of its cases, as well as its limited staff resources have combined to dramatically delay disposition of its caseload.

In response, the Oregon Court of Appeals last year redoubled its focus on issuing opinions, but given the Court's limited resources, this meant an increase in the use of *per curiam* opinions while continuing to resort to AWOPs. Although the court successfully decreased its backlog of cases, it did not believe these actions would completely address the issue of decisional delay. Furthermore, the use of both *per curiam* opinions (which generally recite few facts and include minimal analysis,²) and AWOPs (which include no facts or analysis) leaves some lower tribunals, litigants and bar members dissatisfied. Reliance on these quick methods for disposing of cases is particularly significant in the court's review of administrative agency cases; between 2017 and 2021, the percentage of administrative agency cases that the Court of Appeals resolved by AWOP ranged from 46.4% to 56.2%, with 2021's percentage at 52.5%.³

In January 2022, the Oregon Court of Appeals published a draft of a proposed temporary rule amendment to the Oregon Rules of Appellate Procedure (ORAP). The proposed rule amendment would have allowed the Court of Appeals to issue a nonprecedential memorandum opinion. This new disposition option would allow the Court of Appeals to provide parties with an explanation of the case but without announcing new law for the entire state.

The adoption of the nonprecedential memorandum opinion was expected to reduce the court's use of affirmance without opinion. Along with its use of *per curiam* opinions, the Oregon Court of Appeals implementation of the nonprecedential memorandum opinion option is expected to reduce the court's decisional backlog.

A Court of Appeals panel's potential issuance of a nonprecedential memorandum opinion was not expected to change the process for "reviewing briefs, preparing for argument, analyzing cases, or reaching decisions but [would], in some cases, change how much [the court would] write in a particular opinion."⁴ The expectation was that the use of nonprecedential memorandum opinions would allow the Court of Appeals to issue more timely opinions, both precedential and nonprecedential, while providing more information to the bench, the bar, and members of the public.

The comment period for the proposed temporary rule authorizing nonprecedential memorandum opinions closed on March 31, 2022. Less than two months later, the Court of

² Preface to Temporary ORAP Amendment, January 12, 2022.

³ Agency Cases – Petition for Judicial Review (3/16/2022), Oregon Judicial Department (data available upon request)

⁴ Preface to Temporary ORAP Amendment, January 12, 2022.

Appeals adopted the nonprecedential memorandum opinion rule in Chief Judge Order 22-02 on May 16, 2022.⁵

The order implements the rule that was fashioned to reduce delay and to decrease the number of AWOPs. CJO 22-02 goes into effect on June 1, 2022 and will expire on December 31, 2024 if not permanently adopted or superseded by the adoption of other rules.

Recommendations:

Accordingly, the Work Group recommends:

1. The Oregon State Bar Board of Governors (“BOG”) and its House of Delegates (“HOD”) commend the Oregon Court of Appeals and the Oregon Judicial Department’s Office of the State Court Administrator for recognizing that more detailed opinions are preferred by the bench, the bar, and members of the public. Moreover, that the BOG and HOD appreciate the associated dissatisfaction with Court of Appeals cases in which, due to a lack of court resources, the Court of Appeals affirms the judgment or order of the tribunal below without simultaneously issuing an opinion setting out the reasoning and analysis of the Court of Appeals, a so-called “AWOP.”
2. The BOG and HOD commend the Court of Appeals for formally adopting measures to reduce its “AWOP” rate by seeking to resolve cases, including petitions for review of final orders in contested case proceedings, through issuance of “nonprecedential memorandum opinions,” which would include a short explanation of the basis of the decision resolving the dispute on review without reciting all of the facts or presenting an exhaustive legal analysis of every issue.
3. The BOG and HOD appreciate and support the Court of Appeals’ authorization of the nonprecedential memorandum opinion option through its timely adoption of Temporary Amendments to the Oregon Rules of Appellate Procedure, as outlined in the court’s January 12, 2022, public letter, the court’s May 16, 2022 media release, and attached proposed rule amendments.⁶
4. The BOG and HOD recommend the Administrative Law Section periodically monitor the effectiveness of the Court of Appeals’ implementation of the nonprecedential memorandum opinion option in reducing the rate of AWOP decisions and increasing the number of explanatory opinions on judicial review of final orders in contested cases of administrative agencies.
5. The BOG and HOD continue to support requests to the Legislature by the Chief Justice of the Oregon Supreme Court and by the Office of the State Court Administrator for more

⁵ Notice of Change to Oregon Rules of Appellate Procedure, May 16, 2022.

⁶ A Temporary Amendment, based on the proposed language shared by the Court, was adopted into the Oregon Rules of Appellate Procedure in CJO 22-02 on May 16, 2022.

resources, particularly staff resources, to capitalize on the efficiencies and public benefits that the implementation and development of the nonprecedential memorandum opinion option likely will achieve for the Oregon Court of Appeals.

Addendum:

Can be found on the next page.

Amy Zubko

From: Danny Lang <attorneylang97479@gmail.com>
Sent: Wednesday, May 25, 2022 12:25 PM
To: james.e.mountain@harrang.com; acqueline.s.kamins@ojd.state.or.us;
scott.j.kaplan@ojd.state.or.us; Leah.FELDON@deq.oregon.gov; Jeffrey Dobbins;
Daniel.Parr@ojd.state.or.us; Alison.G.WEBSTER@employ.oregon.gov; Amy Zubko
Subject: Chair Judicial Review of Agency Final Order Workgroup

Dear Chair James Mountain - -

Please consider this communication as a submission, “For the Good of the Order”, to the Workgroup as follows:

I appreciate the efforts of the Workgroup and the adoption of temporary changes to the Oregon Rules of Appellate Procedure to provide for the issuance of nonprecedential memorandum opinions as a step forward.

Nonetheless, I submit that the Workgroup needs to continue addressing the reality that there is a denial of true Access to Justice whenever an “**AWOP**” follows the dedicated costs and the Time expended by Parties to an Appeal or Judicial Review of Agency Final Orders.

In sum, the “*Glass Half Full*” analogy applies here; because, in Agency Contested Cases the protocols generally lack significant Due Process protections of a Jury Trial, ORCP 36 General Provisions Governing Discovery, [Requests for Production, Civil Depositions and Pretrial Motions] compared with the disadvantages of Administrative Hearings that are often held via telephone conference which reduces the ability to assess Witness credibility. Further still, Administrative Law Judges are not required to be Members of the Oregon State Bar, and may not reside within the same Judicial District as Oregon Circuit Court Judges. Accordingly, there is a greater risk of Prejudicial Errors, especially given the express or implied deference to Agency “expertise” in Matters that seriously impact Occupational Licenses, substantial Civil Penalties, and Property Rights via Agency Final Orders. Accordingly, there is a greater need for Access for Appellate Justice without the risk of an “**AWOP**”, given the inherent heightened risk of errors within such Abbreviated Agency Protocols.

* * *

In conclusion, Thank you for functioning as the Workgroup assigned to address Judicial Review of Agency Final Orders. I also remain available to further assist.

Respectfully Submitted,

Danny Lang
DCBA President
Region 3 HOD Delegate