

**Oregon State Bar**  
**Meeting of the Board of Governors**  
September 21, 2018  
Oregon State Bar Center, Tigard, OR  
**Open Session Agenda**

*The mission of the OSB is to serve justice by promoting respect for the rule of law, improving the quality of legal services, and increasing access to justice.*

*The Open Session Meeting of the Oregon State Bar Board of Governors will begin at 12:30 am on September 21, 2018. Items on the agenda will not necessarily be discussed in the order as shown.*

**Friday, September 21, 2018, 1:15pm**

**1. Call to Order**

**2. Closed Sessions – [CLOSED Agenda](#)**

- A. Executive Session (pursuant to ORS 192.660(2)(f) and (h) and ORS 192.690(1))
  - 1. General Counsel/UPL Report

**3. HOD Agenda Approval** [Ms. Nordyke] Action [Exhibit](#)

**4. President’s Report** [Ms. Nordyke] Inform [Exhibit](#)

**5. BOG Committees, Special Committees, Task Forces and Study Groups**

- A. Policy and Governance Committee [Mr. Ramfjord]
  - 1. Event Anti-Harassment Policy Action [Exhibit](#)
  - 2. Review of Bulletin Action Handout
- B. Board Development Committee [Mr. Greco]
  - 1. BOG Public Member Appointment Action Handout
  - 2. SPRB Appointment Recommendations Action [Exhibit](#)
  - 3. PLF Board of Directors Appointment Action [Exhibit](#)
  - 4. Various Appointment Recommendations Action Handout
- C. Budget & Finance Committee [Mr. Wade]
  - 1. Financial Update Inform [Exhibit](#)
- D. Public Affairs Committee [Ms. Rastetter]
  - 1. Legislative Update Inform

**6. Professional Liability Fund** [Ms. Bernick]

- A. Hannover Re Underwriting Audit Inform [Exhibit](#)
- B. Primary Coverage Plan Changes Action [Exhibit](#)
- C. July 31, 2018 Financial Statements Inform [Exhibit](#)
- D. 2019 Budget, Assessment and Payment Deadlines Action [Exhibit](#)
- E. PLF Policy 5.150 (Elimination of Fidelity Bond) Action [Exhibit](#)
- F. PLF Policy 7.600 (H) (2) Excess Program (Midyear changes) Action [Exhibit](#)

## 7. OSB Committees, Sections, Councils and Divisions

- |    |  |        |                         |
|----|--|--------|-------------------------|
| A. | Oregon New Lawyers Division Report [Ms. Nicholl] | Inform | <a href="#">Exhibit</a> |
| B. | ABA HOD Delegate Report                          | Inform |                         |
| C. | Legal Services Program Committee [Ms. Baker]     |        |                         |
| 1. | Recommendation for Unclaimed Funds Disbursement  | Action | <a href="#">Exhibit</a> |

## 8. Campaign for Equal Justice

- |    |  |        |  |
|----|--|--------|--|
| A. | Presentation [Ms. Crawford] – 15 minutes | Inform |  |
|----|--|--------|--|

## 9. Consent Agenda

### A. Report of Officers & Executive Staff

- |    |   |        |                         |
|----|---|--------|-------------------------|
| 1. | Executive Director's Report [Ms. Hirschbiel]                          | Inform | <a href="#">Exhibit</a> |
| a) | OJD Civil Justice Improvements Task Force Report to the Chief Justice | Inform | <a href="#">Exhibit</a> |
| 2. | Director of Regulatory Services [Ms. Evans]                           | Inform | <a href="#">Exhibit</a> |
| 3. | Directory of Diversity & Inclusion [Mr. Puente]                       | Inform | <a href="#">Exhibit</a> |

### B. Client Security Fund Committee [Ms. Hollister]

- |    |                                       |        |                         |
|----|---------------------------------------|--------|-------------------------|
| 1. | CSF Financial Reports and Claims Paid | Inform | <a href="#">Exhibit</a> |
| 2. | Claims to Approve or Review           | Action | <a href="#">Exhibit</a> |

### C. Approve Minutes of Prior BOG Meetings

- |    |                                  |        |                         |
|----|----------------------------------|--------|-------------------------|
| 1. | Special Open Session May 18 2018 | Action | <a href="#">Exhibit</a> |
| 2. | Open Session June 22 2018        | Action | <a href="#">Exhibit</a> |
| 3. | Closed Session June 22 2018      | Action | <a href="#">Exhibit</a> |
| 4. | Open Session July 27 2018        | Action | <a href="#">Exhibit</a> |

## 10. Good of the Order (Non-Action Comments, Information and Notice of Need for Possible Future Board Action)

- A. [Correspondence](#)
- B. [Articles of Interest](#)

**Oregon State Bar**  
**2018 House of Delegates Meeting**  
**Friday, Nov. 2, 2018**  
**10:00 a.m. at the OSB Center in Tigard, OR**

Oregon State Bar

October 12, 2018

Dear Oregon State Bar Member:

I am pleased to invite you to the 2018 OSB House of Delegates meeting, which will begin at **10 a.m.** on **Friday, Nov. 2**, at the Oregon State Bar Center.

I am happy to report that the Board of Governors is not requesting an increase in the annual license fee for 2019. As will be explained in the financial report, the annual Client Security Fund assessment is being increased by \$5.

The preliminary agenda for the HOD meeting includes resolutions regarding.....

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](http://www.osbar.org/docs/leadership/hod/hodroster.pdf).

If you have questions concerning the meeting, contact Lisa Ryan, executive assistant, by email at [lryan@osbar.org](mailto:lryan@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, Nov. 2, and I thank you in advance for your thoughtful consideration and debate of these items.



Vanessa Nordyke  
OSB President

**OREGON STATE BAR**  
**2018 House of Delegates Meeting AGENDA**

Oregon State Bar Center, 16037 SW Upper Boones Ferry Road, Tigard, Oregon 97224  
10 a.m., Friday, Nov. 2, 2018  
Presiding Officer: Vanessa Nordyke, OSB President

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**Reports**

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| <p>1. Call to Order<br/><i>Vanessa Nordyke</i><br/><i>OSB President</i></p> <p>2. Adoption of Final Meeting Agenda<br/><i>Vanessa Nordyke</i><br/><i>OSB President</i></p> <p>3. Report of the President<br/><i>Vanessa Nordyke</i><br/><i>OSB President</i></p> | <p>4. Report on behalf of the Chief Justice of the Oregon Supreme Court<br/><i>Hon. _____, Justice</i><br/><i>Oregon Supreme Court</i></p> <p>5. Report of the Board of Governors Budget and Finance Committee &amp; Notice of 2019 Annual Fees<br/><i>David Wade, Chair</i><br/><i>BOG Budget &amp; Finance Committee</i></p> <p>6. Overview of Parliamentary Procedure<br/><i>James N. Westwood,</i><br/><i>Parliamentarian</i></p> |
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**Resolutions**

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| <p>7. Support for Adequate Funding for Legal Services to Low-Income Oregonians (Delegate Resolution No. 1)<br/><i>Kathleen Evans, HOD, Region 6</i><br/><i>Ed Harnden, HOD, Region 5</i><br/><i>Ross Williamson, HOD, Region 2</i></p> <p>8. Transparency in Criminal Proceedings (Delegate Resolution No. 2)<br/><i>Danny Lang, HOD, Region 3</i></p> <p>9. Ensuring the Justice Across Oregon Stipend for Summer Employment in Rural Oregon Serves All Rural Communities (Delegate Resolution No. 3)<br/><i>David Dorfman, HOD, Region 8</i><br/><i>Jake Klonoski, HOD, Region 8</i></p> | <p style="text-align: right;"><i>Evan Gautier, HOD, Region 8</i></p> <p>10. New Tier of Annual License Fees for Members Active for Less than 5 Years (Delegate Resolution No. 4)<br/><i>Jake Klonoski, HOD, Region 8</i><br/><i>David Dorfman, HOD, Region 8</i><br/><i>Evan Gautier, HOD, Region 8</i></p> <p>11. In Memoriam (Board of Governors Resolution No. 1)<br/><i>TBD, BOG, Region</i><br/><i>TBD, BOG, Region</i><br/><i>TBD, BOG, Region</i></p> <p>12. Veterans Day Remembrance (Board of Governors Resolution No. 2)<br/><i>TBD, BOG, Region</i></p> |
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## 5. Report to House of Delegates - 2019 OSB Membership Fee

Based on a recommendation from the Client Security Fund (CSF) Committee, the Board of Governors resolved to increase the CSF assessment for 2019 from \$10.00 to \$15.00. The new assessment applies to all active Oregon State Bar members.

As of September 30, 2018, the fund balance was \$1.342 million. Throughout 2018, there has been a significant increase in the number and dollar amount of claims, which is forecasted to deplete the balance below the \$1 million reserve level. To maintain an adequate total reserve, this increase is necessary. All other fees remain unchanged.

This chart shows the Fee Schedule for the 2019 Membership Fees. The due date for the 2019 membership fee is Wednesday, January 31, 2019.

<b>Membership Fee Status</b>	<b>Fee Through January 31</b>	<b>Fee Effective February 1</b>
Active Over Two Years	\$ 557.00	\$ 657.00
Active Under Two Years **	\$ 470.00	\$ 570.00
Active Pro Bono	\$ 125.00	\$ 125.00
Inactive	\$ 125.00	\$ 175.00
Retired	\$ 125.00	\$ 175.00

**\*\* Based on admission date to ANY jurisdiction, not admission to Oregon**

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## 7. Support of Adequate Funding for Legal Services for Low-Income Oregonians (Delegate Resolution No. 1)

*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 is a fundamental component of the Bar's effort to provide such access;

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

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

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

*Whereas*, Oregon currently has 2 legal aid lawyers for every 14,000 low-income Oregonians, but the national standards for a minimally adequately funded legal aid program is 2 legal aid lawyers for every 10,000 low-income Oregonians;

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

*Resolved*, that the Oregon State Bar;

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

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

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

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

(5) Support the Oregon Law Foundation and its efforts to increase resources through the interest on Lawyers Trust Accounts (IOLTA) program, and encourage Oregon lawyers to bank with financial institutions that are OLF Partners in Justice, meaning that pay the highest IOLTA rates.

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

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

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

### **Background**

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

The Board of Governors and the House of Delegates have adopted a series of resolutions supporting adequate funding for civil legal services in Oregon (Delegate Resolutions in 1996, 1997, 2002, 2005–2017). This resolution is similar to the resolution passed in 2017, but provides updates on the ratio of legal aid lawyers to Oregonians eligible for legal aid services.

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 non-profits that work together as part of an integrated service delivery system designed to provide high priority free civil legal services to low-income Oregonians in all 36 Oregon counties through offices in 17 communities. There are two statewide programs, Legal Aid Services of Oregon (LASO) and the Oregon Law Center (OLC); and 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. About 31% of legal aid's cases are family law cases, usually helping victims of domestic violence. All of these programs work to stretch limited resources through pro bono programs and self-help materials. Legal aid's website, [www.oregonlawhelp.com](http://www.oregonlawhelp.com) receives about 290,000 unique visitors a year.

Providing access to justice and high quality legal representation to all Oregonians is a central and important mission of the Oregon State Bar. An Oregon study concluded that low-income Oregonians who have access to a legal aid lawyer have a much-improved view of the legal system compared with those who do not have such access: 70% of individuals without access to a lawyer had negative feelings about the legal system, but of those who had access to a legal aid lawyer, 69% had a positive view of the legal system regardless of the outcome of their case. The 2014 Task Force on Legal Aid Funding, which included representatives of the Bar, the Law Foundation, the judiciary, the legislature and private practice concluded that legal aid funding should be doubled over the next 10 years. Because funding for legal aid is a state, federal and private partnership, with about 80 different sources of funding, increases in funding must be made across the board to address the justice gap.

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

*Presenters:*

*Kathleen Evans, HOD, Region 6*

*Ed Harnden, HOD, Region 5*

*Ross Williamson, HOD, Region 2*

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## **8. Transparency in Criminal Case Proceedings (Delegate Resolution No. 2)**

*Whereas*, “The Mission of the Oregon State Bar is to serve justice by promoting respect for the rule of law, by improving the quality of legal services and by increasing access to justice.” OSB Bylaw 1.2;

*Whereas*, current protocol for Motion Hearings in Criminal Cases requires that a Defendant must submit “Points and Authorities” in support of a Defense Motion, such as a “Motion to Suppress,” to be considered by Oregon Circuit Courts in Criminal Cases; however, the State has no such requirements;

*Whereas*, Defendant’s “Points and Authorities” are submitted in written form, and served upon the State (Prosecutor) when a Defense Motion is filed or in advance of the date set for a Hearing on Defendant’s Motion; however, the State may, but is not required to file, any written “Points and Authorities” in opposition prior to or even at the Hearing on a Defense Motion;

*Whereas*, the foregoing current protocol in Criminal Cases implicates Equal Protection and Due Process concerns, by reason of Counsel for the Defendant being blind-sided; which places both Defense Counsel and Defendant at a marked disadvantage by allowing the State to orally cite and argue previously undisclosed Authorities at the Hearing;

*Whereas*, the current permissive protocol in favor of the State deprives the Defense Counsel (and Defendant) of not having the opportunity to; read, analyze, and distinguish such previously undisclosed Oral Authorities; and, thereby offends the Presumption of Innocence;

*Whereas*, Oregon Courts may be hindered by the lack of Pre-Hearing review and analysis of the State’s previously undisclosed Oral Authorities;

*Whereas*, the current protocol is inherently unfair because, it places the State at an unwarranted advantage upon matters involving; Due Process implicating fundamental fairness, the rule of law, and Equal Access to Justice;

*Whereas*, as Members of the Oregon State Bar, we have taken an Oath to Support the Constitution; and, are dedicated to supporting the Oregon State Bar Mission providing Equal Access to Justice;

*Whereas*, as Members of the Oregon State Bar, we owe an ethical duty to zealously represent our Clients in Criminal Cases, most often implicating Liberty Interests;

*Whereas*, as Members of the Oregon State Bar, Members of the House of Delegates or Members of the Board of Governors, we should seek to provide Equal Access to Justice by abolishing the current one-sided protocol that provides the State with an unfair advantage at critical stages in Criminal Cases; now, therefore, be it

*Resolved*, that the House of Delegates recommend that the Board of Governors study how the Mission of the Oregon State Bar’s furtherance of Equal Access to Justice and respect for the Rule of Law will be benefited by abolition of the unjust present protocol of allowing the State to submit Oral Authorities during Motion Hearings without disclosing or filing any advance written “Points and Authorities.”

## Fiscal Impact

None provided; however, transparency in Criminal Case Proceedings will foreseeably assist Circuit Courts in applying the correct Rule of Law, which in turn may reduce costs by reducing the number of Criminal Case Appeals.

*Presenter:*

*Danny Lang, HOD, Region 3*

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### **9. Ensuring the Justice Across Oregon Stipend for Summer Employment in Rural Oregon Serves All Rural Communities (Delegate Resolution No. 3)**

*Whereas*, it is the policy of the Oregon State Bar to advance justice throughout Oregon, in urban and rural communities alike;

*Whereas*, many rural communities in Oregon face significant unmet legal needs, yet struggle to attract new members of the legal profession who could serve as prosecutors, defense attorneys, pro bono service providers, and practitioners in essential fields such as property law and family law;

*Whereas*, the Oregon State Bar administers an annual Justice Across Oregon Stipend program, which incentivizes law students to explore summer legal opportunities in rural Oregon by providing students receiving a summer stipend with supplementary funding if they work in less populated areas of the state;

*Whereas*, law students frequently accept post-graduate employment in the communities or at the organizations where they worked during their summers in law school;

*Whereas*, for purposes of the Justice Across Oregon Stipend, the Oregon State Bar currently defines “rural Oregon” as “anywhere along the Oregon coast, east of the Cascade Mountains, or south of, and including, Roseburg,” with other communities only eligible on a case-by-case basis;

*Whereas*, the Oregon Office of Rural Health defines “rural Oregon” as “any geographic area . . . ten or more miles from the centroid of a population center of 40,000 people or more,” and maintains a database designating each Oregon community as either urban or rural;

*Whereas*, the Justice Across Oregon Stipend’s current definition of “rural Oregon” excludes many jurisdictions considered by the Office of Rural Health to be rural, including northern Douglas County, southern Lane County, substantial portions of the Willamette Valley, and mountain communities within, but not east of, the Cascade Mountains; now, therefore, it be

*Resolved*, that, for purposes of administering the Justice Across Oregon Stipend, the Oregon State Bar shall henceforth define “rural Oregon” as “any geographic area in Oregon along the coast, east of the Cascade Mountains, or south of, and including, Cottage Grove, or otherwise located ten or more miles from the centroid of a population center of 40,000 people or more.”

## Financial Impact

None stated by the delegate.

*Presenters:*

*David Dorfman, HOD, Region 8*

*Jake Klonoski, HOD, Region 8*

*Evan Gautier, HOD, Region 8*

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### **10. New Tier of Annual License Fees for Members Active for Less than 5 Years (Delegate Resolution No. 4)**

*Whereas*, the Oregon State Bar understands that the first several years of practice can be financially challenging for newly-licensed legal professionals;

*Whereas*, the Oregon State Bar 2017 Economic Survey – Report of Findings (available at <https://www.osbar.org/docs/resources/Econsurveys/17EconomicSurvey.pdf>) demonstrates, both in Oregon and nationwide, that the average attorney earns less during her first six years of practice than in the years thereafter;

*Whereas*, the average recent law school graduate carries approximately \$112,000 in student loan debt, which in many cases impedes the ability of such attorneys to pursue public service, legal entrepreneurship, public interest work, or other careers they might otherwise envision;

*Whereas*, a diverse group of state bar associations - among them Hawaii, Massachusetts, Minnesota, Nevada, New York, North Dakota, Rhode Island, and Texas - have recognized that after five years of active practice legal professionals are better positioned to financially support their respective state bar organization, and therefore have created a separate tier of membership dues for active members with less than five years of legal practice;

*Whereas*, ORS 9.191(3) allows the Board of Governors to “consider . . . time periods of membership” in establishing annual membership fees for legal professionals;

*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); now, therefore, be it

*Resolved*, that

1. the House of Delegates recommends that the Board of Governors of the Oregon State Bar authorize the creation of a separate tier of membership fees for Oregon State Bar members active in any jurisdiction under five years or for a similar duration of time; and that
2. the House of Delegates recommends that the Board of Governors consider an equitable assignment of fees to this new tier of active bar members, as well as consider equitable

changes to fees assigned to existing tiers, reflecting the economic realities of experienced and newer legal professionals; and that

3. the House of Delegates further recommends that the Board of Governors also consider other appropriate issues of equity permissible under Oregon statute during the creation of a separate tier of membership fees for Oregon State Bar members active in any jurisdiction under five years or for a similar duration of time; and that
4. the Board of Governors shall present the results of its deliberation on the new membership fee tiers to the House of Delegates at the 2019 House of Delegates meeting for consideration pursuant to ORS 9.191, provided no such changes shall be implemented prior to the 2020 House of Delegates meeting.

**Financial Impact**

None stated.

*Presenters:*

*Jake Klonoski, HOD, Region 8  
David Dorfman, HOD, Region 8  
Evan Gautier, HOD, Region 8*

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**11. In Memoriam  
(Board of Governors Resolution No. 1)**

*Resolved,* That the OSB House of Delegates and members assembled stand for a moment of silence in honor of the members of the Oregon State Bar who have died since the 2017 House of Delegates Meeting.

*DRAFT*

*Presenters:  
, BOG, Region  
, BOG, Region  
, BOG, Region*

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**12. Veterans Day Remembrance**  
**(Board of Governors Resolution No. 2)**

*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:*  
*BOG, Region*

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DRAFT

## TASK FORCE CHAIRS

Bree Buchanan  
James C. Coyle

## ENTITIES REPRESENTED:

ABA LAW PRACTICE DIVISION  
ABA CPR PROFESSIONALISM  
ABA/HAZELDEN STUDY  
APRL  
ALPS  
CoLAP  
CONFERENCE OF CHIEF JUSTICES  
NCBE  
NOBC

## TASK FORCE MEMBERS:

Anne Brafford  
Don Campbell  
Josh Camson  
Charles Gruber  
Terry Harrell  
David Jaffe  
Tracy Kepler  
Patrick Krill  
Chief Justice Donald Lemons  
Sarah Myers  
Chris Newbold  
Jayne Reardon  
Judge David Shaheed  
Lynda Shely  
William Slease

## STAFF ATTORNEY:

Jonathan White

# NATIONAL TASK FORCE ON LAWYER WELL-BEING

Creating a Movement To Improve  
Well-Being in the Legal Profession

August 14, 2017

Enclosed is a copy of *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* from the National Task Force on Lawyer Well-Being. The Task Force was conceptualized and initiated by the ABA Commission on Lawyer Assistance Programs (CoLAP), the National Organization of Bar Counsel (NOBC), and the Association of Professional Responsibility Lawyers (APRL). It is a collection of entities within and outside the ABA that was created in August 2016. Its participating entities currently include the following: ABA CoLAP; ABA Standing Committee on Professionalism; ABA Center for Professional Responsibility; ABA Young Lawyers Division; ABA Law Practice Division Attorney Wellbeing Committee; The National Organization of Bar Counsel; Association of Professional Responsibility Lawyers; National Conference of Chief Justices; and National Conference of Bar Examiners. Additionally, CoLAP was a co-sponsor of the 2016 ABA CoLAP and Hazelden Betty Ford Foundation's study of mental health and substance use disorders among lawyers and of the 2016 Survey of Law Student Well-Being.

To be a good lawyer, one has to be a healthy lawyer. Sadly, our profession is falling short when it comes to well-being. The two studies referenced above reveal that too many lawyers and law students experience chronic stress and high rates of depression and substance use. These findings are incompatible with a sustainable legal profession, and they raise troubling implications for many lawyers' basic competence. This research suggests that the current state of lawyers' health cannot support a profession dedicated to client service and dependent on the public trust.

The legal profession is already struggling. Our profession confronts a dwindling market share as the public turns to more accessible, affordable alternative legal service providers. We are at a crossroads. To maintain public confidence in the profession, to meet the need for innovation in how we deliver legal services, to increase access to justice, and to reduce the level of toxicity that has allowed mental health and substance use disorders to fester among our colleagues, we have to act now. Change will require a wide-eyed and candid assessment of our members' state of being, accompanied by courageous commitment to re-envisioning what it means to live the life of a lawyer.

This report's recommendations focus on five central themes: (1) identifying stakeholders and the role each of us can play in reducing the level of toxicity in our profession, (2) eliminating the stigma associated with help-seeking behaviors, (3) emphasizing that well-being is an indispensable part of a lawyer's duty of competence, (4) educating lawyers, judges, and law students on lawyer well-being issues, and (5) taking small, incremental steps to change how law is practiced and how lawyers are regulated to instill greater well-being in the profession.

The members of this Task Force make the following recommendations after extended deliberation. We recognize this number of recommendations may seem overwhelming at first. Thus we also provide proposed state action plans with simple checklists. These help each stakeholder inventory their current system and explore the recommendations relevant to their group. We invite you to read this report, which sets forth the basis for why the legal profession is at a tipping point, and we present these recommendations and action plans for building a more positive future. We call on you to take action and hear our clarion call. The time is now to use your experience, status, and leadership to construct a profession built on greater well-being, increased competence, and greater public trust.

Sincerely,

Bree Buchanan, Esq.  
Task Force Co-Chair  
Director  
Texas Lawyers Assistance Program  
State Bar of Texas

James C. Coyle, Esq.  
Task Force Co-Chair  
Attorney Regulation Counsel  
Colorado Supreme Court

*"Lawyers, judges and law students are faced with an increasingly competitive and stressful profession. Studies show that substance use, addiction and mental disorders, including depression and thoughts of suicide—often unrecognized—are at shockingly high rates. As a consequence the National Task Force on Lawyer Well-being, under the aegis of CoLAP (the ABA Commission on Lawyer Assistance programs) has been formed to promote nationwide awareness, recognition and treatment. This Task Force deserves the strong support of every lawyer and bar association."*

*David R Brink\**  
*Past President*  
*American Bar Association*

\* David R. Brink (ABA President 1981-82) passed away in July 2017 at the age of 97. He tirelessly supported the work of lawyer assistance programs across the nation, and was a beacon of hope in the legal profession for those seeking recovery.

# THE PATH TO LAWYER WELL-BEING:

Practical Recommendations  
For Positive Change

[ THE REPORT OF THE  
NATIONAL TASK FORCE ON  
LAWYER WELL-BEING ]

August 2017

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7. Enhance Lawyers' Sense of Control.
8. Provide High-Quality Educational Programs and Materials About Lawyer Well-Being.
9. Guide and Support The Transition of Older Lawyers.
10. De-emphasize Alcohol at Social Events.
11. Use Monitoring to Support Recovery from Substance Use Disorders.
12. Begin a Dialogue About Suicide Prevention.
13. Support A Lawyer Well-Being Index to Measure The Profession's Progress.

### PART II – SPECIFIC STAKEHOLDER RECOMMENDATIONS

#### RECOMMENDATIONS FOR JUDGES / p. 22

14. Communicate that Well-Being Is a Priority.
15. Develop Policies for Impaired Judges.

16. Reduce Stigma of Mental Health and Substance Use Disorders.
17. Conduct Judicial Well-Being Surveys.
18. Provide Well-Being Programming for Judges and Staff.
19. Monitor for Impaired Lawyers and Partner with Lawyer Assistance Programs.

#### RECOMMENDATIONS FOR REGULATORS / p. 25

20. Take Actions to Meaningfully Communicate That Lawyer Well-Being is a Priority.
  - 20.1 Adopt Regulatory Objectives That Prioritize Lawyer Well-Being.
  - 20.2 Modify the Rules of Professional Responsibility to Endorse Well-Being as Part of a Lawyer's Duty of Competence.
  - 20.3 Expand Continuing Education Requirements to Include Well-Being Topics.
  - 20.4 Require Law Schools to Create Well-Being Education for Students as an Accreditation Requirement.
21. Adjust the Admissions Process to Support Law Student Well-Being.
  - 21.1 Re-Evaluate Bar Application Inquiries About Mental Health History.
  - 21.2 Adopt Essential Eligibility Admission Requirements.
  - 21.3 Adopt a Rule for Conditional Admission to Practice Law with Specific Requirements and Conditions.
  - 21.4 Publish Data Reflecting Low Rate of Denied Admissions Due to Mental Health Disorders and Substance Use.
22. Adjust Lawyer Regulations to Support Well-Being.
  - 22.1 Implement Proactive Management-Based Programs (PMBP) That Include Lawyer Well-Being Components.
  - 22.2 Adopt a Centralized Grievance Intake System to Promptly Identify Well-Being Concerns.

- 22.3 Modify Confidentiality Rules to Allow One-Way Sharing of Lawyer Well-Being Related Information from Regulators to Lawyer Assistance Programs.
- 22.4 Adopt Diversion Programs and Other Alternatives to Discipline That Are Proven.
- 23. Add Well-Being-Related Questions to the Multistate Professional Responsibility Exam (MPRE).

- 31. Commit Resources for Onsite Professional Counselors.
- 32. Facilitate a Confidential Recovery Network.
- 33. Provide Education Opportunities on Well-Being Related Topics.
  - 33.1 Provide Well-Being Programming During the 1L Year.
  - 33.2 Create a Well-Being Course and Lecture Series for Students.
- 34. Discourage Alcohol-Centered Social Events.
- 35. Conduct Anonymous Surveys Relating to Student Well-Being.

### RECOMMENDATIONS FOR LEGAL EMPLOYERS / p. 31

- 24. Establish Organizational Infrastructure to Promote Well-Being.
  - 24.1 Form a Lawyer Well-Being Committee.
  - 24.2 Assess Lawyers' Well-Being.
- 25. Establish Policies and Practices to Support Lawyer Well-Being.
  - 25.1 Monitor for Signs of Work Addiction and Poor Self-Care.
  - 25.2 Actively Combat Social Isolation and Encourage Interconnectivity.
- 26. Provide Training and Education on Well-Being, Including During New Lawyer Orientation.
  - 26.1 Emphasize a Service-Centered Mission.
  - 26.2 Create Standards, Align Incentives, and Give Feedback.

### RECOMMENDATIONS FOR BAR ASSOCIATIONS / p. 41

- 36. Encourage Education on Well-Being Topics in Association with Lawyer Assistance Programs.
  - 36.1 Sponsor High-Quality CLE Programming on Well-Being-Related Topics.
  - 36.2 Create Educational Materials to Support Individual Well-Being and "Best Practices" for Legal Organizations.
  - 36.3 Train Staff to Be Aware of Lawyer Assistance Program Resources and Refer Members.
- 37. Sponsor Empirical Research on Lawyer Well-Being as Part of Annual Member Surveys.
- 38. Launch a Lawyer Well-Being Committee.
- 39. Serve as an Example of Best Practices Relating to Lawyer Well-Being at Bar Association Events.

### RECOMMENDATIONS FOR LAW SCHOOLS / p. 35

- 27. Create Best Practices for Detecting and Assisting Students Experiencing Psychological Distress.
  - 27.1 Provide Training to Faculty Members Relating to Student Mental Health and Substance Use Disorders.
  - 27.2 Adopt a Uniform Attendance Policy to Detect Early Warning Signs of Students in Crisis.
  - 27.3 Provide Mental Health and Substance Use Disorder Resources.
- 28. Assess Law School Practices and Offer Faculty Education on Promoting Well-Being in the Classroom.
- 29. Empower Students to Help Fellow Students in Need.
- 30. Include Well-Being Topics in Courses on Professional Responsibility.

### RECOMMENDATIONS FOR LAWYERS PROFESSIONAL LIABILITY CARRIERS / p. 43

- 40. Actively Support Lawyer Assistance Programs.
- 41. Emphasize Well-Being in Loss Prevention Programs.
- 42. Incentivize Desired Behavior in Underwriting Law Firm Risk.
- 43. Collect Data When Lawyer Impairment is a Contributing Factor to Claims Activity.

### RECOMMENDATIONS FOR LAWYERS ASSISTANCE PROGRAMS / p. 45

- 44. Lawyers Assistance Programs Should Be Appropriately Organized and Funded.

- 44.1 Pursue Stable, Adequate Funding.
- 44.2 Emphasize Confidentiality.
- 44.3 Develop High-Quality Well-Being Programming.
- 44.4 Lawyer Assistance Programs' Foundational Elements.

## CONCLUSION / p. 47

### Appendix A / p. 48

#### State Action Plans Checklists

### Appendix B / p. 50

#### Example Educational Topics for Lawyer Well-Being

- 8.1 Work Engagement vs. Burnout.
- 8.2 Stress.
- 8.3 Resilience & Optimism.
- 8.4 Mindfulness Meditation.
- 8.5 Rejuvenation Periods to Recover from Stress.
- 8.6 Physical Activity.
- 8.7 Leader Development & Training.
- 8.8 Control & Autonomy.
- 8.9 Conflict Management.
- 8.10 Work-Life Conflict.
- 8.11 Meaning & Purpose.
- 8.12 Substance Use and Mental Health Disorders.
- 8.13 Additional Topics.

### Appendix C / p. 58

#### Appendix to Recommendation 9: Guide and Support The Transition of Older Lawyers.

### Appendix D / p. 59

#### Appendix to Recommendation 25: Topics for Legal Employers' Audit of Well-Being Related Policies and Practices.

### Appendix E / p. 61

#### Appendix to Recommendation 33.2: Creating a Well-Being Course and Lecture Series for Law Students.

### Appendix F / p. 63

#### Task Force Member Biographies and Acknowledgments

# THE PATH TO LAWYER WELL-BEING: Practical Recommendations For Positive Change

Although the legal profession has known for years that many of its students and practitioners are languishing, far too little has been done to address it. Recent studies show we can no longer continue to ignore the problems. In 2016, the American Bar Association (ABA) Commission on Lawyer Assistance Programs and Hazelden Betty Ford Foundation published their study of nearly 13,000 currently-practicing lawyers [the “Study”]. It found that between 21 and 36 percent qualify as problem drinkers, and that approximately 28 percent, 19 percent, and 23 percent are struggling with some level of depression, anxiety, and stress, respectively.<sup>1</sup> The parade of difficulties also includes suicide, social alienation, work addiction, sleep deprivation, job dissatisfaction, a “diversity crisis,” complaints of work-life conflict, incivility, a narrowing of values so that profit predominates, and negative public perception.<sup>2</sup> Notably, the Study found that younger lawyers in the first ten years of practice and those working in private firms experience the highest rates of problem drinking and depression. The budding impairment of many of the future generation of lawyers should be alarming to everyone. Too many face less productive, less satisfying, and more troubled career paths.

Additionally, 15 law schools and over 3,300 law students participated in the Survey of Law Student Well-Being, the results of which were released in 2016.<sup>3</sup> It found

that 17 percent experienced some level of depression, 14 percent experienced severe anxiety, 23 percent had mild or moderate anxiety, and six percent reported serious suicidal thoughts in the past year. As to alcohol use, 43 percent reported binge drinking at least once in the prior two weeks and nearly one-quarter (22 percent) reported binge-drinking two or more times during that period. One-quarter fell into the category of being at risk for alcoholism for which further screening was recommended.

The results from both surveys signal an elevated risk in the legal community for mental health and substance use disorders tightly intertwined with an alcohol-based social culture. The analysis of the problem cannot end there, however. The studies reflect that the majority of lawyers and law students do not have a mental health or substance use disorder. But that does not mean that they’re thriving. Many lawyers experience a “profound ambivalence” about their work,<sup>4</sup> and different sectors of the profession vary in their levels of satisfaction and well-being.<sup>5</sup>

Given this data, lawyer well-being issues can no longer be ignored. Acting for the benefit of lawyers who are functioning below their ability and for those suffering due to substance use and mental health disorders, the National Task Force on Lawyer Well-Being urges our profession’s leaders to act.

<sup>1</sup>P. R. Krill, R. Johnson, & L. Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46 (2016).

<sup>2</sup>A. M. Brafford, *Building the Positive Law Firm: The Legal Profession At Its Best* (August 1, 2014) (Master’s thesis, Univ. Pa., on file with U. Pa. Scholarly Commons Database), available at [http://repository.upenn.edu/mapp\\_capstone/62/](http://repository.upenn.edu/mapp_capstone/62/).

<sup>3</sup>J. M. Organ, D. Jaffe, & K. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116 (2016).

<sup>4</sup>See D. L. Chambers, *Overstating the Satisfaction of Lawyers*, 39 LAW & SOC. INQUIRY 1 (2013).

<sup>5</sup>J. M. Organ, *What Do We Know About the Satisfaction/Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being*, 8 U. ST. THOMAS L. J. 225 (2011); L. S. Krieger & K. M. Sheldon, *What Makes Lawyers Happy? Transcending the Anecdotes with Data from 6200 Lawyers*, 83 GEO. WASH. L. REV. 554 (2015).

## REASONS TO TAKE ACTION

We offer three reasons to take action: organizational effectiveness, ethical integrity, and humanitarian concerns.

**First**, lawyer well-being contributes to organizational success—in law firms, corporations, and government entities. If cognitive functioning is impaired as explained above, legal professionals will be unable to do their best work. For law firms and corporations, lawyer health is an important form of human capital that can provide a competitive advantage.<sup>6</sup>

For example, job satisfaction predicts retention and performance.<sup>7</sup> Gallup Corporation has done years of research showing that worker well-being in the form of engagement is linked to a host of organizational success factors, including lower turnover, high client satisfaction,



### Reasons to Improve Attorney Well-Being

- ✓ Good for business
- ✓ Good for clients
- ✓ The right thing to do

and higher productivity and profitability. The Gallup research also shows that few organizations fully benefit from their human capital because most employees (68 percent) are not engaged.<sup>8</sup> Reducing turnover is especially important for law firms, where turnover rates can be high. For example, a 2016 survey by Law360 found that over 40 percent of lawyers reported that they were likely or very likely to leave their current law firms in the next year.<sup>9</sup> This high turnover rate for law firms is expensive—with estimated costs for larger firms of \$25 million every year.<sup>10</sup> In short, enhancing lawyer health and well-being is good business and makes sound financial sense.

**Second**, lawyer well-being influences ethics and professionalism. Rule 1.1 of the ABA’s Model Rules of Professional Conduct requires lawyers to “provide competent representation.” Rule 1.3 requires diligence in client representation, and Rules 4.1 through 4.4 regulate working with people other than clients. Minimum competence is critical to protecting clients and allows lawyers to avoid discipline. But it will not enable them to live up to the aspirational goal articulated in the Preamble to the ABA’s Model Rules of Professional Conduct, which calls lawyers to “strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.”

Troubled lawyers can struggle with even minimum competence. At least one author suggests that 40 to 70 percent of disciplinary proceedings and malpractice claims against lawyers involve substance use or depression, and often both.<sup>11</sup> This can be explained, in part, by declining mental capacity due to these conditions. For example, major depression is associated

<sup>6</sup> C. Keyes & J. Grzywacz, *Health as a Complete State: The Added Value in Work Performance and Healthcare Costs*, 47 J. OCCUPATIONAL & ENVTL. MED. 523 (2005).

<sup>7</sup> T. A. Judge & R. Klinger, *Promote Job Satisfaction through Mental Challenge*, in HANDBOOK OF PRINCIPLES OF ORGANIZATIONAL BEHAV. (E. A. Locke ed., 2009).

<sup>8</sup> J. K. HARTER, F. L. SCHMIDT, E. A. KILLHAM, & J. W. ASPLUND, Q12 META-ANALYSIS, GALLUP CONSULTING (2006), [https://strengths.gallup.com/private/resources/q12meta-analysis\\_flyer\\_gen\\_08%2008\\_bp.pdf](https://strengths.gallup.com/private/resources/q12meta-analysis_flyer_gen_08%2008_bp.pdf); see also Brafford, *supra* note 2, for a summary of studies linking engagement and other positive employee states to business success factors.

<sup>9</sup> C. Violante, *Law360’s 2016 Lawyer Satisfaction Survey: By the Numbers*, Law360, Sept. 4, 2016, <https://www.law360.com/articles/833246/law360-s-2016-lawyer-satisfaction-survey-by-the-numbers>.

<sup>10</sup> M. Levin & B. MacEwen, *Assessing Lawyer Traits & Finding a Fit for Success Introducing the Sheffield Legal Assessment (2014)* (unpublished), available at <http://therightprofile.com/wp-content/uploads/Attorney-Trait-Assessment-Study-Whitepaper-from-The-Right-Profile.pdf> (discussing associate turnover statistics and estimated cost of turnover in large law firms).

<sup>11</sup> D. B. Marlowe, *Alcoholism, Symptoms, Causes & Treatments*, in STRESS MANAGEMENT FOR LAWYERS 104-130 (Amiram Elwork ed., 2d ed., 1997) (cited in M. A. Silver, *Substance Abuse, Stress, Mental Health and The Legal Profession*, NEW YORK STATE LAW. ASSISTANT TRUST (2004), available at <http://www.nylat.org/documents/courseinbox.pdf>).

with impaired executive functioning, including diminished memory, attention, and problem-solving. Well-functioning executive capacities are needed to make good decisions and evaluate risks, plan for the future, prioritize and sequence actions, and cope with new situations. Further, some types of cognitive impairment persist in up to 60 percent of individuals with depression even after mood symptoms have diminished, making prevention strategies essential.<sup>12</sup> For alcohol abuse, the majority of abusers (up to 80 percent) experience mild to severe cognitive impairment.<sup>13</sup> Deficits are particularly severe in executive functions, especially in problem-solving, abstraction, planning, organizing, and working memory—core features of competent lawyering.

**Third**, from a humanitarian perspective, promoting well-being is the right thing to do. Untreated mental health and substance use disorders ruin lives and careers. They affect too many of our colleagues. Though our profession prioritizes individualism and self-sufficiency, we all contribute to, and are affected by, the collective legal culture. Whether that culture is toxic or sustaining is up to us. Our interdependence creates a joint responsibility for solutions.

## DEFINING “LAWYER WELL-BEING”

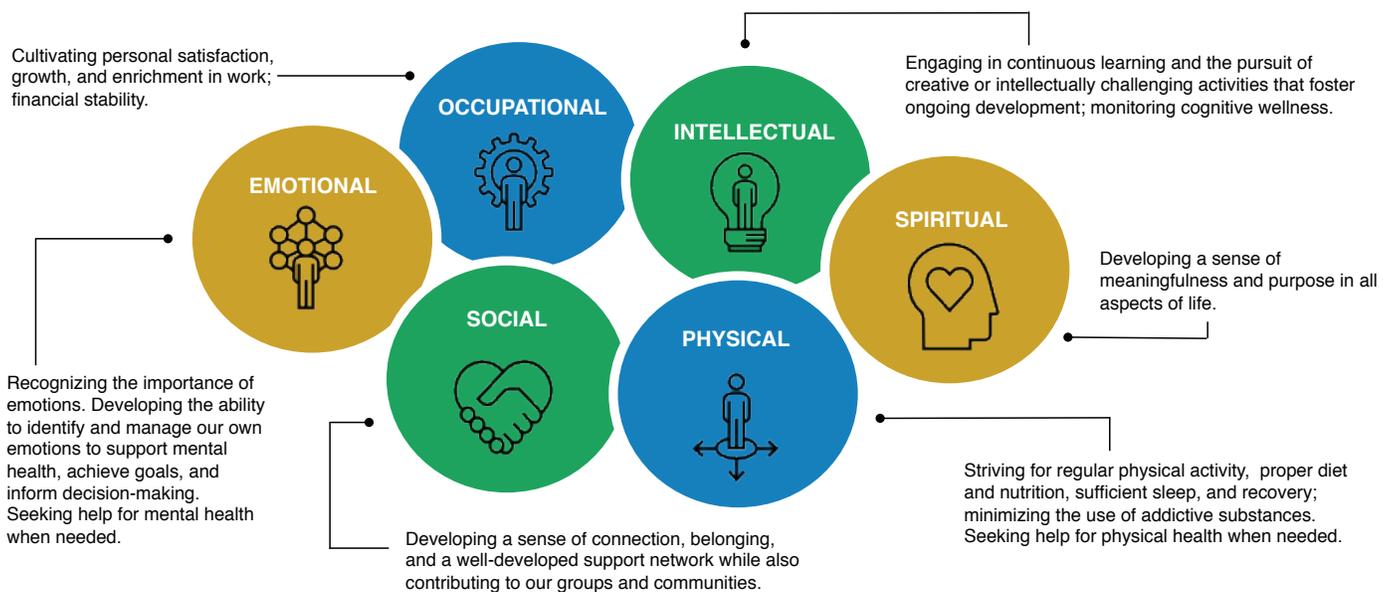
We define lawyer well-being as a continuous process whereby lawyers seek to thrive in each of the following areas: emotional health, occupational pursuits, creative or intellectual endeavors, sense of spirituality or greater purpose in life, physical health, and social connections with others. Lawyer well-being is part of a lawyer’s

# “Well-Being”: A Continuous process toward thriving across all life dimensions.

ethical duty of competence. It includes lawyers’ ability to make healthy, positive work/life choices to assure not only a quality of life within their families and communities, but also to help them make responsible decisions for their clients. It includes maintaining their own long term well-being. This definition highlights that complete health

### Defining Lawyer Well-Being

A continuous process in which lawyers strive for thriving in each dimension of their lives:



<sup>12</sup>P. L. Rock, J. P. Roiser, W. J. Riedel, A. D. Blackwell, *A Cognitive Impairment in Depression: A Systematic Review and Meta-Analysis*, 44 PSYCHOL. MED. 2029 (2014); H. R. Snyder, *Major Depressive Disorder is Associated with Broad Impairments on Neuropsychological Measures of Executive Function: A Meta-Analysis and Review*, 139 PSYCHOL. BULL. 81 (2013).

<sup>13</sup>C. Smeraldi, S. M. Angelone, M. Movalli, M. Cavicchioli, G. Mazza, A. Notaristefano, & C. Maffei, *Testing Three Theories of Cognitive Dysfunction in Alcohol Abuse*, 21 J. PSYCHOPATHOLOGY 125 (2015).<sup>14</sup>The WHO’s definition of “health” can be found at: <http://www.who.int/about/mission/en>. The definition of “mental health” can be found at: [http://www.who.int/features/factfiles/mental\\_health/en/](http://www.who.int/features/factfiles/mental_health/en/).

is not defined solely by the absence of illness; it includes a positive state of wellness.

To arrive at this definition, the Task Force consulted other prominent well-being definitions and social science research, which emphasize that well-being is not limited to: (1) an absence of illness, (2) feeling happy all the time, or (3) intra-individual processes—context matters. For example, the World Health Organization (WHO) defines “health” as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.” It defines “mental health” as “a state of well-being in which every individual realizes his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to her or his community.”<sup>14</sup>

Social science research also emphasizes that “well-being” is not defined solely by an absence of dysfunction; but nor is it limited to feeling “happy” or filled with positive emotions. The concept of well-being in social science research is multi-dimensional and includes, for example, engagement in interesting activities, having close relationships and a sense of belonging, developing confidence through mastery, achieving goals that matter to us, meaning and purpose, a sense of autonomy and control, self-acceptance, and personal growth. This multi-dimensional approach underscores that a positive state of well-being is not synonymous with feeling happy or experiencing positive emotions. It is much broader.

Another common theme in social science research is that well-being is not just an intra-personal process: context powerfully influences it.<sup>15</sup> Consistent with this view, a study of world-wide survey data found that five factors constitute the key elements of well-being: career, social relationships, community, health, and finances.<sup>16</sup>

The Task Force chose the term “well-being” based on the view that the terms “health” or “wellness” connote only physical health or the absence of illness. Our definition of “lawyer well-being” embraces the multi-dimensional

concept of mental health and the importance of context to complete health.

## OUR CALL TO ACTION

The benefits of increased lawyer well-being are compelling and the cost of lawyer impairment are too great to ignore. There has never been a better or more important time for all sectors of the profession to get serious about the substance use and mental health of ourselves and those around us. The publication of this report, in and of itself, serves the vital role of bringing conversations about these conditions out in the open. In the following pages, we present recommendations for many stakeholders in the legal profession including the judiciary, regulators, legal employers, law schools, bar associations, lawyers’ professional liability carriers, and lawyer assistance programs. The recommendations revolve around five core steps intended to build a more sustainable culture:

- (1) Identifying stakeholders and the role that each of us can play in reducing the level of toxicity in our profession.
- (2) Ending the stigma surrounding help-seeking behaviors. This report contains numerous recommendations to combat the stigma that seeking help will lead to negative professional consequences.
- (3) Emphasizing that well-being is an indispensable part of a lawyer’s duty of competence. Among the report’s recommendations are steps stakeholders can take to highlight the tie-in between competence and well-being. These include giving this connection formal recognition through modifying the Rules of Professional Conduct or their comments to reference well-being.
- (4) Expanding educational outreach and programming on well-being issues. We need to educate lawyers, judges, and law students on well-being issues. This includes instruction in recognizing mental health and

<sup>14</sup>The WHO’s definition of “health” can be found at: <http://www.who.int/about/mission/en>. The definition of “mental health” can be found at: [http://www.who.int/features/factfiles/mental\\_health/en/](http://www.who.int/features/factfiles/mental_health/en/)

<sup>15</sup>E.g., I. Prilleltensky, S. Dietz, O. Prilleltensky, N. D. Myers, C. L. Rubenstein, Y. Jin, & A. McMahon, *Assessing Multidimensional Well-Being: Development and Validation of the I COPPE Scale*, 43 J. CMTY. PSYCHOL. 199 (2015).

<sup>16</sup>T. RATH & J. HARTEK, WELL-BEING: THE FIVE ESSENTIAL ELEMENTS (2010).

substance use disorders as well as navigating the practice of law in a healthy manner. To implement this recommendation effectively, more resources need to be devoted to promoting well-being.

- (5) Changing the tone of the profession one small step at a time. This report contains a number of small-scale recommendations, such as allowing lawyers to earn continuing legal education (CLE) credit for well-being workshops or de-emphasizing alcohol at bar association social events. These small steps can start the process necessary to place health, resilience, self-care, and helping others at the forefront of what it means to be a lawyer. Collectively, small steps can lead to transformative cultural change in a profession that has always been, and will remain, demanding.

Historically, law firms, law schools, bar associations, courts, and malpractice insurers have taken a largely hands-off approach to these issues. They have dealt with them only when forced to because of impairment that can no longer be ignored. The dedication and hard work of lawyer assistance programs aside, we have not done enough to help, encourage, or require lawyers to be, get, or stay well. However, the goal of achieving increased lawyer well-being is within our collective reach. The time to redouble our efforts is now.

## RECOMMENDATIONS

Below, the Task Force provides detailed recommendations for minimizing lawyer dysfunction, boosting well-being, and reinforcing the importance of well-being to competence and excellence in practicing law. This section has two main parts. Part I provides general recommendations for all stakeholders in the legal community. Part II provides recommendations tailored to a specific stakeholder: (1) judges, (2) regulators, (3) legal employers, (4) law schools, (5) bar associations, (6) lawyers' professional liability carriers, and (7) lawyer assistance programs.



*“None of us got where we are solely by pulling ourselves up by our bootstraps. We got there because somebody bent down and helped us pick up our boots.” — Thurgood Marshall*

First, we recommend strategies for all stakeholders in the legal profession to play a part in the transformational process aimed at developing a thriving legal profession.

### 1. ACKNOWLEDGE THE PROBLEMS AND TAKE RESPONSIBILITY.

Every sector of the legal profession must support lawyer well-being. Each of us can take a leadership role within our own spheres to change the profession’s mindset from passive denial of problems to proactive support for change. We have the capacity to make a difference.

*For too long, the legal profession has turned a blind eye to widespread health problems.*

For too long, the legal profession has turned a blind eye to widespread health problems. Many in the legal profession have behaved, at best, as if their colleagues’ well-being is none of their business. At worst, some appear to believe that supporting well-being will harm professional success. Many also appear to believe that lawyers’ health problems are solely attributable to their own personal failings for which they are solely responsible.

As to the long-standing psychological distress and substance use problems, many appear to believe that the establishment of lawyer assistance programs—a

necessary but not sufficient step toward a solution—has satisfied any responsibility that the profession might have. Lawyer assistance programs have made incredible strides; however, to meaningfully reduce lawyer distress, enhance well-being, and change legal culture, all corners of the legal profession need to prioritize lawyer health and well-being. It is not solely a job for lawyer assistance programs. Each of us shares responsibility for making it happen.

### 2. USE THIS REPORT AS A LAUNCH PAD FOR A PROFESSION-WIDE ACTION PLAN.

All stakeholders must lead their own efforts aimed at incorporating well-being as an essential component of practicing law, using this report as a launch pad. Changing the culture will not be easy. Critical to this complex endeavor will be the development of a National Action Plan and state-level action plans that continue the effort started in this report. An organized coalition will be necessary to plan, fund, instigate, motivate, and sustain long-term change. The coalition should include, for example, the Conference of Chief Justices, the National Organization of Bar Counsel, the Association of Professional Responsibility Lawyers, the ABA, state bar associations as a whole and specific divisions (young lawyers, lawyer well-being, senior lawyers, etc.), the Commission on Lawyer Assistance Programs, state lawyer assistance programs, other stakeholders that have contributed to this report, and many others.

### 3. LEADERS SHOULD DEMONSTRATE A PERSONAL COMMITMENT TO WELL-BEING.

Policy statements alone do not shift culture. Broad-scale change requires buy-in and role modeling from top

<sup>17</sup>E. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP (2010); R. R. Sims & J. Brinkmann, *Leaders As Moral Role Models*, 35 J. BUS. ETHICS 327 (2002).

leadership.<sup>17</sup> Leaders in the courts, regulators' offices, legal employers, law schools, and bar associations will be closely watched for signals about what is expected. Leaders can create and support change through their own demonstrated commitment to core values and well-being in their own lives and by supporting others in doing the same.<sup>18</sup>

#### 4. FACILITATE, DESTIGMATIZE, AND ENCOURAGE HELP-SEEKING BEHAVIORS.

All stakeholders must take steps to minimize the stigma of mental health and substance use disorders because the stigma prevents lawyers from seeking help.

Research has identified multiple factors that can hinder seeking help for mental health conditions: (1) failure to recognize symptoms; (2) not knowing how to identify or access appropriate treatment or believing it to be a hassle to do so; (3) a culture's negative attitude about such conditions; (4) fear of adverse reactions by others whose opinions are important; (5) feeling ashamed; (6) viewing help-seeking as a sign of weakness, having a strong preference for self-reliance, and/or having a tendency toward perfectionism; (7) fear of career repercussions; (8) concerns about confidentiality; (9) uncertainty about the quality of organizationally-provided therapists or otherwise doubting that treatment will be effective; and (10) lack of time in busy schedules.<sup>19</sup>

The Study identified similar factors. The two most common barriers to seeking treatment for a substance use disorder that lawyers reported were not wanting others to find out they needed help and concerns regarding privacy or confidentiality. Top concerns of law students in the Survey of Law Student Well Being were fear of jeopardizing their academic standing or admission to the practice of law, social stigma, and privacy concerns.<sup>21</sup>

Research also suggests that professionals with hectic, stressful jobs (like many lawyers and law students) are more likely to perceive obstacles for accessing treatment, which can exacerbate depression. The result of these barriers is that, rather than seeking help early, many wait until their symptoms are so severe that they interfere with daily functioning. Similar dynamics likely apply for aging lawyers seeking assistance.

Removing these barriers requires education, skill-building, and stigma-reduction strategies. Research shows that the most effective way to reduce stigma is through direct contact with someone who has personally experienced a relevant disorder. Ideally, this person should be a practicing lawyer or law student (depending on the audience) in order to create a personal connection that lends credibility and combats stigma.<sup>22</sup> Viewing video-taped narratives also is useful, but not as effective as in-person contacts.

The military's "Real Warrior" mental health campaign can serve as one model for the legal profession. It is designed to improve soldiers' education about mental health disorders, reduce stigma, and encourage help-seeking. Because many soldiers (like many lawyers) perceive seeking help as a weakness, the campaign also has sought to re-frame help-seeking as a sign of strength that is important to resilience. It also highlights cultural values that align with seeking psychological help.<sup>23</sup>

#### 5. BUILD RELATIONSHIPS WITH LAWYER WELL-BEING EXPERTS.

##### 5.1. Partner With Lawyer Assistance Programs.

All stakeholders should partner with and ensure stable and sufficient funding for the ABA's Commission on Lawyer Assistance Programs (CoLAP) as well as

<sup>18</sup>L. M. Sama & V. Shoaf, *Ethical Leadership for the Professions: Fostering a Moral Community*, 78 J. BUS. ETHICS 39 (2008).

<sup>19</sup>T. W. Britt, T. M. Greene-Shorridge, S. Brink, Q. B. Nguyen, J. Rath, A. L. Cox, C. W. Hoge, C. A. Castro, *Perceived Stigma and Barriers to Care for Psychological Treatment: Implications for Reactions to Stressors in Different Contexts*, 27 J. SOC. & CLINICAL PSYCHOL. 317 (2008); S. Ey, K. R. Henning, & D. L. Shaw, *Attitudes and Factors Related to Seeking Mental Health Treatment among Medical and Dental Students*, 14 J. C. STUDENT PSYCHOTHERAPY 23 (2000); S. E. Hanisch, C. D. Twomey, A. H. Szeto, U. W. Birner, D. Nowak, & C. Sabariego, *The Effectiveness of Interventions Targeting the Stigma of Mental Illness at the Workplace: A Systematic Review*, 16 BMC PSYCHIATRY 1 (2016); K. S. Jennings, J. H. Cheung, T. W. Britt, K. N. Goguen, S. M. Jeffers, A. L. Peasley, & A. C. Lee, *How Are Perceived Stigma, Self-Stigma, and Self-Reliance Related to Treatment-Seeking? A Three-Path Model*, 38 PSYCHIATRIC REHABILITATION J. 109 (2015); N. G. Wade, D. L. Vogel, P. Armistead-Jehle, S. S. Meit, P. J. Heath, H. A. Strass, *Modeling Stigma, Help-Seeking Attitudes, and Intentions to Seek Behavioral Healthcare in a Clinical Military Sample*, 38 PSYCHIATRIC REHABILITATION J. 135 (2015).

<sup>20</sup>Krill, Johnson, & Albert, *supra* note 1, at 50.

<sup>21</sup>Organ, Jaffe, & Bender, *supra* note 3, at 141.

<sup>22</sup>P. W. Corrigan, S. B. Morris, P. J. Michaels, J. D. Rafacz, & N. Rüsçh, *Challenging the Public Stigma of Mental Illness: a Meta-Analysis of Outcome Studies*, 63 PSYCHIATRIC SERV. 963 (2012).

<sup>23</sup>Wade, Vogel, Armistead-Jehle, Meit, Heath, Strass, *supra* note 19. The Real Warrior website can be found at [www.realwarriors.net](http://www.realwarriors.net).



for state-based lawyer assistance programs. ABA CoLAP and state-based lawyer assistance programs are indispensable partners in efforts to educate and empower the legal profession to identify, treat, and prevent conditions at the root of the current well-being crisis, and to create lawyer-specific programs and access to treatment.<sup>24</sup> Many lawyer assistance programs employ teams of experts that are well-qualified to help lawyers, judges, and law students who experience physical or mental health conditions. Lawyer assistance programs' services are confidential, and many include prevention, intervention, evaluation, counseling, referral to professional help, and on-going monitoring. Many cover a range of well-being-related topics including substance use and mental health disorders, as well as cognitive impairment, process addictions, burnout, and chronic stress. A number also provide services to lawyer discipline and admissions processes (e.g., monitoring and drug and alcohol screening).<sup>25</sup>

Notably, the Study found that, of lawyers who had reported past treatment for alcohol use, those who had used a treatment program specifically tailored to legal professionals reported, on average, significantly lower scores on the current assessment of alcohol use.<sup>26</sup> This at least suggests that lawyer assistance programs, which are specifically tailored to identify and refer lawyers to treatment providers and resources, are a better fit than general treatment programs.

Judges, regulators, legal employers, law schools, and bar associations should ally themselves with lawyer assistance programs to provide the above services. These stakeholders should also promote the services of state lawyer assistance programs. They also should emphasize the confidential nature of those services to reduce barriers to seeking help. Lawyers are reluctant

to seek help for mental health and substance use disorders for fear that doing so might negatively affect their licenses and lead to stigma or judgment of peers.<sup>27</sup> All stakeholders can help combat these fears by clearly communicating about the confidentiality of lawyer assistance programs.

We also recommend coordinating regular meetings with lawyer assistance program directors to create solutions to the problems facing the profession. Lawyer assistance programs can help organizations establish confidential support groups, wellness days, trainings, summits, and/or fairs. Additionally, lawyer assistance programs can serve as a resource for speakers and trainers on lawyer well-being topics, contribute to publications, and provide guidance to those concerned about a lawyer's well-being.

## **5.2. Consult Lawyer Well-Being Committees and Other Types of Well-Being Experts.**

We also recommend partnerships with lawyer well-being committees and other types of organizations and consultants that specialize in relevant topics. For example, the American Bar Association's Law Practice Division established an Attorney Well-Being Committee in 2015. A number of state bars also have well-being committees including Georgia, Indiana, Maryland, South Carolina, and Tennessee.<sup>28</sup> The Florida Bar Association's Young Lawyers Division has a Quality of Life Committee "for enhancing and promoting the quality of life for young lawyers."<sup>29</sup> Some city bar associations also have well-being initiatives, such as the Cincinnati Bar Association's Health and Well-Being Committee.<sup>30</sup> These committees can serve as a resource for education, identifying speakers and trainers, developing materials, and contributing to publications. Many high-quality consultants are also available on well-being subjects.

<sup>24</sup>The ABA Commission on Lawyer Assistance Programs' (CoLAP) website provides numerous resources, including help lines and a directory of state-based law assistant programs. See [http://www.americanbar.org/groups/lawyer\\_assistance.html](http://www.americanbar.org/groups/lawyer_assistance.html).

<sup>25</sup>COMM'N ON LAWYER ASSISTANCE PROGRAMS, AM. BAR ASS'N, 2014 COMPREHENSIVE SURVEY OF LAWYER ASSISTANCE PROGRAMS 34-37 (2014).

<sup>26</sup>Krill, Johnson, & Albert, *supra* note 1, at 50.

<sup>27</sup>*Id.* at 51.

<sup>28</sup>The State Bar of Georgia, "Lawyers Living Well," <https://www.gabar.org/wellness/>; The Indiana State Bar Association Wellness Committee, <https://inbar.site-ym.com/members/group.aspx?id=134020>; Maryland State Bar Association Wellness Committee, <http://www.msba.org/Wellness/default.aspx>; South Carolina Bar Lawyer Wellness Committee, <http://discussions.scbbar.org/public/wellness/index.html>; Tennessee Bar Association Attorney Well Being Committee, <http://www.tba.org/committee/attorney-well-being-committee>.

<sup>29</sup>The Fla. Bar Ass'n, Young Lawyers Division, Committees, Quality of Life, <https://flayld.org/board-of-governors/committees/> (last visited June 8, 2017).

<sup>30</sup>Cincinnati Bar Ass'n Health and Well-Being Committee, <http://www.cincybar.org/groups/health-and-well-being.php> (last visited June 28, 2017).



Care should be taken to ensure that they understand the particular types of stress that affect lawyers.

## 6. FOSTER COLLEGIALLY AND RESPECTFUL ENGAGEMENT THROUGHOUT THE PROFESSION.

We recommend that all stakeholders develop and enforce standards of collegiality and respectful engagement. Judges, regulators, practicing lawyers, law students, and professors continually interact with each other, clients, opposing parties, staff, and many others.<sup>31</sup> Those interactions can either foment a toxic culture that contributes to poor health or can foster a respectful culture that supports well-being. Chronic incivility is corrosive. It depletes energy and motivation, increases burnout, and inflicts emotional and physiological damage. It diminishes productivity, performance, creativity, and helping behaviors.<sup>32</sup>

Civility appears to be declining in the legal profession. For example, in a 1992 study, 42 percent of lawyers and 45 percent of judges believed that civility and professionalism among bar members were significant problems. In a 2007 survey of Illinois lawyers, 72 percent of respondents categorized incivility as a serious or moderately serious problem<sup>33</sup> in the profession. A recent study of over 6,000 lawyers found that lawyers did not generally have a positive view of lawyer or judge professionalism.<sup>34</sup> There is evidence showing that

women lawyers are more frequent targets of incivility and harassment.<sup>36</sup> Legal-industry commentators offer a host of hypotheses to explain the decline in civility.<sup>37</sup> Rather than continuing to puzzle over the causes, we acknowledge the complexity of the problem and invite further thinking on how to address it.

## *Incivility appears to be on the rise.*

As a start, we recommend that bar associations and courts adopt rules of professionalism and civility, such as those that exist in many jurisdictions.<sup>38</sup> Likewise, law firms should adopt their own professionalism standards.<sup>39</sup> Since rules alone will not change culture, all stakeholders should devise strategies to promote wide-scale, voluntary observance of those standards. This should include an expectation that all leaders in the profession be a role model for these standards of professionalism.

Exemplary standards of professionalism are inclusive. Research reflects that organizational diversity and inclusion initiatives are associated with employee well-being, including, for example, general mental and physical health, perceived stress level, job satisfaction, organizational commitment, trust, work engagement,

<sup>31</sup>See C. B. Preston & H. Lawrence, *Incentivizing Lawyers to Play Nice: A National Survey on Civility Standards and Options for Enforcement*, 48 U. MICH. J.L. REFORM 701 (2015); AM. BAR ASS'N RESOL. 108 (August 2011), [http://www.americanbar.org/content/dam/aba/administrative/dispute\\_resolution/civility.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/civility.authcheckdam.pdf); AM. BAR ASS'N RESOL. 105B (August 2014), [http://www.americanbar.org/news/reporter\\_resources/aba-2014-annual-meeting/2014-annual-meeting-house-of-delegates-resolutions/105b.html](http://www.americanbar.org/news/reporter_resources/aba-2014-annual-meeting/2014-annual-meeting-house-of-delegates-resolutions/105b.html).

<sup>32</sup>J. E. Dutton & E. D. Heaphy, *The Power of High-Quality Connections*, in *POSITIVE ORGANIZATIONAL SCHOLARSHIP: FOUNDATIONS OF A NEW DISCIPLINE* 263-278 (K. S. Cameron, J. E. Dutton, & R. E. Quinn eds., 2003); C. M. Pearson & C. L. Porath, *On the Nature, Consequences and Remedies of Workplace Incivility: No Time for "Nice"? Think Again*, 19 ACAD. OF MGMT. EXECUTIVE 7 (2005); B. M. Walsh, V. J. Magley, D. W. Reeves, K. A. Davies-Schriels, M. D. Marmet, & J. A. Gallus, *Assessing Workgroup Norms for Civility: The Development of the Civility Norms Questionnaire-Brief*, 27 J. BUS. PSYCHOL. 407 (2012).

<sup>33</sup>S. S. DAICOFF, *LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES* (2004).

<sup>34</sup>D. E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility As An Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99 (2012); see also IL. SUP. CT. COMM'N ON PROFESSIONALISM, *Survey on Professionalism, A Study of Illinois Lawyers 2007 & Survey on Professionalism, A Study of Illinois Lawyers 2014* (2007 & 2014); L. Brodoff & T. M. Jaasko-Fisher, *WSBA Civility Study*, NW LAWYER, Dec. 2016/Jan. 2017, at 22, available at [http://nwlawyer.wsba.org/nwlawyer/dec\\_2016\\_jan\\_2017?pg=22#pg22](http://nwlawyer.wsba.org/nwlawyer/dec_2016_jan_2017?pg=22#pg22).

<sup>35</sup>Krieger & Sheldon, *supra* note 5.

<sup>36</sup>L. M. Cortina, K. A. Lonsway, V. J. Magley, L. V. Freeman, L. L. Collinworth, M. Hunter, & L. F. Fitzgerald, *What's Gender Got to Do with It? Incivility in the Federal Courts*, 27 LAW & SOC. INQUIRY 235 (2002); see also L. M. Cortina, D. Kabat-Farr, E. A. Leskinen, M. Huerta, & V. J. Magley, *Selective Incivility as Modern Discrimination in Organizations: Evidence and Impact*, 30 J. MGMT. 1579 (2013).

<sup>37</sup>E.g., Campbell, *supra* note 34; A. T. Kronman, *THE LOST LAWYER* (1993); J. Smith, *Lawyers Behaving Badly Get a Dressing Down from Civility Cops*, WALL ST. J., Jan. 27, 2013, at A1; Walsh, Magley, Reeves, Davies-Schriels, Marmet, & Gallus, *supra* note 32.

<sup>38</sup>Examples of professionalism codes can be found on the ABA Center for Professional Responsibility's website: [https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/standingcommitteeonprofessionalism2/professionalism\\_codes.html](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/standingcommitteeonprofessionalism2/professionalism_codes.html); see also AM. BAR ASS'N RESOL. 108 (2011), available at [http://www.americanbar.org/content/dam/aba/directories/policy/2011\\_am\\_108.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2011_am_108.authcheckdam.pdf).

<sup>39</sup>See C. B. Preston & H. Lawrence, *Incentivizing Lawyers to Play Nice: A National Survey on Civility Standards and Options for Enforcement*, 48 U. MICH. J.L. REFORM 701 (2015).



perceptions of organizational fairness, and intentions to remain on the job.<sup>40</sup> A significant contributor to well-being is a sense of organizational belongingness, which has been defined as feeling personally accepted, respected, included, and supported by others. A weak sense of belonging is strongly associated with depressive symptoms.<sup>41</sup> Unfortunately, however, a lack of diversity and inclusion is an entrenched problem in the legal profession.<sup>42</sup> The issue is pronounced for women and minorities in larger law firms.<sup>43</sup>

### 6.1. Promote Diversity and Inclusivity.

Given the above, we recommend that all stakeholders urgently prioritize diversity and inclusion. Regulators and bar associations can play an especially influential role in advocating for initiatives in the profession as a whole and educating on why those initiatives are important to individual and institutional well-being. Examples of relevant initiatives include: scholarships, bar exam grants for qualified applicants, law school orientation programs that highlight the importance of diversity and inclusion, CLE programs focused on diversity in the legal profession, business development symposia for women- and minority-owned law firms, pipeline programming for low-income high school and college students, diversity clerkship programs for law students, studies and reports on the state of diversity within the state's bench and bar, and diversity initiatives in law firms.<sup>44</sup>

### 6.2. Create Meaningful Mentoring and Sponsorship Programs.

Another relevant initiative that fosters inclusiveness and respectful engagement is mentoring. Research has shown that mentorship and sponsorship can aid well-being and career progression for women and diverse professionals. They also reduce lawyer isolation.<sup>46</sup> Those who have participated in legal mentoring report a stronger sense of personal connection with others in the legal community, restored enthusiasm for the legal profession, and more resilience—all of which benefit both mentors and mentees.<sup>47</sup> At least 35 states and the District of Columbia sponsor formal mentoring programs.<sup>48</sup>

## 7. ENHANCE LAWYERS' SENSE OF CONTROL.

Practices that rob lawyers of a sense of autonomy and control over their schedules and lives are especially harmful to their well-being. Research studies show that high job demands paired with a lack of a sense of control breeds depression and other psychological disorders.<sup>49</sup> Research suggests that men in jobs with such characteristics have an elevated risk of alcohol abuse.<sup>50</sup> A recent review of strategies designed to prevent workplace depression found that those designed to improve the perception of control were among the

<sup>40</sup>E.g., M. M. Barak & A. Levin, *Outside of the Corporate Mainstream and Excluded from the Work Community: A Study of Diversity, Job Satisfaction and Well-Being*, 5 COMM., WORK & FAM. 133 (2002); J. Hwang & K. M. Hopkins, *A Structural Equation Model of the Effects of Diversity Characteristics and Inclusion on Organizational Outcomes in the Child Welfare Workforce*, 50 CHILD. & YOUTH SERVS. REV. 44 (2015); see generally G. R. Ferris, S. R. Daniels, & J. C. Sexton, *Race, Stress, and Well-Being in Organizations: An Integrative Conceptualization*, in THE ROLE OF DEMOGRAPHICS IN OCCUPATIONAL STRESS AND WELL-BEING 1-39 (P. L. Perrewé eds., 2014).

<sup>41</sup>W. D. Cockshaw & I. M. Shochet, *The Link Between Belongingness and Depressive Symptoms: An Exploration in the Workplace Interpersonal Context*, 45 AUSTRAL. PSYCHOL. 283 (2010); W. D. Cockshaw, I. M. Shochet & P. L. Obst, *Depression and Belongingness in General and Workplace Contexts: A Cross-Lagged Longitudinal Investigation*, 33 J. SOC. & CLINICAL PSYCHOL. 448 (2014).

<sup>42</sup>D. L. Rhode, *Law Is The Least Diverse Profession in The Nation. And Lawyers Aren't Doing Enough to Change That*, WASH. POST, *Post Everything*, May 27, 2015, available at [https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm\\_term=.a79ad124eb5c1](https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm_term=.a79ad124eb5c1); see also Aviva Culyer, *Diversity in the Practice of Law: How Far Have We Come?*, G.P. SOLO, Sept./Oct. 2012, available at [http://www.americanbar.org/publications/gp\\_solo/2012/september\\_october/diversity\\_practice\\_law\\_how\\_far\\_have\\_we\\_come.html](http://www.americanbar.org/publications/gp_solo/2012/september_october/diversity_practice_law_how_far_have_we_come.html).

<sup>43</sup>L. S. RIKLEEN, NAT'L ASSOC. WOMEN LAWYERS, REPORT OF THE NINTH ANNUAL NAWL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS (2015), available at <http://www.nawl.org/2015nawlsurvey>; S. A. SCHARFL, R. LIEBENBERG, & C. AMALFE, NAT'L ASSOC. WOMEN LAWYERS, REPORT OF THE EIGHTH ANNUAL NAWL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS (2014), available at <http://www.nawl.org/p/bl/et/blogid=10&blogaid=56>; see also FLA. BAR ASS'N YOUNG LAW. DIVISION COMM'N ON WOMEN, <https://flayld.org/commission-on-women/>.

<sup>44</sup>See C. U. Stacy, *Trends and Innovations Boosting Diversity in the Law and Beyond*, L. PRAC. TODAY, March 14, 2016, available at <http://www.lawpracticetoday.org/article/trends-and-innovations-boosting-diversity-in-the-law-and-beyond>; IL. SUP. CT. COMM'N ON PROFESSIONALISM, DIVERSITY & INCLUSION TOOLKIT, <https://www.2civility.org/programs/cle/cle-resources/diversity-inclusion>.

<sup>45</sup>Ferris, Daniels, & Sexton, *supra* note 40; A. Ramaswami, G. F. Dreher, R. Bretz, & C. Wiethoff, *The Interactive Effects of Gender and Mentoring on Career Attainment: Making the Case for Female Lawyers*, 37 J. CAREER DEV. 692 (2010).

<sup>46</sup>R. NERISON, LAWYERS, ANGER, AND ANXIETY: DEALING WITH THE STRESSES OF THE LEGAL PROFESSION (2010).

<sup>47</sup>D. A. Cotter, *The Positives of Mentoring*, YOUNG LAW. DIV., AM. BAR ASS'N (2017), available at [http://www.americanbar.org/publications/tyl/topics/mentoring/the\\_positives\\_mentoring.html](http://www.americanbar.org/publications/tyl/topics/mentoring/the_positives_mentoring.html); M. M. Heekin, *Implementing Psychological Resilience Training in Law Incubators*, 1 J. EXPERIENTIAL LEARNING 286 (2016).

<sup>48</sup>Of the 35 programs, seven are mandatory (GA, NV, NM, OR, SC, UT, and WY) and some are approved for CLE credits. See the American Bar Association for more information: [http://www.americanbar.org/groups/professional\\_responsibility/resources/professionalism/mentoring.html](http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/mentoring.html).

<sup>49</sup>J-M Woo & T. T. Postolache, *The Impact of Work Environment on Mood Disorders and Suicide: Evidence and Implications*, 7 INT'L J. DISABILITY & HUMAN DEV. 185 (2008); J. M. Griffin, R. Fuhrer, S. A. Stansfeld, & M. Marmot, *The Importance of Low Control at Work and Home on Depression and Anxiety: Do These Effects Vary by Gender and Social Class?*, 54 SOC. SCI. & MED. 783 (2002).

<sup>50</sup>A. J. Crum, P. Salovey, & S. Achor, *Rethinking Stress: The Role of Mindsets in Determining the Stress Response*, 10 J. PERSONALITY & SOC. PSYCHOL. 716 (2013).



most effective.<sup>51</sup> Research confirms that environments that facilitate control and autonomy contribute to optimal functioning and well-being.<sup>52</sup>

We recommend that all stakeholders consider how long-standing structures of the legal system, organizational norms, and embedded expectations might be modified to enhance lawyers' sense of control and support a healthier lifestyle. Courts, clients, colleagues, and opposing lawyers all contribute to this problem. Examples of the types of practices that should be reviewed include the following:

- Practices concerning deadlines such as tight deadlines for completing a large volume of work, limited bases for seeking extensions of time, and ease and promptness of procedures for requesting extensions of time;
- Refusal to permit trial lawyers to extend trial dates to accommodate vacation plans or scheduling trials shortly after the end of a vacation so that lawyers must work during that time;
- Tight deadlines set by clients that are not based on business needs;
- Senior lawyer decision-making in matters about key milestones and deadlines without consulting other members of the litigation team, including junior lawyers;
- Senior lawyers' poor time-management habits that result in repeated emergencies and weekend work for junior lawyers and staff;
- Expectations of 24/7 work schedules and of prompt response to electronic messages at all times; and
- Excessive law school workload, controlling teaching styles, and mandatory grading curves.

## 8. PROVIDE HIGH-QUALITY EDUCATIONAL PROGRAMS ABOUT LAWYER DISTRESS AND WELL-BEING.

All stakeholders should ensure that legal professionals receive training in identifying, addressing, and supporting fellow professionals with mental health and substance use disorders. At a minimum, training should cover the following:

- The warning signs of substance use or mental health disorders, including suicidal thinking;
- How, why, and where to seek help at the first signs of difficulty;
- The relationship between substance use, depression, anxiety, and suicide;
- Freedom from substance use and mental health disorders as an indispensable predicate to fitness to practice;
- How to approach a colleague who may be in trouble;
- How to thrive in practice and manage stress without reliance on alcohol and drugs; and
- A self-assessment or other check of participants' mental health or substance use risk.

As noted above, to help reduce stigma, such programs should consider enlisting the help of recovering lawyers who are successful members of the legal community. Some evidence reflects that social norms predict problem drinking even more so than stress.<sup>53</sup> Therefore, a team-based training program may be most effective because it focuses on the level at which the social norms are enforced.<sup>54</sup>

Given the influence of drinking norms throughout the profession, however, isolated training programs are not sufficient. A more comprehensive, systemic campaign is likely to be the most effective—though certainly the most challenging.<sup>55</sup> All stakeholders will be critical players in such an aspirational goal. Long-term strategies should consider scholars' recommendations to incorporate mental health and substance use disorder training into broader health-promotion programs to help skirt the stigma that may otherwise deter attendance.

<sup>51</sup>S. Joyce, M. Modini, H. Christensen, A. Mykletun, R. Bryant, P. B. Mitchell, & S. B. Harvey, *Workplace Interventions for Common Mental Disorders: A Systematic Meta-Review*, 46 PSYCHOL. MED. 683, 693 (2016).

<sup>52</sup>Y-L Su & J. Reeve, *A Meta-Analysis of the Effectiveness of Intervention Programs Designed to Support Autonomy*, 23 EDUC. PSYCHOL. REV. 159 (2011).

<sup>53</sup>D. C. Hodgins, R. Williams, & G. Munro, *Workplace Responsibility, Stress, Alcohol Availability and Norms as Predictors of Alcohol Consumption-Related Problems Among Employed Workers*, 44 SUBSTANCE USE & MISUSE 2062 (2009).

<sup>54</sup>C. Kolar & K. von Treuer, *Alcohol Misuse Interventions in the Workplace: A Systematic Review of Workplace and Sports Management Alcohol Interventions*, 13 INT'L J. MENTAL HEALTH ADDICTION 563 (2015); e.g., J. B. Bennett, W. E. K. Lehman, G. S. Reynolds, *Team Awareness for Workplace Substance Abuse Prevention: The Empirical and Conceptual Development of a Training Program*, 1 PREVENTION SCI. 157 (2000).

<sup>55</sup>Kolar & von Treuer, *supra* note 54.



Research also suggests that, where social drinking has become a ritual for relieving stress and for social bonding, individuals may resist efforts to deprive them of a valued activity that they enjoy. To alleviate resistance based on such concerns, prevention programs should consider making “it clear that they are not a temperance movement, only a force for moderation,” and that they are not designed to eliminate bonding but to ensure that drinking does not reach damaging dimensions.<sup>56</sup>

Additionally, genuine efforts to enhance lawyer well-being must extend beyond disorder detection and treatment. Efforts aimed at remodeling institutional and organizational features that breed stress are

## *Well-being efforts must extend beyond detection and treatment and address root causes of poor health.*

crucial, as are those designed to cultivate lawyers’ personal resources to boost resilience. All stakeholders should participate in the development and delivery of educational materials and programming that go beyond detection to include causes and consequences of distress. These programs should be eligible for CLE credit, as discussed in Recommendation 20.3. **Appendix B** to this report offers examples of well-being-related educational content, along with empirical evidence to support each example.

## 9. GUIDE AND SUPPORT THE TRANSITION OF OLDER LAWYERS.

Like the general population, the lawyer community is aging and lawyers are practicing longer.<sup>57</sup> In the Baby Boomer generation, the oldest turned 62 in 2008, and the youngest will turn 62 in 2026.<sup>58</sup> In law firms, one estimate indicates that nearly 65 percent of equity partners will retire over the next decade.<sup>59</sup> Senior lawyers can bring much to the table, including their wealth of experience, valuable public service, and mentoring of new lawyers. At the same time, however, aging lawyers have an increasing risk for declining physical and mental capacity. Yet few lawyers and legal organizations have sufficiently prepared to manage transitions away from the practice of law before a crisis occurs. The result is a rise in regulatory and other issues relating to the impairment of senior lawyers. We make the following recommendations to address these issues:



### Planning Transition of Older Lawyers

1. Provide education to detect cognitive decline.
2. Develop succession plans.
3. Create transition programs to respectfully aid retiring professionals plan for their next chapter.

<sup>56</sup>R. F. Cook, A. S. Back, J. Trudeau, & T. McPherson, *Integrating Substance Abuse Prevention into Health Promotion Programs in the Workplace: A Social Cognitive Intervention Targeting the Mainstream User*, in PREVENTING WORKPLACE SUBSTANCE ABUSE: BEYOND DRUG TESTING TO WELLNESS 97 (W. K. Lehman, J. B. Bennett eds., 2003).

<sup>57</sup>A recent American Bar Association report reflected that, in 2005, 34 percent of practicing lawyers were age fifty-five or over, compared to 25 percent in 1980. See LAWYER DEMOGRAPHICS, A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR (2016), available at [http://www.americanbar.org/content/dam/aba/administrative/market\\_research/lawyer-demographics-tables-2016.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf).

<sup>58</sup>E. A. McNickle, A Grounded Theory Study of Intrinsic Work Motivation Factors Influencing Public Utility Employees Aged 55 and Older as Related to Retirement Decisions (2009) (doctoral dissertation, Capella University) (available from ProQuest Dissertations and Theses Database).

<sup>59</sup>M. P. Shannon, *A Short Course in Succession Planning*, 37 L. PRAC. MAG. (2011), available at [http://www.americanbar.org/publications/law\\_practice\\_magazine/2011/may\\_june/a\\_short\\_course\\_in\\_succession\\_planning.html](http://www.americanbar.org/publications/law_practice_magazine/2011/may_june/a_short_course_in_succession_planning.html).



**First**, all stakeholders should create or support programming for detecting and addressing cognitive decline in oneself and colleagues.

**Second**, judges, legal employers, bar associations, and regulators should develop succession plans, or provide education on how to do so, to guide the transition of aging legal professionals. Programs should include help for aging members who show signs of diminished cognitive skills, to maintain their dignity while also assuring they are competent to practice.<sup>60</sup> A model program in this regard is the North Carolina Bar Association's Senior Lawyers Division.<sup>61</sup>

**Third**, we recommend that legal employers, law firms, courts, and law schools develop programs to aid the transition of retiring legal professionals. Retirement can enhance or harm well-being depending on the individual's adjustment process.<sup>62</sup> Many lawyers who are approaching retirement age have devoted most of their adult lives to the legal profession, and their identities often are wrapped up in their work. Lawyers whose self-esteem is contingent on their workplace success are likely to delay transitioning and have a hard time adjusting to retirement.<sup>63</sup> Forced retirement that deprives individuals of a sense of control over the exit timing or process is particularly harmful to well-being and long-term adjustment to retirement.<sup>64</sup>

To assist stakeholders in creating the programming to guide and support transitioning lawyers, the Task Force sets out a number of suggestions in **Appendix C**.

## 10. DE-EMPHASIZE ALCOHOL AT SOCIAL EVENTS.

Workplace cultures or social climates that support alcohol consumption are among the most consistent predictors of employee drinking. When employees drink

together to unwind from stress and for social bonding, social norms can reinforce tendencies toward problem drinking and stigmatize seeking help. On the other hand, social norms can also lead colleagues to encourage those who abuse alcohol to seek help.<sup>65</sup>

In the legal profession, social events often center around alcohol consumption (e.g., "Happy Hours," "Bar Reviews," networking receptions, etc.). The expectation of drinking is embedded in the culture, which may contribute to over-consumption. Legal employers, law schools, bar associations, and other stakeholders that plan social events should provide a variety of alternative non-alcoholic beverages and consider other types of activities to promote socializing and networking. They should strive to develop social norms in which lawyers discourage heavy drinking and encourage others to seek help for problem use.

## 11. UTILIZE MONITORING TO SUPPORT RECOVERY FROM SUBSTANCE USE DISORDERS.

Extensive research has demonstrated that random drug and alcohol testing (or "monitoring") is an effective way of supporting recovery from substance use disorders and increasing abstinence rates. The medical profession has long relied on monitoring as a key component of its treatment paradigm for physicians, resulting in long-term recovery rates for that population that are between 70-96 percent, which is the highest in all of the treatment outcome literature.<sup>66</sup> One study found that 96 percent of medical professionals who were subject to random drug tests remained drug-free, compared to only 64 percent of those who were not subject to mandatory testing.<sup>67</sup> Further, a national survey of physician health programs found that among medical professionals who completed their prescribed treatment requirements (including monitoring), 95 percent were licensed and actively

<sup>60</sup>See generally W. SLEASE ET AL., NOBC-APRL-COLAP SECOND JOINT COMMITTEE ON AGING LAWYERS, FINAL REPORT (2014), available at [http://www.americanbar.org/content/dam/aba/administrative/lawyer\\_assistance/ls\\_colap\\_nobc\\_aprl\\_colap\\_second\\_joint\\_committee\\_aging\\_lawyers.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_nobc_aprl_colap_second_joint_committee_aging_lawyers.authcheckdam.pdf).

<sup>61</sup>Senior Lawyers Division, N. C. Bar Ass'n, <https://www.ncbar.org/members/divisions/senior-lawyers/>.

<sup>62</sup>N. Houffort, C. Fernet, R. J. Vallerand, A. Laframboise, F. Guay, & R. Koestner, *The Role of Passion for Work and Need for Satisfaction in Psychological Adjustment to Retirement*, 88 J. VOCATIONAL BEHAVIORS 84 (2015).

<sup>63</sup>*Id.*

<sup>64</sup>E. Dingemans & K. Henkens, *How Do Retirement Dynamics Influence Mental Well-Being in Later Life? A 10-Year Panel Study*, 41 SCANDINAVIAN J. WORK, ENV'T & HEALTH 16 (2015); A. M. Muratore & J. K. Earl, *Improving Retirement Outcomes: The Role of Resources, Pre-Retirement Planning and Transition Characteristics*, 35 AGEING & SOC. 2100 (2015).

<sup>65</sup>J. B. Bennett, C. R. Patterson, G. S. Reynolds, W. L. Wiitala, & W. K. Lehman, *Team Awareness, Problem Drinking, and Drinking Climate: Workplace Social Health Promotion in a Policy Context*, 19 AM. J. HEALTH PROMOTION 103 (2004).

<sup>66</sup>R. L. DuPont, A. T. McLellan, W. L. White, L. Merlo & M. S. Gold, *Setting the Standard for Recovery: Physicians Health Programs Evaluation Review*, 36 J. SUBSTANCE ABUSE TREATMENT 159 (2009).

<sup>67</sup>J. Shore, *The Oregon Experience with Impaired Physicians on Probation: An Eight Year Follow-Up*, 257 J. AM. MED. ASS'N 2931 (1987).



working in the health care field at a five year follow-up after completing their primary treatment program.<sup>68</sup> In addition, one study has found that physicians undergoing monitoring through physician health programs experienced lower rates of malpractice claims.<sup>69</sup>

Such outcomes are not only exceptional and encouraging, they offer clear guidance for how the legal profession could better address its high rates of substance use disorders and increase the likelihood of positive outcomes. Although the benefits of monitoring have been recognized by various bar associations, lawyer assistance programs, and employers throughout the legal profession, a uniform or “best practices” approach to the treatment and recovery management of lawyers has been lacking. Through advances in monitoring technologies, random drug and alcohol testing can now be administered with greater accuracy and reliability—as well as less cost and inconvenience—than ever before. Law schools, legal employers, regulators, and lawyer assistance programs would all benefit from greater utilization of monitoring to support individuals recovering from substance use disorders.

## 12. BEGIN A DIALOGUE ABOUT SUICIDE PREVENTION.

It is well-documented that lawyers have high rates of suicide.<sup>70</sup> The reasons for this are complicated and varied, but some include the reluctance of attorneys to ask for help when they need it, high levels of depression amongst legal professionals, and the stressful nature of the job.<sup>71</sup> If we are to change these statistics, stakeholders need to provide education and take action. Suicide, like mental health or substance use disorders, is a highly stigmatized topic. While it is an issue that touches many of us, most people are uncomfortable discussing suicide. Therefore, stakeholders must make a concerted effort towards suicide prevention to demonstrate to the legal community that we are not

afraid of addressing this issue. We need leaders to encourage dialogue about suicide prevention.

One model for this is through a “Call to Action,” where members of the legal community and stakeholders from lawyer assistance programs, the judiciary, law firms, law schools, and bar associations are invited to attend a presentation and community discussion about the issue.



## Call to Action

- ✓ Organize “Call to Action” events to raise awareness.
- ✓ Share stories of those affected by suicide.
- ✓ Provide education about signs of depression and suicidal thinking.
- ✓ Learn non-verbal signs of distress.
- ✓ Collect and publicize available resources.

When people who have been affected by the suicide of a friend or colleague share their stories, other members of the legal community begin to better understand the impact and need for prevention.<sup>72</sup> In addition, stakeholders can schedule educational presentations that incorporate information on the signs and symptoms of suicidal thinking along with other mental health/

<sup>68</sup>R. L. DuPont, A. T. McLellan, G. Carr, M. Gendel, & G. E. Skipper, *How Are Addicted Physicians Treated? A National Survey of Physician Health Programs*, 37 J. SUBSTANCE ABUSE TREATMENT 1 (2009).

<sup>69</sup>E. Brooks, M. H. Gendel, D. C. Gundersen, S. R. Early, R. Schirmacher, A. Lembitz, & J. H. Shore, *Physician Health Programs and Malpractice Claims: Reducing Risk Through Monitoring*, 63 OCCUPATIONAL MED. 274 (2013).

<sup>70</sup>R. Flores & R. M. Arce, *Why Are Lawyers Killing Themselves?*, CNN, Jan. 20, 2014, <http://www.cnn.com/2014/01/19/us/lawyer-suicides/>. If you or someone you know is experiencing suicidal thinking, please seek help immediately. The National Suicide Prevention Lifeline can be reached at 1-800-273-8255, <https://suicidepreventionlifeline.org>.

<sup>71</sup>*Id.*

<sup>72</sup>The Colorado Lawyer Assistance Program sponsored one such Call to Action on January 21, 2016, in an effort to generate more exposure to this issue so the legal community better understands the need for dialogue and prevention.



substance use disorders. These can occur during CLE presentations, staff meetings, training seminars, at law school orientations, bar association functions, etc. Stakeholders can contact their state lawyer assistance programs, employee assistance program agencies, or health centers at law schools to find speakers, or referrals for counselors or therapists so that resources are available for family members of lawyers, judges, and law students who have taken their own life.

It's important for all stakeholders to understand that, while lawyers might not tell us that they are suffering, they will show us through various changes in behavior and communication styles. This is so because the majority of what we express is non-verbal.<sup>73</sup> Becoming better educated about signs of distress will enable us to take action by, for example, making health-related inquiries or directing them to potentially life-saving resources.

### **13. SUPPORT A LAWYER WELL-BEING INDEX TO MEASURE THE PROFESSION'S PROGRESS.**

We recommend that the ABA coordinate with state bar associations to create a well-being index for the legal profession that will include metrics related to lawyers, staff, clients, the legal profession as a whole, and the broader community. The goal would be to optimize the well-being of all of the legal profession's stakeholders.<sup>74</sup> Creating such an index would correspond with a growing worldwide consensus that success should not be measured solely in economic terms. Measures of well-

being also have an important role to play in defining success and informing policy.<sup>75</sup> The index would help track progress on the transformational effort proposed in this report. For law firms, it also may help counter-balance the "profits per partner metric" that has been published by *The American Lawyer* since the late 1980s, and which some argue has driven the profession away from its core values. As a foundation for building the well-being index, stakeholders could look to, for example, criteria used in *The American Lawyer's Best Places to Work* survey, or the Tristan Jepson Memorial Foundation's best practice guidelines for promoting psychological well-being in the legal profession.<sup>76</sup>

<sup>73</sup>ALBERT MEHRABIAN, SILENT MESSAGES: IMPLICIT COMMUNICATION OF EMOTIONS AND ATTITUDES (1972).

<sup>74</sup>See R. E. FREEMAN, J. S. HARRISON, & A. WICKS, MANAGING FOR STAKEHOLDERS: SURVIVAL, REPUTATION, AND SUCCESS (2007); J. MACKEY & R. SISODIA, CONSCIOUS CAPITALISM: LIBERATING THE HEROIC SPIRIT OF BUSINESS (2014).

<sup>75</sup>L. Fasolo, M. Galetto, & E. Turina, *A Pragmatic Approach to Evaluate Alternative Indicators to GDP*, 47 QUALITY & QUANTITY 633 (2013); WORLD HAPPINESS REPORT (J. Helliwell, R. Layard, & J. Sachs eds., 2013), available at [http://unsdsn.org/wp-content/uploads/2014/02/WorldHappinessReport2013\\_online.pdf](http://unsdsn.org/wp-content/uploads/2014/02/WorldHappinessReport2013_online.pdf); G. O'Donnell, *Using Well-Being as a Guide to Public Policy*, in WORLD HAPPINESS REPORT.

<sup>76</sup>The Tristan Jepson Memorial Foundation's Guidelines are available at [http://tjmf.client.fatbeehive.com.au/wp/wp-content/uploads/TJMFmentalHealthGuidelines\\_A4\\_140427.pdf](http://tjmf.client.fatbeehive.com.au/wp/wp-content/uploads/TJMFmentalHealthGuidelines_A4_140427.pdf).





*“A tree with strong roots laughs at storms.” — Malay Proverb*

Judges occupy an esteemed position in the legal profession and society at large. For most, serving on the bench is the capstone of their legal career. The position, however, can take a toll on judges’ health and well-being. Judges regularly confront contentious, personal, and vitriolic proceedings. Judges presiding over domestic relations dockets make life-changing decisions for children and families daily.<sup>77</sup> Some report lying awake at night worrying about making the right decision or the consequences of that decision.<sup>78</sup> Other judges face the stress of presiding over criminal cases with horrific underlying facts.<sup>79</sup>

Also stressful is the increasing rate of violence against judges inside and outside the courthouse.<sup>80</sup> Further, many judges contend with isolation in their professional lives and sometimes in their personal lives.<sup>81</sup> When a judge is appointed to the bench, former colleagues who were once a source of professional and personal support can become more guarded and distant.<sup>82</sup> Often, judges do not have feedback on their performance. A number take the bench with little preparation, compounding the sense of going it alone.<sup>83</sup> Judges also cannot “take off the robe” in every day interactions outside the courthouse because of their elevated status in society, which can contribute to social isolation.<sup>84</sup> Additional stressors include re-election in certain jurisdictions.<sup>85</sup> Limited judicial resources coupled with time-intensive, congested dockets are a pronounced problem.<sup>86</sup> More recently, judges have reported a sense of diminishment

in their estimation among the public at large.<sup>87</sup> Even the most astute, conscientious, and collected judicial officer can struggle to keep these issues in perspective.

We further recognize that many judges have the same reticence in seeking help out of the same fear of embarrassment and occupational repercussions that lawyers have. The public nature of the bench often heightens the sense of peril in coming forward.<sup>88</sup> Many judges, like lawyers, have a strong sense of perfectionism and believe they must display this perfectionism at all times.<sup>89</sup> Judges’ staff can act as protectors or enablers of problematic behavior. These are all impediments to seeking help. In addition, lawyers, and even a judge’s colleagues, can be hesitant to report or refer a judge whose behavior is problematic for fear of retribution.

In light of these barriers and the stressors inherent in the unique role judges occupy in the legal system, we make the following recommendations to enhance well-being among members of the judiciary.

#### **14. COMMUNICATE THAT WELL-BEING IS A PRIORITY.**

The highest court in each state should set the tone for the importance of the well-being of judges. Judges are not immune from suffering from the same stressors as lawyers, and additional stressors are unique to work as a jurist.

<sup>77</sup>A. Resnick, K. Myatt, & P. Marotta, *Surviving Bench Stress*, 49 FAM. CT. REV. 610, 610-11 (2011).

<sup>78</sup>*Id.* at 611-12.

<sup>79</sup>M. K. Miller, D. M. Flores, & A. N. Dolezilek, *Addressing the Problem of Courtroom Stress*, 91 JUDICATURE 60, 61, 64 (2007); J. Chamberlain & M. Miller, *Evidence of Secondary Traumatic Stress, Safety Concerns, and Burnout Among a Homogeneous Group of Judges in a Single Jurisdiction*, 37 J. AM. ACAD. PSYCHIATRY L. 214, 215 (2009).

<sup>80</sup>Miller, Flores, & Dolezilek, *supra* note 79, at 60-61; *see also* T. FAUTSKO, S. BERSON, & S. SWENSEN, NAT’L CTR. FOR STATE CTS., STATUS OF COURT SECURITY IN STATE COURTS – A NATIONAL PERSPECTIVE (2013), available at [http://ncsc.contentdm.oclc.org/cdm/ref/collection/facilities/id/184#img\\_view\\_container](http://ncsc.contentdm.oclc.org/cdm/ref/collection/facilities/id/184#img_view_container).

<sup>81</sup>I. Zimmerman, *Helping Judges in Distress*, 90 JUDICATURE 10, 13 (2006).

<sup>82</sup>*Id.*

<sup>83</sup>C. Bremer, *Reducing Judicial Stress Through Mentoring*, 87 JUDICATURE 244-45 (2004).

<sup>84</sup>Resnick, Myatt, & Marotta, *supra* note 77, at 610.

<sup>85</sup>*Id.* at 610-11; Zimmerman, *supra* note 81, at 11-12.

<sup>86</sup>Resnick, Myatt, Marotta, *supra* note 77, at 610.

<sup>87</sup>*Judges Are Feeling Less Respected*, NAT’L JUDICIAL C. (2017), available at <http://www.judges.org/judges-feeling-less-respected/>.

<sup>88</sup>S. KRAUSS, N. STEK, W. DRESSEL, AM. BAR ASS’N COMM’N ON LAW. ASSISTANCE PROGRAMS, HELPING JUDGES, MODULE 1 – OVERVIEW OF A JUDICIAL ASSISTANCE PROGRAM (2010); Zimmerman, *supra* note 81, at 13.

<sup>89</sup>R. L. Childers, *Got Stress? Using CoLAP and Its New Judicial Assistance Project*, JUDGES JOURNAL (2006); Chamberlain & Miller, *supra* note 79, at 220.

## 15. DEVELOP POLICIES FOR IMPAIRED JUDGES.

It is essential that the highest court and its commission on judicial conduct implement policies and procedures for intervening with impaired members of the judiciary. For example, the highest court should consider adoption of policies such as a Diversion Rule for Judges in appropriate cases. Administrative and chief judges also should implement policies and procedures for intervening with members of the judiciary who are impaired in compliance with Model Rule of Judicial Conduct 2.14. They should feel comfortable referring members to judicial or lawyer assistance programs. Educating judicial leaders about the confidential nature of these programs will go a long way in this regard. Judicial associations and educators also should promote CoLAP's judicial peer support network, as well as the National Helpline for Judges Helping Judges.<sup>90</sup>

## 16. REDUCE THE STIGMA OF MENTAL HEALTH AND SUBSTANCE USE DISORDERS.

As reflected in Recommendation 4, the stigma surrounding mental health and substance use disorders poses an obstacle to treatment. Judges are undisputed leaders in the legal profession. We recommend they work to reduce this stigma by creating opportunities for open dialogue. Simply talking about these issues helps combat the unease and discomfort that causes the issues to remain unresolved. In a similar vein, we encourage judges to participate in the activities of lawyer assistance programs, such as volunteering as speakers and serving as board members. This is a powerful way to convey to lawyers, law students, and other judges the importance of lawyer assistance programs and to encourage them to access the programs' resources.

## 17. CONDUCT JUDICIAL WELL-BEING SURVEYS.

This report was triggered in part by the Study and the Survey of Law Student Well-Being. No comparable research has been conducted of the judiciary. We recommend that CoLAP and other concerned entities conduct a broad-based survey of the judiciary to

determine the state of well-being and the prevalence of issues directly related to judicial fitness such as burnout, compassion fatigue, mental health, substance use disorders and help-seeking behaviors.

## 18. PROVIDE WELL-BEING PROGRAMMING FOR JUDGES AND STAFF.

Judicial associations should invite lawyer assistance program directors and other well-being experts to judicial conferences who can provide programming on topics related to self-care as well as resources available to members of the judiciary experiencing mental health or



- ✓ **Design well-being education specifically for judges.**
- ✓ **Connect judges for support and mentoring.**
- ✓ **Publish well-being resources tailored to judges.**

substance use disorders. Topics could include burnout, secondary traumatic stress, compassion fatigue, strategies to maintain well-being, as well as identification of and intervention for mental health and substance use disorders.

Judicial educators also should make use of programming that allows judges to engage in mutual support and sharing of self-care strategies. One such example is roundtable discussions held as part of judicial conferences or establishing a facilitated mentoring

<sup>90</sup>The ABA-sponsored National Helpline for Judges Helping Judges is 1-800-219-6474.



program or mentoring circle for judicial members. We have identified isolation as a significant challenge for many members of the judiciary. Roundtable discussions and mentoring programs combat the detrimental effects of this isolation.<sup>91</sup>

Judicial associations and educators also should develop publications and resources related to well-being, such as guidebooks. For example, a judicial association could create wellness guides such as “A Wellness Guide for Judges of the California State Courts.” This sends the signal that thought leaders in the judiciary value well-being.

## **19. MONITOR FOR IMPAIRED LAWYERS AND PARTNER WITH LAWYER ASSISTANCE PROGRAMS**

Judges often are among the first to detect lawyers suffering from an impairment. Judges know when a lawyer is late to court regularly, fails to appear, or appears in court under the influence of alcohol or drugs. They witness incomprehensible pleadings or cascading requests for extensions of time. We believe judges have a keen pulse on when a lawyer needs help. With the appropriate training, judges’ actions can reduce client harm and save a law practice or a life. We make the following recommendations tailored to helping judges help the lawyers appearing before them.

Consistent with Recommendation 5.1, judges should become familiar with lawyer assistance programs in their state. They should learn how best to make referrals to the program. They should understand the confidentiality protections surrounding these referrals. Judges also should invite lawyer assistance programs to conduct educational programming for lawyers in their jurisdiction using their courtroom or other courthouse space.

Judges, for example, can devote a bench-bar luncheon at the courthouse to well-being and invite representatives of the lawyers assistance program to the luncheon.

Judicial educators should include a section in bench book-style publications dedicated to lawyer assistance programs and their resources, as well as discussing how to identify and handle lawyers who appear to have mental health or substance use disorders. Further, judges and their staff should learn the signs of mental health and substance use disorders, as well as strategies for intervention, to assist lawyers in their courtrooms who may be struggling with these issues. Judges can also advance the well-being of lawyers who appear before them by maintaining courtroom decorum and de-escalating the hostilities that litigation often breeds.

<sup>90</sup>The ABA-sponsored National Helpline for Judges Helping Judges is 1-800-219-6474.

<sup>91</sup>For more information on judicial roundtables, see AM. BAR ASS’N COMM’N ON LAW. ASSISTANCE PROGRAMS, JUDICIAL ROUNDTABLES, available at [https://www.americanbar.org/content/dam/aba/administrative/lawyer\\_assistance/lis\\_colap\\_Judicial\\_Roundtable\\_Protocols.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/lis_colap_Judicial_Roundtable_Protocols.authcheckdam.pdf).





*“You can do what I cannot do. I can do what you cannot do.  
Together we can do great things.” — Mother Teresa*

**R**egulators play a vital role in fostering individual lawyer well-being and a professional culture that makes it possible. We broadly define “regulators” to encompass all stakeholders who assist the highest court in each state in regulating the practice of law.<sup>92</sup> This definition includes lawyers and staff in regulatory offices; volunteer lawyer and non-lawyer committee, board, and commission members; and professional liability lawyers who advise law firms and represent lawyers in the regulatory process.

Courts and their regulators frequently witness the conditions that generate toxic professional environments, the impairments that may result, and the negative professional consequences for those who do not seek help. Regulators are well-positioned to improve and adjust the regulatory process to address the conditions that produce these effects. As a result, we propose that the highest court in each state set an agenda for action and send a clear message to all participants in the legal system that lawyer well-being is a high priority.

## *Transform the profession’s perception of regulators from police to partner.*

To carry out the agenda, regulators should develop their reputation as partners with practitioners. The legal profession often has a negative perception of regulators,

who typically appear only when something has gone awry. Regulators can transform this perception by building their identity as partners with the rest of the legal community rather than being viewed only as its “police.”

Most regulators are already familiar with the 1992 Report of the Commission on Evaluation of Disciplinary Enforcement—better known as the “McKay Commission Report.”<sup>93</sup> It recognized and encouraged precisely what we seek to do through this report: to make continual improvements to the lawyer regulation process to protect the public and assist lawyers in their professional roles. Accordingly, we offer the following recommendations to ensure that the regulatory process proactively fosters a healthy legal community and provides resources to rehabilitate impaired lawyers.

### **20. TAKE ACTIONS TO MEANINGFULLY COMMUNICATE THAT LAWYER WELL-BEING IS A PRIORITY.**

#### **20.1. Adopt Regulatory Objectives That Prioritize Lawyer Well-Being.**

In 2016, the Conference of Chief Justices adopted a resolution recommending that each state’s highest court consider the ABA’s proposed Model Regulatory Objectives.<sup>94</sup> Among other things, those objectives sought to encourage “appropriate preventive or wellness programs.” By including a wellness provision, the ABA recognized the importance of the human element in the practice of law: To accomplish all other listed objectives, the profession must have healthy, competent lawyers. The Supreme Court of Colorado already has adopted

<sup>92</sup>See AM. BAR ASS’N RESOL. 105 (February 2016).

<sup>93</sup>AM BAR ASS’N COMM’N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT (1992), available at [http://www.americanbar.org/groups/professional\\_responsibility/resources/report\\_archive/mckay\\_report.html](http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html).

<sup>94</sup>RESOL. 105, *supra* note 92.

a version of the ABA’s Regulatory Objectives. In doing so, it recommended proactive programs offered by the Colorado Lawyer Assistance Program and other organizations to assist lawyers throughout all stages of their careers to practice successfully and serve their clients.<sup>95</sup> The Supreme Court of Washington also recently enacted regulatory objectives.<sup>96</sup>

We recommend that the highest court in each U.S. jurisdiction follow this lead. Each should review the ABA and Colorado regulatory objectives and create its own objectives that specifically promote effective lawyer assistance and other proactive programs relating to well-being. Such objectives will send a clear message that the court prioritizes lawyer well-being, which influences competent legal services. This, in turn, can boost public confidence in the administration of justice.

### **20.2. Modify the Rules of Professional Conduct to Endorse Well-Being As Part of a Lawyer’s Duty of Competence.**

ABA Model Rule of Professional Conduct 1.1 (Competence) states that lawyers owe a duty of competence to their clients. “Competent” representation is defined to require “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>97</sup> We recommend revising this Rule and/or its Comments to more clearly include lawyers’ well-being in the definition of “competence.”

One alternative is to include language similar to California’s Rule of Professional Conduct 3-110, which defines “competence” to include the “mental, emotional, and physical ability reasonably necessary” for the representation.<sup>98</sup> A second option is to amend the Comments to Rule 1.1 to clarify that professional competence requires an ability to comply with all of the Court’s essential eligibility requirements (see Recommendation 21.2 below).

Notably, we do not recommend discipline solely for a

lawyer’s failure to satisfy the well-being requirement or the essential eligibility requirements. Enforcement should proceed only in the case of actionable misconduct in the client representation or in connection with disability proceedings under Rule 23 of the ABA Model Rules for Disciplinary Enforcement. The goal of the proposed amendment is not to threaten lawyers with discipline for poor health but to underscore the importance of well-being in client representations. It is intended to remind lawyers that their mental and physical health impacts clients and the administration of justice, to reduce stigma associated with mental health disorders, and to encourage preventive strategies and self-care.

### **20.3. Expand Continuing Education Requirements to Include Well-Being Topics.**

We recommend expanding continuing education requirements for lawyers and judges to mandate credit for mental health and substance use disorder programming and allow credit for other well-being-related topics that affect lawyers’ professional capabilities.

In 2017, the ABA proposed a new Model Continuing Legal Education (MCLE) Rule that recommends mandatory mental health programming. The Model Rule requires lawyers to earn at least one credit hour every three years of CLE programming that addresses the prevention, detection, and/or treatment of “mental health and substance use disorders.” We recommend that all states adopt this provision of the Model Rule. Alternatively, states could consider authorizing ethics credit (or other specialized credits) for CLE programs that address these topics. California and Illinois are examples of state bars that already have such requirements.<sup>99</sup>

The ABA’s new Model Rule also provisionally recommends that states grant CLE credit for “Lawyer Well-Being Programming.” The provision encompasses a broader scope of topics than might fall under a narrow definition of mental health and substance use

<sup>95</sup>Washington Courts, Suggested Amendments to General Rules (2017), [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.proposedRuleDisplay&ruleId=549](http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=549).

<sup>97</sup>MODEL RULES PROF. CONDUCT R. 1.1 (2017), available at [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_1\\_competence.html](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.html).

<sup>98</sup>CAL. RULES PROF’L CONDUCT R. 3-110, available at <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules/Rule-3-110>.

<sup>99</sup>See RULES OF THE STATE BAR OF CAL., Title 2, Div. 4, R. 2.72 (2017); ILL. SUP. CT. R. 794(d)(1) (2017).



disorders. Tennessee is one example of a pioneering state that authorizes credit for a broad set of well-being topics. Its CLE Regulation 5H authorizes ethics and professionalism credit for programs that are designed, for example, to: enhance optimism, resilience, relationship skills, and energy and engagement in their practices; connect lawyers with their strengths and values; address stress; and to foster cultures that support outstanding professionalism.<sup>100</sup> We recommend that regulators follow Tennessee's lead by revising CLE rules to grant credit for similar topics.

#### **20.4. Require Law Schools to Create Well-Being Education for Students as An Accreditation Requirement.**

In this recommendation, the Task Force recognizes the ABA's unique role as accreditor for law schools through the Council of the Section of Legal Education and Admissions to the Bar of the ABA.<sup>101</sup> The Task Force recommends that the Council revise the Standards and Rules of Procedure for Approval of Law Schools to require law schools to create well-being education as a criterion for ABA accreditation. The ABA should require law schools to publish their well-being-related resources on their websites. These disclosures can serve as resources for other law schools as they develop and improve their own programs. Examples of well-being education include a mandatory one credit-hour course on well-being topics or incorporating well-being topics in to the professional responsibility curriculum.

A requirement similar to this already has been implemented in the medical profession for hospitals that operate residency programs. Hospitals that operate Graduate Medical Education programs to train residents must comply with the Accreditation Council for Graduate Medical Education (ACGME) Program Requirements. The ACGME requires hospitals to “be committed to and

responsible for . . . resident well-being in a supportive educational environment.”<sup>102</sup> This provision requires that teaching hospitals have a documented strategy for promoting resident well-being and, typically, hospitals develop a wellness curriculum for residents.

### **21. ADJUST THE ADMISSIONS PROCESS TO SUPPORT LAW STUDENT WELL-BEING.**

To promote law student well-being, regulations governing the admission to the practice of law should facilitate the treatment and rehabilitation of law students with impairments.

#### **21.1. Re-Evaluate Bar Application Inquiries About Mental Health History.**

Most bar admission agencies include inquiries about applicants' mental health as part of fitness evaluations for licensure. Some critics have contended that the deterrent effect of those inquiries discourages persons in need of help from seeking it. Not everyone agrees with that premise, and some argue that licensing of professionals necessarily requires evaluation of all risks that an applicant may pose to the public. Over the past several decades, questions have evolved to be more tightly focused and to elicit only information that is current and germane. There is continuing controversy over the appropriateness of asking questions about mental health at all. The U.S. Department of Justice has actively encouraged states to eliminate questions relating to mental health, and some states have modified or eliminated such questions.<sup>103</sup> In 2015, the ABA adopted a resolution that the focus should be directed “on conduct or behavior that impairs an applicant's ability to practice law in a competent, ethical, and professional manner.”<sup>104</sup> We recommend that each state follow the ABA and more closely focus on such conduct or behavior rather than any diagnosis or treatment history.

<sup>100</sup>TENN. COMM'N ON CONTINUING LEGAL EDUC., REG. 5H (2008), available at <http://www.cletrn.com/images/Documents/Regulations2013.04.16.pdf>.

<sup>101</sup>See AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016-2017, available at [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2016\\_2017\\_aba\\_standards\\_and\\_rules\\_of\\_procedure.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf).

<sup>102</sup>ACCREDITATION COUNSEL FOR GRADUATE MEDICAL EDUCATION, CGME COMMON PROGRAM REQUIREMENTS, § VI.A.2, available at [https://www.acgme.org/Portals/0/PFAssets/ProgramRequirements/CPRs\\_07012016.pdf](https://www.acgme.org/Portals/0/PFAssets/ProgramRequirements/CPRs_07012016.pdf)

<sup>103</sup>D. Hudson, *Honesty Is the Best Policy for Character and Fitness Screenings*, A.B.A. J., June 1, 2016, available at [http://www.abajournal.com/magazine/article/honesty\\_is\\_the\\_best\\_policy\\_for\\_character\\_and\\_fitness\\_screenings](http://www.abajournal.com/magazine/article/honesty_is_the_best_policy_for_character_and_fitness_screenings).

<sup>104</sup>AM. BAR ASS'N RESOL. 102 (August 2015).



## 21.2. Adopt Essential Eligibility Admission Requirements.

Promoting lawyer well-being includes providing clear eligibility guidelines for lawyers with mental or physical impairments. Regulators in each state should adopt essential eligibility requirements that affirmatively state the abilities needed to become a licensed lawyer. Their purpose is to provide the framework for determining whether or not an individual has the required abilities, with or without reasonable accommodations.

At least fourteen states have essential eligibility requirements for admission to practice law.<sup>105</sup> These requirements help the applicant, the admissions authority, and the medical expert understand what is needed to demonstrate fitness to practice law. Essential eligibility requirements also aid participants in lawyer disability and reinstatement proceedings, when determinations must be made of lawyers' capacity to practice law.

## 21.3. Adopt a Rule for Conditional Admission to Practice Law With Specific Requirements and Conditions.

Overly-rigid admission requirements can deter lawyers and law students from seeking help for substance use and mental health disorders. To alleviate this problem, states should adopt conditional admission requirements, which govern applicants for admission to the practice of law who have successfully undergone rehabilitation for substance use or another mental disorder, but whose period of treatment and recovery may not yet be sufficient to ensure continuing success.<sup>106</sup> Conditional admission programs help dismantle the stigma of mental health and substance use disorders as "scarlet letters." Especially for law students, they send a meaningful message that even in the worst circumstances, there is

# *Rigid admission requirements can deter help-seeking.*

hope: seeking help will not block entry into their chosen profession.

## 21.4. Publish Data Reflecting Low Rate of Denied Admissions Due to Mental Health Disorders and Substance Use.

At present, no state publishes data showing the number of applications for admission to practice law that are actually denied or delayed due to conduct related to substance use and other mental health disorders. From informal discussions with regulators, we know that a low percentage of applications are denied. Publication of this data might help alleviate law students' and other applicants' fears that seeking help for such disorders will inevitably block them from practicing law. Accordingly, we recommend that boards of bar examiners collect and publish such data as another means of encouraging potential applicants to seek help immediately and not delay until after their admission.

## 22. ADJUST LAWYER REGULATIONS TO SUPPORT WELL-BEING.

### 22.1. Implement Proactive Management-Based Programs (PMBP) That Include Lawyer Well-Being Components.

PMBP programs encourage best business practices and provide a resource-based framework to improve lawyers' ability to manage their practice. Such programs

<sup>105</sup>See, e.g., SUP. CT. OF OHIO, OFF. OF BAR ADMISSIONS, OHIO ESSENTIAL ELIGIBILITY REQUIREMENTS; available at [http://www.supremecourt.ohio.gov/AttySvcs/admissions/pdf/ESSENTIAL\\_ELIGIBILITY\\_REQUIREMENTS.pdf](http://www.supremecourt.ohio.gov/AttySvcs/admissions/pdf/ESSENTIAL_ELIGIBILITY_REQUIREMENTS.pdf); MINN. RULES FOR ADMISSION TO THE BAR, RULE 5, available at [https://www.revisor.leg.state.mn.us/court\\_rules/rule.php?type=pr&subtype=admi&id=5](https://www.revisor.leg.state.mn.us/court_rules/rule.php?type=pr&subtype=admi&id=5); COLO. R. CIV. PROC. 208.1(5), available at [http://www.coloradosupremecourt.com/Future%20Lawyers/FAQ\\_CharacterFitness.asp](http://www.coloradosupremecourt.com/Future%20Lawyers/FAQ_CharacterFitness.asp); WASH. ADMISSION AND PRACTICE RULES, RULE 20(e), available at [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=ga&set=APR&ruleid=gaaprj](http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=APR&ruleid=gaaprj); IDAHO BAR COMM'N RULE 201. Other states to adopt essential eligibility requirements include Florida, Illinois, Kentucky, Massachusetts, Minnesota, Nebraska, North Dakota, South Dakota, and Wyoming.

<sup>106</sup>About a quarter of all jurisdictions already have conditional admission rules for conduct resulting from substance use or other mental disorders. See 2016 NAT'L CONF. OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS, Chart 2: Character and Fitness Determinations (2016). Those states include Arizona, Connecticut, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Oregon, Puerto Rico, Rhode Island, South Dakota, Tennessee, Texas, West Virginia, Wisconsin and Wyoming. Additionally, Guam allows conditional admission for conduct related to substance abuse.



are designed to alleviate practice stress, improve lawyer-client relationships, and enhance career satisfaction.<sup>107</sup> Further, PMBP programs allow regulators to engage with the profession in a service-oriented, positive manner, reducing the anxiety, fear, and distrust that often accompanies lawyers' interactions with regulators.<sup>108</sup> Transforming the perception of regulators so that they are viewed as partners and not only as police will help combat the culture of stress and fear that has allowed mental health and substance use disorders to proliferate.

## **22.2. Adopt A Centralized Grievance Intake System to Promptly Identify Well-Being Concerns.**

We recommend that regulators adopt centralized intake systems. These allow expedited methods for receipt and resolution of grievances and help reduce the stress associated with pending disciplinary matters. With specialized training for intake personnel, such systems also can result in faster identification of and possible intervention for lawyers struggling with substance use or mental health disorders.<sup>109</sup>

## **22.3. Modify Confidentiality Rules to Allow One-Way Sharing of Lawyer Well-Being Related Information From Regulators to Lawyer Assistance Programs.**

Regulators' information-sharing practices can contribute to the speed of help to lawyers in need. For example, admissions offices sometimes learn that applicants are suffering from a substance use or other mental health disorder. Other regulators may receive similar information during investigations or prosecutions of lawyer regulation

matters that they consider to be confidential information. To facilitate help for lawyers suffering from such disorders, each state should simplify its confidentiality rules to allow admissions offices and other regulators to share such information immediately with local lawyer assistance programs.

Allowing this one-way flow of information can accelerate help to lawyers who need it. To be clear, the recommended information sharing would be one-way. As always, the lawyer assistance programs would be precluded from sharing any information with any regulators or others.

## **22.4. Adopt Diversion Programs and Other Alternatives to Discipline That Are Proven Successful in Promoting Well-Being.**

Discipline does not make an ill lawyer well. We recommend that regulators adopt alternatives to formal disciplinary proceedings that rehabilitate lawyers with impairments. Diversion programs are one such alternative, and they have a direct and positive impact

*Discipline does not make an ill lawyer well.*

on lawyer well-being. Diversion programs address minor lawyer misconduct that often features an underlying mental health or substance use disorder.<sup>110</sup> When lawyers enter a diversion program, they agree to follow

<sup>107</sup>S. Fortney & T. Gordon, *Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 U. ST. THOMAS L. J. 152 (2012).

<sup>108</sup>L. Terry, *The Power of Lawyer Regulators to Increase Client & Public Protection Through Adoption of a Proactive Regulation System*, 20 LEWIS & CLARK L. REV. 717 (2016).

<sup>109</sup>The American Bar Association's Model Rules for Lawyer Disciplinary Enforcement, Rule 1, defines a Central Intake Office as the office that "receive[s] information and complaints regarding the conduct of lawyers over whom the court has jurisdiction" and determines whether to dismiss the complaint or forward it to the appropriate disciplinary agency. The Model Rules for Lawyer Disciplinary Enforcement are available at [http://www.americanbar.org/groups/professional\\_responsibility/resources/lawyer\\_ethics\\_regulation/model\\_rules\\_for\\_lawyer\\_disciplinary\\_enforcement.html](http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement.html).

<sup>110</sup>Title 6 of Washington's Rules for Enforcement of Lawyer Conduct provides an excellent overview of when diversion is appropriate and procedures for diversion. It is available through the Washington State Courts website at [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.list&group=ga&set=ELC](http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=ELC). Some of the many jurisdictions to adopt such programs are Arizona, Colorado, the District of Columbia, Florida, Illinois, Iowa, Kansas, Louisiana, New Hampshire, New Jersey, Oklahoma, Oregon, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming.



certain conditions to continue practicing law. Those conditions can include training, drug or alcohol testing, peer assistance, and treatment. Monitoring plays a central role in ensuring compliance with the diversion agreement and helps lawyers successfully transition back to an unconditional practice of law and do so healthy and sober. By conditioning continued practice on treatment for an underlying mental health disorder or substance use disorder, diversion agreements can change a lawyer's life.

In addition, probation programs also promote wellness. Lawyer misconduct that warrants a suspension of a lawyer's license may, under certain circumstances, qualify for probation. In most jurisdictions, the probation period stays the license suspension and lawyers may continue practicing under supervision and specified conditions that include training, testing, monitoring, and treatment. Once again, this places a lawyer facing a mental health or substance use crisis on the path to better client service and a lifetime of greater well-being and sobriety.

### **23. ADD WELL-BEING-RELATED QUESTIONS TO THE MULTISTATE PROFESSIONAL RESPONSIBILITY EXAM (MPRE).**

A 2009 survey reflected that 22.9 percent of professional responsibility/legal ethics professors did not cover substance use and addiction at all in their course, and 69.8 percent addressed the topic in fewer than two hours.<sup>111</sup> Notwithstanding the pressure to address myriad topics in this course, increased attention must be

given to reduce these issues among our law students. The National Conference of Bar Examiners should consider adding several relevant questions to the MPRE, such as on the confidentiality of using lawyer assistance programs, the frequency of mental health and substance use disorders, and the tie-in to competence and other professional responsibility issues.<sup>112</sup> Taking this step underscores both the importance of the topic and the likelihood of students paying closer attention to that subject matter in their course. In addition, professional responsibility casebook authors are encouraged to include a section devoted to the topic, which will in turn compel instructors to teach in this area.

<sup>111</sup>A. M. PERLMAN, M. RAYMOND & L. S. TERRY, A SURVEY OF PROFESSIONAL RESPONSIBILITY COURSES AT AMERICAN LAW SCHOOLS IN 2009, <http://www.legalethicsforum.com/files/pr-survey-results-final.pdf>.

<sup>112</sup>See Krill, Johnson, & Albert, *supra* note 1, for the ABA Commission on Lawyer Assistance Programs and Hazelden Betty Ford Foundation Study; Organ, Jaffe, Bender, *supra* note 3, for *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*.





*“Self-care is not selfish. You cannot serve from an empty vessel.” — Eleanor Brown*

Legal employers, meaning all entities that employ multiple practicing lawyers, can play a large role in contributing to lawyer well-being. While this is a broad and sizable group with considerable diversity, our recommendations apply fairly universally. A specific recommendation may need to be tailored to address the realities particular to each context, but the crux of each recommendation applies to all.

## 24. ESTABLISH ORGANIZATIONAL INFRASTRUCTURE TO PROMOTE WELL-BEING.

### 24.1. Form A Lawyer Well-Being Committee.

Without dedicated personnel, real progress on well-being strategies will be difficult to implement and sustain.<sup>113</sup> Accordingly, legal employers should launch a well-being initiative by forming a Lawyer Well-Being Committee or appointing a Well-Being Advocate. The advocate or committee should be responsible for evaluating the work environment, identifying and addressing policies and procedures that create the greatest mental distress among employees, identifying how best to promote a positive state of well-being, and tracking progress of well-being strategies. They should prepare key milestones, communicate them, and create accountability strategies.<sup>114</sup> They also should develop strategic partnerships with lawyer assistance programs and other well-being experts and stay abreast of developments in the profession and relevant literature.

### 24.2. Assess Lawyers' Well-Being.

Legal employers should consider continually assessing the state of well-being among lawyers and staff and

whether workplace cultures support well-being. An assessment strategy might include an anonymous survey conducted to measure lawyer and staff attitudes and beliefs about well-being, stressors in the firm that significantly affect well-being, and organizational support for improving well-being in the workplace. Attitudes are formed not only by an organization's explicit messages but also implicitly by how leaders and lawyers actually behave. Specifically related to the organizational climate for support for mental health or substance use disorders, legal employers should collect information to ascertain, for example, whether lawyers:

- Perceive that you, their employer, values and supports well-being.
- Perceive leaders as role modeling healthy behaviors and empathetic to lawyers who may be struggling.
- Can suggest improvements to better support well-being.
- Would feel comfortable seeking needed help, taking time off, or otherwise taking steps to improve their situation.
- Are aware of resources available to assist their well-being.
- Feel expected to drink alcohol at organizational events.
- Feel that substance use and mental health problems are stigmatized.
- Understand that the organization will reasonably accommodate health conditions, including recovery from mental health disorders and addiction.

<sup>113</sup>Companies with dedicated wellness personnel achieve, on average, a 10 percent higher rate of employee participation. See OPTUM HEALTHCARE, WELLNESS IN THE WORKPLACE 2012: AN OPTUM RESEARCH UPDATE (Resource Center for Health & Wellbeing White Paper 2012), available at <https://broker.uhc.com/assets/wellness-in-the-workplace-2012-WP.pdf>.

<sup>114</sup>For guidance on developing their own strategic plan, Well-Being Committees could look to the Tristan Jepson Memorial Foundation's best practice guidelines for promoting psychological well-being in the legal profession, see *supra* note 76. They might also consider creating an information hub to post all well-being related resources. Resources could include information about the growing number of mental health apps. See, e.g., R. E. Silverman, *Tackling Workers' Mental Health, One Text at a Time*, WALL ST. J., July 19, 2016, available at <https://www.wsj.com/articles/tackling-workers-mental-health-one-text-at-a-time-1468953055>; B. A. Clough & L. M. Casey, *The Smart Therapist: A Look to the Future of Smartphones and eHealth Technologies in Psychotherapy*, 46 PROF. PSYCHOL. RES. & PRAC. 147 (2015).

As part of the same survey or conducted separately, legal employers should consider assessing the overall state of lawyers' well-being. Surveys are available to measure concepts like depression, substance use, burnout, work engagement, and psychological well-being. The Maslach Burnout Inventory (MBI) is the most widely used burnout assessment. It has been used to measure burnout among lawyers and law students.<sup>115</sup> Programs in the medical profession have recommended a bi-annual distribution of the MBI.<sup>116</sup>

Legal employers should carefully consider whether internal staff will be able to accurately conduct this type of assessment or whether hiring an outside consultant would be advisable. Internal staff may be more vulnerable to influence by bias, denial, and misinterpretation.

## 25. ESTABLISH POLICIES AND PRACTICES TO SUPPORT LAWYER WELL-BEING.

Legal employers should conduct an in-depth and honest evaluation of their current policies and practices that relate to well-being and make necessary adjustments. This evaluation should seek input from all lawyers and staff in a safe and confidential manner, which creates transparency that builds trust. **Appendix D** sets out example topics for an assessment.

Legal employers also should establish a confidential reporting procedure for lawyers and staff to convey concerns about their colleagues' mental health or substance use internally, and communicate how lawyers and staff can report concerns to the appropriate disciplinary authority and/or to the local lawyer assistance program. Legal employers additionally should establish a procedure for lawyers to seek confidential help for themselves without being

penalized or stigmatized. CoLAP and state lawyer assistance programs can refer legal employers to existing help lines and offer guidance for establishing an effective procedure that is staffed by properly-trained people.<sup>117</sup> We note that the ABA and New York State Bar Association have proposed model law firm policies for handling lawyer impairment that can be used for guidance.<sup>118</sup> The ABA has provided formal guidance on managing lawyer impairment.<sup>119</sup>

### 25.1. Monitor For Signs of Work Addiction and Poor Self-Care.

Research reflects that about a quarter of lawyers are workaholics, which is more than double that of the 10 percent rate estimated for U.S. adults generally.<sup>120</sup> Numerous health and relationship problems, including depression, anger, anxiety, sleep problems, weight gain, high blood pressure, low self-esteem, low life satisfaction, work burnout, and family conflict can develop from work addiction. Therefore, we recommend that legal employers monitor for work addiction and avoid rewarding extreme behaviors that can ultimately harm their health. Legal employers should expressly encourage lawyers to make time to care for themselves and attend to other personal obligations. They may also want to consider promoting physical activity to aid health and cognitive functioning.

### 25.2. Actively Combat Social Isolation and Encourage Interconnectivity.

As job demands have increased and budgets have tightened, many legal employers have cut back on social activities. This could be a mistake. Social support from colleagues is an important factor for coping with stress and preventing negative consequences like burnout.<sup>121</sup> Socializing helps individuals recover from work demands

<sup>115</sup>See, e.g., S. E. Jackson, J. A. Turner, & A. P. Brief, *Correlates of Burnout Among Public Service Lawyers*, 8 J. ORG. BEHAV. 339 (1987); see also R. Durr, *Creating 'Whole Lawyers': Wellness, Balance, and Performance Excellence At Northwestern University School of Law*, NW. SCH. OF L. (2015), available at [http://www.americanbar.org/content/dam/aba/events/professional\\_responsibility/2015/May/Conference/Materials/8\\_wellbeing\\_program\\_catalog\\_2014\\_2015%204%203%2015%20version.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2015/May/Conference/Materials/8_wellbeing_program_catalog_2014_2015%204%203%2015%20version.authcheckdam.pdf).

<sup>116</sup>J. Eckleberry-Hunt, A. Van Dyke, D. Lick, & J. Tucciarone, *Changing the Conversation from Burnout to Wellness: Physician Well-being in Residency Training Programs*, 1 J. GRADUATE MED. EDUC. 225 (2009). The MBI is available at <http://www.mindgarden.com/117-maslach-burnout-inventory>.

<sup>117</sup>CoLAP's website provides help-line information and a directory of state-based lawyer assistance programs: [http://www.americanbar.org/groups/lawyer\\_assistance.html](http://www.americanbar.org/groups/lawyer_assistance.html).

<sup>118</sup>AM. BAR ASS'N RESOL. 118, MODEL LAW FIRM/LEGAL DEPARTMENT IMPAIRMENT POLICY & GUIDELINES (Aug. 1990), available at <http://www.texasbar.com/AM/Template.cfm?Section=Employers1&Template=/CM/ContentDisplay.cfm&ContentID=15131>; NEW YORK STATE BAR ASSOCIATION LAWYER ASSISTANCE COMMITTEE MODEL POLICY, N. Y. STATE BAR ASS'N (2010), available at [https://www.nassaubar.org/UserFiles/Model\\_Policy.pdf](https://www.nassaubar.org/UserFiles/Model_Policy.pdf).

<sup>119</sup>AM. BAR ASS'N FORMAL OPINION 03-429 (2003), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/03\\_429.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/03_429.authcheckdam.pdf).

<sup>120</sup>Brafford, *supra* note 2.

<sup>121</sup>C. Maslach, W. B. Schaufeli, & M. P. Leiter, *Job Burnout*, 52 ANN. REV. OF PSYCHOL. 397, 415 (2001); T. Reuter & R. Schwarzer, *Manage Stress at Work Through Preventive and Proactive Coping*, in Locke, *supra* note 7.



and can help stave off emotional exhaustion.<sup>122</sup> It inhibits lawyers feeling isolated and disconnected, which helps with firm branding, messaging, and may help reduce turnover. We recommend deemphasizing alcohol at such events.

## 26. PROVIDE TRAINING AND EDUCATION ON WELL-BEING, INCLUDING DURING NEW LAWYER ORIENTATION.

We recommend that legal employers provide education and training on well-being-related topics and recruit experts to help them do so. A number of law firms already offer well-being related programs, like meditation, yoga sessions, and resilience workshops.<sup>123</sup> We also recommend orientation programs for new lawyers that incorporate lawyer well-being education and training.<sup>124</sup> Introducing this topic during orientation will signal its importance to the organization and will start the process of developing skills that may help prevent well-being problems. Such programs could:

- Introduce new lawyers to the psychological challenges of the job.<sup>125</sup>
- Reduce stigma surrounding mental health problems.
- Take a baseline measure of well-being to track changes over time.
- Provide resilience-related training.
- Incorporate activities focused on individual lawyers' interests and strengths, and not only on organizational expectations.<sup>126</sup>

Further, law firms should ensure that all members and staff know about resources, including lawyer assistance

programs, that can assist lawyers who may experience mental health and substance use disorders. This includes making sure that members and staff understand confidentiality issues pertaining to those resources.

### 26.1. Emphasize a Service-Centered Mission.

At its core, law is a helping profession. This can get lost in the rush of practice and in the business aspects of law. Much research reflects that organizational cultures that focus chiefly on materialistic, external rewards can damage well-being and promote a self-only focus. In fact, research shows that intrinsic values like relationship-

*Work cultures that constantly emphasize competitive, self-serving goals can harm lawyer well-being.*

development and kindness are stifled in organizations that emphasize extrinsic values like competition, power, and monetary rewards.<sup>127</sup> Work cultures that constantly emphasize competitive, self-serving goals will continually trigger competitive, selfish behaviors from lawyers that harm organizations and individual well-being. This can be psychologically draining. Research of Australian lawyers found that 70 percent reported that the practice of law is bottom-line driven.<sup>128</sup> Lawyers who reported that the practice of law was primarily about generating profits were more likely to be depressed.<sup>129</sup> This affects the

<sup>122</sup>M. J. Tews, J. W. Michel, & K. Stafford, *Does Fun Pay? The Impact of Workplace Fun on Employee Turnover and Performance*, 54 CORNELL HOSPITALITY QUARTERLY, 370 (2013).

<sup>123</sup>E.g., C. Bushey, *Kirkland & Ellis to Offer Wellness Training to All U.S. Lawyers*, CRAIN'S CHICAGO BUS., May 2, 2016, available at <http://www.chicagobusiness.com/article/20160502/NEWS04/160509972/kirkland-ellis-to-offer-wellness-training-to-all-u-s-lawyers>; N. Rodriguez, *What the Army Can Teach BigLaw about Bouncing Back*, LAW360, Feb. 17, 2017, [https://www.law360.com/in-depth/articles/891995?nl\\_pk=972d8116-f9f0-4582-a4c6-0ab3cf4a034c&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=in-depth](https://www.law360.com/in-depth/articles/891995?nl_pk=972d8116-f9f0-4582-a4c6-0ab3cf4a034c&utm_source=newsletter&utm_medium=email&utm_campaign=in-depth) (identifying Goodwin Procter LLP, O'Melveny & Myers LLP, Morgan Lewis & Bockius LLP, Fish & Richardson PC, Drinker Biddle & Reath LLP, Quarles & Brady LLP, and Neal Gerber & Eisenberg LLP as having hosted resilience workshops).

<sup>124</sup>See A. M. Saks, & J. A. Gruman, *Organizational Socialization and Positive Organizational Behaviour: Implications for Theory, Research, and Practice*, 28 CANADIAN J. ADMIN. SCI. 14 (2011).

<sup>125</sup>See generally J. P. Wanous & A. E. Reichers, *New Employee Orientation Programs*, 10 HUMAN RESOURCE MGMT. REV. 435 (2000), available at <http://homepages.se.edu/cvonbergen/files/2013/01/New-Employee-Orientation-Programs.pdf>.

<sup>126</sup>See D. M. Cable, F. Gino, & B. R. Staats, *Reinventing Employee Onboarding*, M.I.T. SLOAN MGMT. REV. (2013), available at <http://sloanreview.mit.edu/article/reinventing-employee-onboarding>.

<sup>127</sup>T. Kasser, *Materialistic Values and Goals*, 67 ANN. REV. OF PSYCHOL. 489 (2015); T. Kasser, *Teaching about Values and Goals: Applications of the Circumplex Model to Motivation, Well-Being, and Prosocial Behavior*, 41 TEACHING PSYCHOL. 365 (2014).

<sup>128</sup>A. J. Bergin & N. L. Jimmieson, *Australian Lawyer Well-Being: Workplace Demands, Resources and the Impact of Time-Billing Targets*, 21 PSYCHIATRY, PSYCHOL. & L. 427 (2014).

<sup>129</sup>A. D. Joudrey & J. E. Wallace, *Leisure as a Coping Resource: A Test of the Job Demand-Control-Support Model*, 62 HUMAN RELATIONS 195 (2009).

<sup>130</sup>A. Hansen, Z. Byrne, & C. Kiersch, *How Interpersonal Leadership Relates to Employee Engagement*, 29 J. MANAGERIAL PSYCHOL. 953 (2014).



bottom line since poor mental health can cause disability and lost productivity.

Consequently, we recommend that legal employers evaluate what they prioritize and value, and how those values are communicated. When organizational values evoke a sense of belonging and pride, work is experienced as more meaningful.<sup>130</sup> Experiencing work as meaningful is the biggest contributor to work engagement—a form of work-related well-being.<sup>131</sup>

## **26.2. Create Standards, Align Incentives, and Give Feedback.**

Contextual factors (i.e., the structure, habits, and dynamics of the work environment) play an enormous role in influencing behavior change. Training alone is almost never enough. To achieve change, legal employers will need to set standards, align incentives, and give feedback about progress on lawyer well-being topics.<sup>132</sup>

Currently, few legal employers have such structural supports for lawyer well-being. For example, many legal employers have limited or no formal leader development programs, no standards set for leadership skills and competencies, and no standards for evaluating leaders' overall performance or commitment to lawyer well-being. Additionally, incentive systems rarely encourage leaders to develop their own leadership skills or try to enhance the well-being of lawyers with whom they work. In law firms especially, most incentives are aligned almost entirely toward revenue growth, and any feedback is similarly narrow. To genuinely adopt lawyer well-being as a priority, these structural and cultural issues will need to be addressed.

<sup>130</sup>A. Hansen, Z. Byrne, & C. Kiersch, *How Interpersonal Leadership Relates to Employee Engagement*, 29 J. MANAGERIAL PSYCHOL. 953 (2014).

<sup>131</sup>A. M. BRAFFORD, POSITIVE PROFESSIONALS: CREATING HIGH-PERFORMING, PROFITABLE FIRMS THROUGH THE SCIENCE OF ENGAGEMENT. (American Bar Association, forthcoming November 2017.); D. R. May, R. L. Gilson, & L. M. Harter, *The Psychological Conditions of Meaningfulness, Safety and Availability and the Engagement of the Human Spirit at Work*, 77 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 11 (2004).

<sup>132</sup>R. A. NOE, EMPLOYEE TRAINING AND DEVELOPMENT (McGraw-Hill 2013).





*“Well-being is a combination of feeling good as well as actually having meaning, good relationships, and accomplishment.” — Martin Seligman*

Law students start law school with high life satisfaction and strong mental health measures. But within the first year of law school, they experience a significant increase in anxiety and depression.<sup>133</sup> Research suggests that law students are among the most dissatisfied, demoralized, and depressed of any graduate student population.<sup>134</sup>

The 2016 Survey of Law Student Well-Being found troublesome rates of alcohol use, anxiety, depression, and illegal drug use at law schools across the country.

***42% of students needed help for poor mental health but only about half sought it out.***

Equally worrisome is students' level of reluctance to seek help for those issues. A large majority of students (about 80 percent) said that they were somewhat or very likely to seek help from a health professional for alcohol, drug, or mental health issues, but few actually did.<sup>135</sup> For example, while 42 percent thought that they had needed help for mental health problems in the prior year, only about half of that group actually received counseling from a health professional.<sup>136</sup> Only four percent said they had ever received counseling for alcohol or drug issues—even though a quarter were at risk for problem drinking.<sup>137</sup>

The top factors that students reported as discouraging them from seeking help were concerns that it would threaten their bar admission, job, or academic status; social stigma; privacy concerns; financial reasons; belief that they could handle problems on their own; and not having enough time. Students' general reluctance to seek help may be one factor explaining why law student wellness has not changed significantly since the last student survey in the 1990s.<sup>138</sup> It appears that recommendations stemming from the 1993 survey either were not implemented or were not successful.<sup>139</sup>

The Survey of Law Student Well-Being did not seek to identify the individual or contextual factors that might be contributing to students' health problems. It is important to root out such causes to enable real change. For example, law school graduates cite heavy workload, competition, and grades as major law school stressors.<sup>140</sup> Others in the legal community have offered additional insights about common law school practices, which are discussed below. Law school well-being initiatives should not be limited to detecting disorders and enhancing student resilience. They also should include identifying organizational practices that may be contributing to the problems and assessing what changes can be made to support student well-being. If legal educators ignore the impact of law school stressors, learning is likely to be suppressed and illness may be intensified.<sup>141</sup>

The above reflects a need for both prevention strategies to address dysfunctional drinking and misuse of substances as well as promotion strategies that identify aspects of legal education that can be revised to support

<sup>133</sup>L. S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 113-15 (2002).

<sup>134</sup>A. A. Patthoff, *This is Your Brain on Law School: The Impact of Fear-Based Narratives on Law Students*, 2015 UTAH L. REV. 391, 424 (2015).

<sup>135</sup>Organ, Jaffe, & Bender, *supra* note 3, at 143.

<sup>136</sup>*Id.* at 140.

<sup>137</sup>*Id.*

<sup>138</sup>ASS'N AM. L. SCH. SPECIAL COMM. ON PROBLEMS OF SUBSTANCE ABUSE IN THE L. SCHS. (1993).

<sup>139</sup>*Id.* at vi-vii.

<sup>140</sup>R. A. Lasso, *Is Our Students Learning? Using Assessments to Measure and Improve Law School Learning and Performance*, 15 BARRY L. REV. 73, 79 (2010).

<sup>141</sup>Patthoff, *supra* note 134, at 424.

well-being. The recommendations below offer some ideas for both.

## 27. CREATE BEST PRACTICES FOR DETECTING AND ASSISTING STUDENTS EXPERIENCING PSYCHOLOGICAL DISTRESS.

# *Ignoring law school stressors can suppress learning and intensify illness.*

Law schools should develop best practices for creating a culture in which all associated with the school take responsibility for student well-being. Faculty and administrators play an important role in forming a school's culture and should be encouraged to share responsibility for student well-being.

### **27.1. Provide Training to Faculty Members Relating to Student Mental Health and Substance Use Disorders.**

Faculty have significant sway over students but generally students are reluctant to approach them with personal problems, especially relating to their mental health. Students' aversion to doing so may be exacerbated by a perception that faculty members must disclose information relating to students' competence to practice to the state bar. To help remove uncertainty and encourage students to ask for help, law schools should consider working with lawyer assistance programs on training faculty on how to detect students in trouble, how to have productive conversations with such students, what and when faculty need to report information relating to such students, as well as confidentiality surrounding these services.<sup>142</sup> Students should be educated about

faculty's reporting requirements to add clarity and reduce student anxiety when interacting with faculty.

Additionally, faculty members should be encouraged to occasionally step out of their formal teaching role to convey their respect and concern for students, to acknowledge the stressors of law school, and to decrease stigma about seeking help for any health issues that arise. Faculty should consider sharing experiences in which students confronted similar issues and went on to become healthy and productive lawyers.

To support this recommendation, deans of law schools must be engaged. The well-being of future lawyers is too important to relegate to student affairs departments. For faculty to take these issues seriously, it must be clear to them that deans value the time that faculty spend learning about and addressing the needs of students outside the classroom. With the full backing of their deans, deans of students should provide training and/or information to all faculty that includes talking points that correspond to students' likely needs—e.g., exam scores, obtaining jobs, passing the bar, accumulating financial debt, etc. Talking points should be offered only as a guideline. Faculty should be encouraged to tailor conversations to their own style, voice, and relationship with the student.

Law schools should consider inviting law student and lawyer well-being experts to speak at faculty lunches, colloquia, and workshops to enhance their knowledge of this scholarship.<sup>143</sup> Such programming should include not just faculty but teaching assistants, legal writers, peer mentors, and others with leadership roles in whom law students may seek to confide. Many of these experts are members of the Association of American Law Schools section on Balance in Legal Education.<sup>144</sup> Their scholarship is organized in an online bibliography divided into two topics: Humanizing the Law School Experience and Humanizing the Practice of Law.<sup>145</sup>

<sup>142</sup>See Organ, Jaffe, & Bender, *supra* note 3, at 153. At American University Washington College of Law, as but one example likely among many, the dean of students invites faculty no less than every other year to meet with the University Counseling director and D.C. Bar Lawyer Assistance Program manager to discuss trends, highlight notable behaviors, discuss how to respond to or refer a student, and the importance of tracking attendance.

<sup>143</sup>See J. Bibelhausen, K. M. Bender, R. Barrett, *Reducing the Stigma: The Deadly Effect of Untreated Mental Illness and New Strategies for Changing Outcomes in Law Students*, 41 WM. MITCHELL L. REV. 918 (2015).

<sup>144</sup>Balance in Legal Educ. Sec., Ass'n Am. L. Sch., [https://memberaccess.aals.org/eweb/dynamicpage.aspx?webcode=ChpDetail&chp\\_cst\\_key=9fb324e8-e515-4fd3-b6db-a1723feeb799](https://memberaccess.aals.org/eweb/dynamicpage.aspx?webcode=ChpDetail&chp_cst_key=9fb324e8-e515-4fd3-b6db-a1723feeb799).

<sup>145</sup>*Id.* at Bibliography.



### 27.2. Adopt a Uniform Attendance Policy to Detect Early Warning Signs of Students in Crisis.

While law students may occasionally miss class due to personal conflicts, their repeated absence often results from deteriorating mental health.<sup>146</sup> Creating a system to monitor for chronic absences can help identify students for proactive outreach. Consequently, law schools should adhere to a consistent attendance policy that includes a timely reporting requirement to the relevant law school official. Absent such a requirement, deans of students may be left with only a delayed, reactive approach.

If faculty members are reluctant to report student absences, a system can be created to ensure that a report cannot be traced to the faculty member. Several law schools have adopted “care” networks or random check-ins whereby someone can report a student as potentially needing assistance.<sup>147</sup> In these programs, the identity of the person who provided the report is kept confidential.

Certain models on this issue include the American University Washington College of Law, which implements random “check-in” outreach, emailing students to visit the Student Affairs office for brief conversations. This method allows for a student about whom a concern has been raised to be folded quietly into the outreach.<sup>148</sup> Georgetown Law School allows anyone concerned about a student to send an email containing only the student’s name, prompting relevant law school officials to check first with one another and then investigate to determine if a student meeting is warranted.<sup>149</sup> The University of Miami School of Law uses an online protocol for a student to self-report absences in advance, thus enabling the dean of students to follow up as appropriate if personal problems are indicated.<sup>150</sup>

### 27.3. Provide Mental Health and Substance Use Disorder Resources.

Law schools should identify and publicize resources so that students understand that there are resources available to help them confront stress and well-being crises. They should highlight the benefits of these resources and that students should not feel stigmatized for seeking help. One way to go about this is to have



## Develop Student Resources

- ✓ **Create and publicize well-being resources designed for students.**
- ✓ **Counter issues of stigma.**
- ✓ **Include mental health resources in every course syllabus.**
- ✓ **Organize wellness events.**
- ✓ **Develop a well-being curriculum.**
- ✓ **Establish peer mentoring.**

every course syllabus identify the law school’s mental health resources. The syllabus language should reflect an understanding that stressors exist.<sup>151</sup> Law schools also can hold special events, forums, and conversations that coincide with national awareness days, such as mental health day and suicide prevention day.

<sup>146</sup>See Organ, Jaffe, & Bender, *supra* note 3, at 152.

<sup>147</sup>*Id.*

<sup>148</sup>*Id.*

<sup>149</sup>*Id.*

<sup>150</sup>*Id.*

<sup>151</sup>One example of such a provision is: “Mental Health Resources: Law school is a context where mental health struggles can be exacerbated. If you ever find yourself struggling, please do not hesitate to ask for help. If you wish to seek out campus resources, here is some basic information: [Website]. [Law School Name] is committed to promoting psychological wellness for all students. Our mental health resources offer support for a range of psychological issues in a confidential and safe environment. [Phone; email; address; hotline number].”

Developing a well-being curriculum is an additional way to convey that resources are available and that the law school considers well-being a top priority. Northwestern University's Pritzker School of Law has accomplished the latter with well-being workshops, mindfulness and resilience courses, and meditation sessions as part of a larger well-being curriculum.<sup>152</sup>

Another noteworthy way to provide resources is to establish a program where law students can reach out to other law students who have been trained to intervene and help refer students in crisis. Touro Law School established a "Students Helping Students" program in 2010 where students volunteer to undergo training to recognize mental health problems and refer students confronting a mental health crisis.<sup>153</sup>

## **28. ASSESS LAW SCHOOL PRACTICES AND OFFER FACULTY EDUCATION ON PROMOTING WELL-BEING IN THE CLASSROOM.**

Law school faculty are essential partners in student well-being efforts. They often exercise powerful personal influence over students, and their classroom practices contribute enormously to the overall law school experience. Whether faculty members exercise their influence to promote student well-being depends, in part, on support of the law school culture and priorities. To support their involvement, faculty members should be invited into strategic planning to develop workable ideas. Framing strategies as helping students develop into healthy lawyers who possess grit and resilience may help foster faculty buy-in. Students' mental resilience can be viewed as a competitive advantage during their job searches and as support along their journeys as practicing lawyers toward sustainable professional and personal identities.

Educating law school faculty on how classroom practices can affect student well-being is one place to start the process of gaining faculty buy-in. For example, law professor Larry Krieger and social scientist Kennon

Sheldon identified potential culprits that undercut student well-being, including hierarchical markers of worth such as comparative grading, mandatory curves, status-seeking placement practices, lack of clear and timely feedback, and teaching practices that are isolating and intimidating.<sup>154</sup>

## ***Evaluate classroom practices for their impact on student well-being.***

Because organizational practices so significantly influence student well-being, we recommend against focusing well-being efforts solely on detecting dysfunction and strengthening students' mental toughness. We recommend that law schools assess their classroom and organizational practices, make modifications where possible, and offer faculty programming on supporting student well-being while continuing to uphold high standards of excellence. Harmful practices should not be defended solely on the ground that law school has always been this way. Teaching practices should be evaluated to assess whether they are necessary to the educational experience and whether evidence supports their effectiveness.

## **29. EMPOWER STUDENTS TO HELP FELLOW STUDENTS IN NEED.**

As noted above, students often are reluctant to seek mental health assistance from faculty members. Empowering students to assist each other can be a helpful alternative. One suggestion is to create a peer mentoring program that trains student mentors to provide support to fellow students in need. The ideal mentors would be students who are themselves in

<sup>152</sup>Northwestern Law's well-being curriculum can be found at <http://www.law.northwestern.edu/law-school-life/student-services/wellness/curriculum/>.

<sup>153</sup>TOURO L. SCH. STUDENTS HELPING STUDENTS (2017), available at <https://www.tourolaw.edu/uploads/Students%20Helping%20Students%20Spring17.pdf>.

<sup>154</sup>See K. M. Sheldon & L. S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 PERSONALITY & SOC. PSYCH. BULL. 883 (2007); K. M. Sheldon & L. S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & THE LAW 261 (2004).



recovery. They should be certified by the local lawyer assistance program or another relevant organization and should be covered by the lawyer assistance program's confidentiality provisions. Peer mentors should not have a direct reporting obligation to their law school dean of students. This would help ensure confidentiality in the peer mentoring relationship and would foster trust in the law school community.<sup>155</sup>

### **30. INCLUDE WELL-BEING TOPICS IN COURSES ON PROFESSIONAL RESPONSIBILITY.**

Mental health and substance use should play a more prominent role in courses on professional responsibility, legal ethics, or professionalism. A minimum of one class session should be dedicated to the topic of substance use and mental health issues, during which bar examiners and professional responsibility professors or their designee (such as a lawyer assistance program representative) appear side-by-side to address the issues. Until students learn from those assessing them that seeking assistance will not hurt their bar admission prospects, they will not get the help they need.

### **31. COMMIT RESOURCES FOR ONSITE PROFESSIONAL COUNSELORS.**

Law schools should have, at a minimum, a part-time, onsite professional counselor. An onsite counselor provides easier access to students in need and sends a symbolic message to the law school community that seeking help is supported and should not be stigmatized. Although the value of such a resource to students should justify the necessary budget, law schools also could explore inexpensive or no-cost assistance from lawyer assistance programs. Other possible resources may be available from the university or private sector.

### **32. FACILITATE A CONFIDENTIAL RECOVERY NETWORK.**

Law schools should consider facilitating a confidential network of practicing lawyers in recovery from substance

use to connect with law students in recovery. Law students are entering a new community and may assume that there are few practicing lawyers in recovery. Facilitating a confidential network will provide an additional support network to help students manage the challenges of law school and maintain health. Lawyers Concerned for Lawyers is an example of a legal peer assistance group that exists in many regions that may be a confidential network source.

### **33. PROVIDE EDUCATION OPPORTUNITIES ON WELL-BEING-RELATED TOPICS.**

#### **33.1. Provide Well-Being Programming During the 1L Year.**

We agree with the Survey of Law Student Well-Being report's recommendation that law schools should incorporate well-being topics into student orientation.<sup>156</sup> We recommend that during 1L orientation, law schools should include information about student well-being and options for dealing with stress. Communications should convey that seeking help is the best way to optimize their studies and to ensure they graduate and move successfully into law practice. Other vulnerable times during which well-being-related programming would be particularly appropriate include the period before fall final exams, the period when students receive their first set of law school grades (usually at the start of spring semester), and the period before spring final exams. The Task Force commends Southwestern Law School's IL "Peak Performance Program" and its goal of helping new law students de-stress, focus, and perform well in law school.<sup>157</sup> This voluntary program is the type of programming that can have a transformative effect on law student well-being.

#### **33.2. Create A Well-Being Course and Lecture Series for Students.**

To promote a culture of well-being, law schools should create a lecture series open to all students and a course designed to cover well-being topics in depth. Well-being

<sup>155</sup>The University of Washington School of Law offers a "Peer Support Program" that includes peer counseling, that offers stress management resources, and support for multicultural engagement. More information on the program can be found at <https://www.law.uw.edu/wellness/resources/>.

<sup>156</sup>Organ, Jaffe, & Bender, *supra* note 3, at 148.

<sup>157</sup>Southwestern Law School, Mindfulness, Peak Performance, and Wellness Programs, <http://www.swlaw.edu/student-life/support-network/mindfulness-peak-performance-and-wellness-programs>.



has been linked to improved academic performance, and, conversely, research reflects that well-being deficits connect to impaired cognitive performance. Recent research also has found that teaching well-being skills enhances student performance on standardized tests, and improves study habits, homework submission,



## Effects of Student Well-Being

- ✓ Better academic performance and cognitive functioning
- ✓ Enhanced test performance
- ✓ Improved study habits and homework quality
- ✓ Long-term academic success

grades, and long-term academic success, as well as adult education attainment, health, and wealth.<sup>158</sup> A well-being course can, for example, leverage research findings from positive psychology and neuroscience to explore the intersection of improved well-being, enhanced performance, and enriched professional identity development for law students and lawyers. Further knowledge of how to maintain well-being can enhance competence, diligence, and work

relationships—all of which are required by the ABA's Model Rules of Professional Conduct. The content of a well-being course could be guided by education reform recommendations. **Appendix E** provides content suggestions for such a course.

### 34. DISCOURAGE ALCOHOL-CENTERED SOCIAL EVENTS.

Although the overwhelming majority of law students are of legal drinking age, a law school sends a strong message when alcohol-related events are held or publicized with regularity. Students in recovery and those thinking about it may feel that the law school does not take the matter seriously and may be less likely to seek assistance or resources. A law school can minimize the alcohol provided; it can establish a policy whereby student organizations cannot use student funds for the purchase of alcohol.<sup>159</sup> Events at which alcohol is not the primary focus should be encouraged and supported. Further, law school faculty should refrain from drinking alcohol at law school social events.

### 35. CONDUCT ANONYMOUS SURVEYS RELATING TO STUDENT WELL-BEING.

Recommendation 24 for legal employers suggests regular assessment of lawyer well-being. That same Recommendation applies in the law school context.

<sup>158</sup>A. Adler & M. E. P. Seligman, *Using Wellbeing for Public Policy: Theory, Measurement, and Recommendations*, 6 INT'L J. WELLBEING, 1, 17 (2016); M. A. White & A. S. Murray, *Building a Positive Institution*, in EVIDENCE-BASED APPROACHES IN POSITIVE EDUC. IN SCHS.: IMPLEMENTING A STRATEGIC FRAMEWORK FOR WELL-BEING IN SCHS. 1, 8 (M. A. White & A. S. Murray eds., 2015).

<sup>159</sup>At a minimum, permission should be sought from the dean of students to serve alcohol at school-sponsored, school-located events, so administration is aware. Off-campus events should be only on a cash basis by the establishment. Professional networking events, and on campus events should be focused on the program or speaker, and not on drink specials or offers of free alcohol. Publicity of these events should avoid mention of discounted drink specials that could detract from the professional networking environment. In all instances, providing alcohol should be limited to beer and wine. Open bars not regulated by drink tickets or some other manner of controlling consumption should not be permitted.





*“When we look at what has the strongest statistical relationship to overall [life satisfaction], the first one is your career well-being, or the mission, purpose and meaning of what you’re doing when you wake up each day.” — Tom Rath*

**B**ar associations are organized in a variety of ways, but all share common goals of promoting members’ professional growth, quality of life, and quality of the profession by encouraging continuing education, professionalism (which encompasses lawyer competence, ethical conduct, eliminating bias, and enhancing diversity), pro bono and public service. Bar members who are exhausted, impaired, disengaged, or overly self-interested will not live up to their full potential as lawyers or positive contributors to society. Below are recommendations for bar associations to foster positive change in the well-being of the legal community which, in turn, should benefit lawyers, bar associations, and the general public.

### **36. ENCOURAGE EDUCATION ON WELL-BEING TOPICS IN COORDINATION AND IN ASSOCIATION WITH LAWYER ASSISTANCE PROGRAMS.**

#### **36.1. Sponsor High-Quality CLE Programming on Well-Being-Related Topics.**

In line with Recommendation 8, bar associations should develop and regularly offer educational programming on well-being-related topics. Bar leadership should recommend that all sections adopt a goal of providing at least one well-being related educational opportunity at all bar-sponsored events, including conferences, section retreats, and day-long continuing legal education events.

#### **36.2. Create Educational Materials to Support Individual Well-Being and “Best Practices” for Legal Organizations.**

We recommend that bar associations develop “best practice” model policies on well-being-related topics, for example practices for responding to lawyers in distress, succession planning, diversity and inclusion, mentoring practices, work-life balance policies, etc.

#### **36.3 Train Staff to Be Aware of Lawyer Assistance Program Resources and Refer Members.**

Educating bar association staff regarding lawyer assistance programs’ services, resources, and the confidentiality of referrals is another way to foster change in the legal community. Bar association staff can further promote these resources to their membership. A bar association staff member may be the person who coordinates a needed intervention for a lawyer facing a mental health or substance use crisis.

### **37. SPONSOR EMPIRICAL RESEARCH ON LAWYER WELL-BEING AS PART OF ANNUAL MEMBER SURVEYS.**

Many bar associations conduct annual member surveys. These surveys offer an opportunity for additional research on lawyer well-being and awareness of resources. For example, questions in these surveys can gauge awareness of support networks either in law firms or through lawyer assistance programs. They can survey lawyers on well-being topics they would like to see addressed in bar journal articles, at bar association events, or potentially through continuing legal education courses. The data gathered can inform bar associations’ outreach and educational efforts.

### 38. LAUNCH A LAWYER WELL-BEING COMMITTEE.

We recommend that bar associations consider forming Lawyer Well-Being Committees. As noted in Recommendation 5.2, the ABA and a number of state bar associations already have done so. Their work supplements lawyer assistance programs with a more expansive approach to well-being. These committees typically focus not only on addressing disorders and ensuring competence to practice law but also on optimal functioning and full engagement in the profession. Such committees can provide a valuable service to members by, for example, dedicating attention to compiling resources, high-quality speakers, developing and compiling educational materials and programs, serving as a clearinghouse for lawyer well-being information, and partnering with the lawyer assistance program, and other state and national organizations to advocate for lawyer well-being initiatives.

The South Carolina Bar’s Lawyer Wellness Committee, launched in 2014 and featuring a “Living Above the Bar” website, is a good model for well-being committees. In 2016, the ABA awarded this Committee the E. Smythe Gambrell Professionalism Award, which honors excellence and innovation in professionalism programs.<sup>160</sup>

### 39. SERVE AS AN EXAMPLE OF BEST PRACTICES RELATING TO LAWYER WELL-BEING AT BAR ASSOCIATION EVENTS.

Bar associations should support members’ well-being and role model best practices in connection with their own activities and meetings. This might include, for example, organizing functions to be family-friendly, scheduling programming during times that do not interfere with personal and family time, offering well-being-related activities at events (e.g., yoga, fun runs, meditation, providing coffee or juice bars, organizing Friends of Bill/support group meetings), providing well-being-related education and training to bar association leaders, and including related programming at conferences and other events. For instance, several bar associations around the country sponsor family-friendly fun runs, such as the Maricopa County Bar Association annual 5k Race Judicata.

<sup>160</sup>The South Carolina Bar’s lawyer well-being website is *available* at <http://discussions.scbar.org/public/wellness/index.html>.





*"If any organism fails to fulfill its potentialities, it becomes sick." — William James*

Lawyers' professional liability (LPL) carriers have a vested interest from a loss prevention perspective to encourage lawyer well-being. Happier, healthier lawyers generally equate to better risks. Better risks create stronger risk pools. Stronger risk pools enjoy lower frequency and often less severe claims. Fewer claims increases profitability. For lawyers, the

***Happier, healthier lawyers equate to better risk, fewer claims, and greater profitability.***

stronger the performance of the risk pool, the greater the likelihood of premium reduction. Stakeholders interested in lawyer well-being would be well-served to explore partnerships with lawyers' professional liability carriers, many of whom enjoy bar-related origins with their respective state bar and as members of the National Association of Bar-Related Insurance Carriers (or NABRICOs). Even commercial carriers active in the lawyers' malpractice market enjoy important economic incentives to support wellness initiatives, and actively assess risks which reflect on the likelihood of future claims.<sup>161</sup> Below are several recommendations for LPL carriers to consider in their pursuit of improving lawyer well-being.

#### **40. ACTIVELY SUPPORT LAWYER ASSISTANCE PROGRAMS.**

In certain jurisdictions, lawyers' professional liability carriers are amongst the most important funders of lawyer assistance programs, appreciating that an ounce of prevention is worth a pound of cure. An impaired or troubled attorney who is aided before further downward spiral harms the lawyer's ability to engage in high-quality professional services can directly prevent claims. Thus, LPL carriers are well-served to understand lawyer assistance program needs, their impact, and how financial and marketing support of such programs can be a worthy investment. At the same time, where appropriate, lawyer assistance programs could prepare a case for support to LPL carriers on how their activities affect attorneys, much like a private foundation examines the impact effectiveness of grantees. If the case for support is effectively made, support may follow.

#### **41. EMPHASIZE WELL-BEING IN LOSS PREVENTION PROGRAMS.**

Most LPL carriers, as a means of delivering value beyond just the promise of attorney protection in the event of an error or omission, are active in developing risk management programs via CLE, law practice resources, checklists, and sample forms designed to reduce the susceptibility of an attorney to a claim. These resources often center on topics arising from recent claims trends, be it law practice management tips, technology traps, professionalism changes, or ethical infrastructure challenges. LPL carriers should consider paying additional attention to higher level attorney wellness issues, focusing on how such programs promote the emotional and physical foundations from which lawyers can thrive in legal service delivery. Bar associations are increasingly exploring well-being programs as a member benefit, and LPL carriers could be helpful in providing financial support or thought leadership in the development of such programs.

<sup>161</sup>Examples of LPL carriers serving the market from the commercial side include CNA, AON, Liberty Mutual, Hartford, among others.

## **42. INCENTIVIZE DESIRED BEHAVIOR IN UNDERWRITING LAW FIRM RISK.**

The process of selecting, structuring, and pricing LPL risk is part art, part science. Underwriters, in addition to seeking core LPL information such as area of practice, claim frequency, claim severity, firm size, firm longevity and firm location, are also working to appreciate and understand the firm's complete risk profile. The more effectively a firm can illustrate its profile in a positive manner, the more desirable a firm will be to a carrier's risk pool. Most states permit carriers flexibility in applying schedule rating credits or debits to reflect the individual risk characteristics of the law firm. LPL carriers should more actively explore the application of lawyer well-being premium credits, much like they currently do for internal risk management systems, documented attorney back-up systems, and firm continuity.

## **43. COLLECT DATA WHEN LAWYER IMPAIRMENT IS A CONTRIBUTING FACTOR TO CLAIMS ACTIVITY.**

LPL carriers traditionally track claims based on area of practice or the nature of the error. LPL carriers do

not ordinarily track when substance abuse, stress, depression, or mental health are suspected to be contributing factors to the underlying claim. This is primarily due to the fact that most LPL claims adjusters, usually attorneys by trade, lack sufficient (or usually any) clinical training to make such a determination. That being said, anecdotal evidence suggests the impact is substantial. Thus, LPL carriers should consider whether a "common sense" assessment of instances where attorney impairment is suspected to be a contributing factor to the underlying claim. Such information would be helpful to lawyer assistance programs and as an important data point for what bar counsel or disciplinary units similarly see when investigating bar grievances. LPL carriers are in a prime position to collect data, share such data when appropriate, and assess the manner in which lawyer impairment has a direct correlation to claims activity.





*“It is under the greatest adversity that there exists the greatest potential for doing good, both for oneself and others.” — Dalai Lama*

**B**ecause lawyer assistance programs are so well-positioned to play a pivotal role in lawyer well-being, they should be adequately funded and organized to ensure that they can fulfill their potential.

## *Lawyer assistance programs should be supported to fulfill their full potential.*

This is not consistently the case. While a lawyer assistance program exists in every state, according to the 2014 Comprehensive Survey of Lawyer Assistance Programs their structures, services, and funding vary widely. Lawyer assistance programs are organized either as agencies within bar associations, as independent agencies, or as programs within the state’s court system.<sup>162</sup> Many operate with annual budgets of less than \$500,000.<sup>163</sup> About one quarter operate without any funding and depend solely on volunteers.<sup>164</sup> The recommendations below are designed to equip lawyer assistance programs to best serve their important role in lawyer well-being.

### **44. LAWYERS ASSISTANCE PROGRAMS SHOULD BE APPROPRIATELY ORGANIZED AND FUNDED.**

#### **44.1 Pursue Stable, Adequate Funding.**

Lawyer assistance programs should advocate for stable, adequate funding to provide outreach, screening, counseling, peer assistance, monitoring, and preventative education. Other stakeholders should ally themselves with lawyer assistance programs in pursuit of this funding.

#### **44.2 Emphasize Confidentiality.**

Lawyer assistance programs should highlight the confidentiality of the assistance they provide. The greatest concern voiced by lawyer assistance programs in the most recent CoLAP survey was under-utilization of their services stemming from the shame and fear of disclosure that are bound up with mental health and substance use disorders.<sup>165</sup> Additionally, lawyer assistance programs should advocate for a supreme court rule protecting the confidentiality of participants in the program, as well as immunity for those making good faith reports, volunteers, and staff.

#### **44.3 Develop High-Quality Well-Being Programming.**

Lawyer assistance programs should collaborate with other organizations to develop and deliver programs on the topics of lawyer well-being, identifying and treating substance use and mental health disorders, suicide prevention, cognitive impairment, and the like.<sup>166</sup> They should ensure that all training and other education efforts emphasize the availability of resources and the

<sup>162</sup>2014 COMPREHENSIVE SURVEY OF LAWYER ASSISTANCE PROGRAMS, *supra* note 25, at 3.

<sup>163</sup>*Id.* at 5.

<sup>164</sup>*Id.* at 27.

<sup>165</sup>*Id.* at 49-50.

<sup>166</sup>Accommodating adult learning should inform program development. The Illinois Supreme Court Commission on Professionalism offers a number of resources through its “Strategies for Teaching CLE” web page, <https://www.2civility.org/programs/cle/cle-resources/strategies-for-teaching-cle/>. See also K. TAYLOR & C. MARIENAU, FACILITATING LEARNING WITH THE ADULT BRAIN IN MIND: A CONCEPTUAL AND PRACTICAL GUIDE (2016); M. Silverthorn, *Adult Learning: How Do We Learn?*, ILL. SUP. CT. COMM’N ON PROFESSIONALISM, Dec. 4, 2014, <https://www.2civility.org/adult-learning/>.

confidentiality of the process.

Lawyer assistance programs should evaluate whether they have an interest in and funding to expand their programming beyond the traditional focus on treatment of alcohol use and mental health disorders. Some lawyer assistance programs already have done so. The 2014 Comprehensive Survey of Lawyer Assistance Programs reflects that some well-resourced lawyer assistance programs include services that, for example, address transition and succession planning, career counseling, anger management, grief, and family counseling.<sup>167</sup> Increasingly, lawyer assistance programs are expanding their services to affirmatively promote well-being (rather than seeking only to address dysfunction) as a means of preventing prevalent impairments.

This expansion is consistent with some scholars' recommendations for Employee Assistance Programs that encourage engagement in a broader set of prevention and health-promotion strategies. Doing so could expand the lawyer assistance programs' net to people who are in need but have not progressed to the level of a disorder. It also could reach people who may participate in a health-promotion program but would avoid a prevention program due to social stigma.<sup>168</sup> Health-promotion approaches could be incorporated into traditional treatment protocols. For example, "Positive Recovery" strategies strive not only for sobriety but also for human flourishing.<sup>169</sup> Resilience-boosting strategies have also been proposed for addiction treatment.<sup>170</sup>

#### 44.4 Lawyer Assistance Programs' Foundational Elements.

All lawyer assistance programs should include the following foundational elements to provide effective leadership and services to lawyers, judges, and law students:

- A program director with an understanding of the legal profession and experience addressing mental health conditions, substance use disorders, and wellness issues for professionals;
- A well-defined program mission and operating policies and procedures;
- Regular educational activities to increase awareness and understanding of mental health and substance use disorders;
- Volunteers trained in crisis intervention and assistance;
- Services to assist impaired members of the legal profession to begin and continue recovery;
- Participation in the creation and delivery of interventions;
- Consultation, aftercare services, voluntary and diversion monitoring services, referrals to other professionals, and treatment facilities; and
- A helpline for individuals with concern about themselves or others.<sup>171</sup>

<sup>167</sup>2014 COMPREHENSIVE SURVEY OF LAWYER ASSISTANCE PROGRAMS, *supra* note 25, at 13.

<sup>168</sup>R. F. Cook, A. S. Back, J. Trudeau, & T. McPherson, *Integrating Substance Abuse Prevention into Health Promotion Programs in the Workplace: A Social Cognitive Intervention Targeting the Mainstream User*, in PREVENTING WORKPLACE SUBSTANCE ABUSE: BEYOND DRUG TESTING TO WELLNESS 97-133 (J. B. Bennett, W. K. Lehman eds., 2003).

<sup>169</sup>J. Z. POWERS, POSITIVE RECOVERY DAILY GUIDE: THRIVE IN RECOVERY (2015).

<sup>170</sup>T. Alim, W. Lawson, A. Neumeister, et al., *Resilience to Meet the Challenge of Addiction: Psychobiology and Clinical Considerations*, 34 ALCOHOL RESEARCH: CURRENT REVIEWS 506 (2012).

<sup>171</sup>See AM. BAR ASS'N, MODEL LAWYER ASSISTANCE PROGRAM (Revised 2004), available at [http://www.americanbar.org/content/dam/aba/administrative/lawyer\\_assistance/ls\\_colap\\_model\\_lawyer\\_assistance\\_program.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_model_lawyer_assistance_program.authcheckdam.pdf); AM. BAR ASS'N, GUIDING PRINCIPLES FOR A LAWYER ASSISTANCE PROGRAM (1991), available at [http://www.americanbar.org/content/dam/aba/administrative/lawyer\\_assistance/ls\\_colap\\_guiding\\_principles\\_for\\_assistance.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_guiding_principles_for_assistance.authcheckdam.pdf).



*“It always seems impossible until it’s done.” — Nelson Mandela*

This Report makes a compelling case that the legal profession is at a crossroads. Our current course, one involving widespread disregard for lawyer well-being and its effects, is not sustainable. Studies cited above show that our members suffer at alarming rates from conditions that impair our ability to function at levels compatible with high ethical standards and public expectations. Depression, anxiety, chronic stress, burnout, and substance use disorders exceed those of many other professions. We have ignored this state of affairs long enough. To preserve the public’s trust and maintain our status as a self-regulating profession, we must truly become “our brothers’ and sisters’ keepers,” through a strong commitment to caring for the well-being of one another, as well as ourselves.

The members of the National Task Force for Lawyer Well-Being urge all stakeholders identified in this report to take action. To start, please review the State Action Plan and Checklist that follows in **Appendix A**. If you are a leader in one of these sectors, please use your authority to call upon your cohorts to come together and develop

a plan of action. Regardless of your position in the legal profession, please consider ways in which you can make a difference in the essential task of bringing about a

***We have the capacity  
to create a better  
future for our lawyers.***

culture change in how we, as lawyers, regard our own well-being and that of one another.

As a profession, we have the capacity to face these challenges and create a better future for our lawyers that is sustainable. We can do so—not in spite of—but in pursuit of the highest professional standards, business practices, and ethical ideals.

<sup>1</sup>P. R. Krill, R. Johnson, & L. Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46 (2016).

<sup>2</sup>A. M. Brafford, *Building the Positive Law Firm: The Legal Profession At Its Best* (August 1, 2014) (Master’s thesis, Univ. Pa., on file with U. Pa. Scholarly Commons Database), available at [http://repository.upenn.edu/mapp\\_capstone/62/](http://repository.upenn.edu/mapp_capstone/62/).

<sup>3</sup>J. M. Organ, D. Jaffe, & K. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116 (2016).

<sup>4</sup>See D. L. Chambers, *Overstating the Satisfaction of Lawyers*, 39 LAW & SOC. INQUIRY 1 (2013).

<sup>5</sup>J. M. Organ, *What Do We Know About the Satisfaction/Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being*, 8 U. ST. THOMAS L. J. 225 (2011); L. S. Krieger & K. M. Sheldon, *What Makes Lawyers Happy? Transcending the Anecdotes with Data from 6200 Lawyers*, 83 GEO. WASH. L. REV. 554 (2015).

## National Task Force on Lawyer Well-Being State Action Plan & Checklist

*Chief Justice (or Designee) "To Do List"*

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### Gather all stakeholders

(Identify leaders in the jurisdiction with an interest in and commitment to well-being issues. Bring these leaders together in a Commission on Lawyer Well-Being. The attached list of potential stakeholder representatives offers guidance.)

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### Review the Task Force Report

Have Commission members familiarize themselves with the Task Force Report. It provides concrete recommendations for how to address lawyer well-being issues.

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### Do an inventory of recommendations

(Next, assess which recommendations can be implemented in the jurisdiction. This includes an assessment of the leadership and resources required to implement these recommendations.)

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### Create priorities

(Each jurisdiction will have its own priorities based on the inventory of recommendations. Which ones are the most urgent? Which ones will create the most change? Which ones are feasible?)

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### Develop an action plan

(Having inventoried the recommendations and prioritized them, now is the time to act. What does that path forward look like? Who needs to be involved? How will progress be measured?)

# National Task Force on Lawyer Well-Being State Action Plan & Checklist

## *Checklist for Gathering the Stakeholders*

Item 1 of the Plan above recommends the gathering of stakeholders as a first step. The National Task Force suggests the Chief Justice of each state create a Commission on Lawyer Well-Being in that state and appoint representatives from each stakeholder group to the Commission. Below is a checklist of potential stakeholder representatives the Chief Justice may consider in making appointments.

### **JUDICIAL**

- Supreme Court Chief Justice or designated representative
- Other judge representatives

### **LAWYER ASSISTANCE PROGRAM (LAP)**

- LAP Director
- Clinical director
- Lawyer representative to the LAP

### **LAW SCHOOLS**

- Dean representative
- Faculty representative
- Law student representative

### **REGULATORS**

- Admissions (or Board of Law Examiners) representative
- Mandatory CLE program representative
- CLE provider representative
- Regulation/Bar/Disciplinary Counsel representative

### **BAR ASSOCIATIONS**

- Bar president
- Bar president-elect
- Executive director
- Young lawyer division representative
- Specialty bar representative

### **LAW FIRMS**

- Sole practitioner
- Small firm representative (2-5 lawyers)
- Medium firm representative (6-15 lawyers)
- Large firm representative (16+ lawyers)
- In-house counsel representative
- Non-traditional lawyer representative

### **ALLIES**

- ASAM representative (addiction psychiatrist)
- Organizational/behavioral psychologist
- Members of the public

## Appendix to Recommendation 8: Example Educational Topics About Lawyer Distress and Well-Being

Recommendation 8 advises stakeholders to provide high-quality education programs and materials on causes and consequences of lawyer distress and well-being. Below is a list of example educational topics for such programming with empirical support.

### 8.1 Work Engagement vs. Burnout

The work engagement-burnout model can serve as a general organizing framework for stakeholders' efforts to boost lawyer well-being and curb dysfunction. Work engagement is a kind of work-related well-being. It includes high levels of energy and mental resilience, dedication (which includes a sense of meaningfulness, significance, and challenge), and frequently feeling positively absorbed in work.<sup>172</sup> Work engagement contributes to, for example, mental health, less stress and burnout, job satisfaction, helping behaviors, reduced turnover, performance, and profitability.<sup>173</sup>

Burnout is essentially the opposite of engagement. It is a stress response syndrome that is highly correlated with depression and can have serious psychological and physiological effects. Workers experiencing burnout feel emotionally and physically exhausted, cynical about the value of their activities, and uncertain about their capacity to perform well.<sup>174</sup>

The work engagement-burnout model proposes the idea of a balance between resources and demands: Engagement arises when a person's resources (i.e., positive individual, job, and organizational factors, like autonomy, good leadership, supportive colleagues, feedback, interesting work, optimism, resilience) outweigh demands (i.e., draining aspects of the job, like work overload and conflicting demands). But when excessive demands or a lack of recovery from demands tip the scale, workers are in danger of burnout. Disengagement, alienation, and turnover become likely. Resources contribute to engagement; demands feed burnout. Using this framework as a guide, stakeholders should develop lawyer well-being strategies that focus on increasing individual and organizational resources and decreasing demands when possible.<sup>175</sup>

The incidence of burnout vs. work engagement in the legal profession is unknown but has been well-studied in the medical profession. Research has found that 30-40 percent of licensed physicians, 49 percent of medical students, and 60 percent of new residents meet the definition of burnout, which is associated with an increased risk of depression, substance use, and suicidal thinking.<sup>176</sup> Burnout also undermines professionalism and quality of patient care by eroding honesty, integrity, altruism, and self-regulation.<sup>177</sup>

The medical profession's work on these issues can serve as a guide for the legal profession. It has conducted

<sup>172</sup>W. B. Schaufeli, *What is Engagement?*, in EMPLOYEE ENGAGEMENT IN THEORY AND PRACTICE (C. Truss, K. Alfes, R. Delbridge, A. Shantz, & E. Soane eds., 2013).

<sup>173</sup>C. Bailey, A. Madden, K. Alfes, & L. Fletcher, *The Meaning, Antecedents and Outcomes of Employee Engagement: A Narrative Synthesis*, 19 INT'L J. MGMT. REV. 19 (2017); BRAFFORD, *supra* note 131; GALLUP, INC., ENGAGEMENT AT WORK: ITS EFFECT ON PERFORMANCE CONTINUES IN TOUGH ECONOMIC TIMES (2013), available at <http://www.gallup.com/services/176657/engagement-work-effect-performance-continues-tough-economic-times.aspx>.

<sup>174</sup>Maslach, Schaufeli, & Leiter, *supra* note 121.

<sup>175</sup>A. B. Bakker & E. Demerouti, *Job Demands-Resources Theory: Taking Stock and Looking Forward*, J. OCCUPATIONAL HEALTH PSYCHOL. (2016), advance online publication available at <http://dx.doi.org/10.1037/ocp0000056>; A. B. Bakker, *Top-Down and Bottom-Up Interventions to Increase Work Engagement*, in AM. PSYCHOL. ASS'N HANDBOOK OF CAREER INTERVENTION: VOL. 2. APPLICATIONS 427-38 (P. J. Hartung, M. L. Savickas, & W. B. Walsh eds., 2015); BRAFFORD, *supra* note 131.

<sup>176</sup>L. Dyrbye, T. Shanafelt, *Physician Burnout: A Potential Threat to Successful Health Care Reform*, 305 J. AM. MED. ASS'N 2009 (2009); L. Dyrbye & T. Shanafelt, *A Narrative Review of Burnout Experienced by Medical Students and Residents*, 50 MED. EDUC. 132 (2016); J. J. Hakanen & W. B. Schaufeli, *Do Burnout and Work Engagement Predict Depressive Symptoms and Life Satisfaction? A Three-Wave Seven-Year Prospective Study*, 141 J. AFFECTIVE DISORDERS 415 (2012).

<sup>177</sup>Dyrbye & Shanafelt, *supra* note 176; T. L. Schwenk, *Resident Depression: The Tip of a Graduate Medical Education Iceberg*, 314 J. AM. MED. ASS'N 2357 (2015).

hundreds of studies, has identified many individual and organizational contributors to burnout, and has proposed wellness strategies and resilience programs.<sup>178</sup> Bi-annually, the American Medical Association (AMA) co-sponsors an International Conference on Physician Health. The September 2016 conference was held in Boston with the theme, “Increasing Joy in Medicine.” The conference included 70 presentations, workshops, and plenary speaker sessions on a wide variety of well-being topics over a three-day period (See AMA website).

## 8.2 Stress

Stress is inevitable in lawyers’ lives and is not necessarily unhealthy.<sup>179</sup> Mild to moderate levels of stress that are within our capability can present positive challenges that result in a sense of mastery and accomplishment.<sup>180</sup> Much of our daily stress is governed by our beliefs about our coping abilities.<sup>181</sup> When stress is perceived as a positive, manageable challenge, the stress response actually can enable peak performance.<sup>182</sup> For example, in a study of a New Zealand law firm, researchers found that lawyers who frequently experience positive challenge reported the highest levels of work engagement. The researchers also found that, where lawyers felt overburdened by work, they were more likely to experience burnout.<sup>183</sup>

This finding highlights the importance of positive challenge but also its paradoxical effect: Challenge contributes to work-related well-being, but it also can lead to negative

consequences like burnout when it becomes overwhelming. Stressors that pose the greatest risk of harm are those that are uncontrollable, ambiguous, unpredictable, and chronic that we perceive as exceeding our ability to cope.<sup>184</sup> Such stressors increase the rise of (or exacerbate) depression, anxiety, burnout, alcohol abuse, and physical conditions such as cardiovascular, inflammatory, and other illnesses that can affect lawyers’ health and capacity to practice.<sup>185</sup> For example, in a 2004 study of North Carolina lawyers, more than half had elevated levels of perceived stress, and this was the highest predictor of depression of all factors in the study.<sup>186</sup>

Stress also is associated with cognitive decline, including impaired attention, concentration, memory, and problem-solving.<sup>187</sup> Stress also can harm one’s ability to establish strong relationships with clients and is associated with relational conflict, which can further undermine lawyers’ ability to competently represent and interact with clients. Both personal and environmental factors in the workplace contribute to stress and whether it positively fuels performance or impairs mental health and functioning.<sup>188</sup> Research reflects that organizational factors more significantly contribute to dysfunctional stress responses than individual ones, and that the most effective prevention strategies target both.<sup>189</sup>

## 8.3 Resilience & Optimism

The American Psychological Association defines resilience

<sup>178</sup>E.g., J. Brennan & A. McGrady, *Designing and Implementing a Resiliency Program for Family Medicine Residents*, 50 INT’L J. PSYCHIATRY MED. 104 (2015); J. Eckleberry-Hunt, A. Van Dyke, D. Lick, & J. Tucciarone, *Changing the Conversation from Burnout to Wellness: Physician Well-Being in Residency Training Programs*, 1 J. GRADUATE MED. EDUC. 225 (2009); R. M. Epstein & M. S. Krasner, *Physician Resilience: What It Means, Why It Matters, and How to Promote It*, 88 ACAD. MED. 301 (2013); A. Nedrow, N. A. Steckler, & J. Hardman, *Physician Resilience and Burnout: Can You Make the Switch?* 20 FAMILY PRAC. MGMT. 25 (2013).

<sup>179</sup>A. ELWORK, *STRESS MANAGEMENT FOR LAWYERS* (2007).

<sup>180</sup>K. M. Keyes, M. L. Hatzenbuehler, B. F. Grant, & D. S. Hasin, *Stress and Alcohol: Epidemiologic Evidence*, 34 ALCOHOL RES.: CURRENT REV. 391 (2012).

<sup>181</sup>J. B. Avey, F. Luthans, & S. M. Jensen, *Psychological Capital: A Positive Resource for Combating Employee Stress and Turnover*, 48 HUMAN RES. MGMT. 677 (2009).

<sup>182</sup>BRAFFORD, *supra* note 131; Crum, Salovey, Achor, *supra* note 50; K. McGonigal, *THE UPSIDE OF STRESS: WHY STRESS IS GOOD FOR YOU, AND HOW TO GET GOOD AT IT* (2015).

<sup>183</sup>V. Hopkins & D. Gardner, *The Mediating Role of Work Engagement and Burnout in the Relationships Between Job Characteristics and Psychological Distress Among Lawyers*, 41 N. Z. J. PSYCHOL. 59 (2012).

<sup>184</sup>R. M. Anthenelli, *Overview: Stress and Alcohol Use Disorders Revisited*, 34 ALCOHOL RES.: CURRENT REV. 386 (2012).

<sup>185</sup>E.g., S. M. Southwick, G. A. Bonanno, A. S. Masten, C. Panter-Brick, & R. Yehuda, *Resilience Definitions, Theory, and Challenges: Interdisciplinary Perspectives*, 5 EUR. J. PSYCHOTRAUMATOLOGY 1 (2014); M. R. Frone, *Work Stress and Alcohol Use*, 23 ALCOHOL RES. & HEALTH 284 (1999); C. Hammen, *Stress and Depression*, 1 ANN. REV. CLINICAL PSYCHOL. 293 (2005); Keyes, Hatzenbuehler, Grant, & Hasin, *supra* note 180; J. Wang, *Work Stress as a Risk Factor for Major Depressive Episode(s)*, 35 PSYCHOL. MED. 865 (2005); J-M Woo & T. T. Postolache, *The Impact of Work Environment on Mood Disorders and Suicide: Evidence and Implications*, 7 INT’L J. DISABILITY & HUMAN DEV. 185 (2008).

<sup>186</sup>M. H. Howerton, *The Relationship Between Attributional Style, Work Addiction, Perceived Stress, and Alcohol Abuse on Depression in Lawyers in North Carolina* (2004) (doctoral dissertation, Univ. of N.C. at Charlotte) (available from ProQuest Dissertations and Theses database).

<sup>187</sup>B. S. McEwen, & R. M. Sapolsky, *Stress and Cognitive Function*, 5 CURRENT OPINION IN NEUROBIOLOGY 205–216 (1995); L. Schwabe & O. T. Wolf, *Learning Under Stress Impairs Memory Formation*, 93 NEUROBIOLOGY OF LEARNING & MEMORY 183 (2010); S. Shapiro, J. Astin, S. Bishop, & M. Cordova, *Mindfulness-Based Stress Reduction and Health Care Professionals: Results from a Randomized Controlled Trial*, 12 INT’L J. STRESS MGMT. 164 (2005).

<sup>188</sup>J. C. QUICK, T. A. WRIGHT, J. A. ADKINS, D. L. NELSON, & J. D. QUICK, *PREVENTIVE STRESS MANAGEMENT IN ORGANIZATIONS* (2013).

<sup>189</sup>Maslach, Schaufeli, & Leiter, *supra* note 121.

as a process that enables us to bounce back from adversity in a healthy way. It also has been defined as a “process to harness resources to sustain well-being”<sup>190</sup>—a definition that connects resilience to the resource-balancing framework of the work engagement-burnout model discussed above. Our capacity for resilience derives from a host of factors, including genetics and childhood experiences that influence the neurobiology of our stress response—specifically, whether the stress response is both activated and terminated efficiently.<sup>191</sup>

But resilience also derives from a collection of psychological, social, and contextual factors—many of which we can change and develop. These include, for example, optimism, confidence in our abilities and strengths (self-efficacy), effective problem-solving, a sense of meaning and purpose, flexible thinking, impulse control, empathy, close relationships and social support, and faith/spirituality.<sup>192</sup> A model for developing many of these psychological and social competencies is provided by the U.S. Army’s Master Resilience Training program.<sup>193</sup> As noted above, the medical profession also has designed resilience programs for physicians and residents that can serve as guides, and researchers have offered additional strategies.<sup>194</sup>

Among the most important of the personal competencies is optimistic explanatory style, which is a habit of thought that allows people to put adverse events in a rational context and not be overwhelmed by catastrophic thinking. The principal strategy for building optimistic explanatory style is by teaching cognitive reframing based on cognitive-behavioral therapy research.<sup>195</sup> The core of the technique is to teach people to monitor and dispute their automatic

negative self-talk. Neurobiology scholars recently have argued that this capacity is so important to our regulation of stress that it constitutes the cornerstone of resilience.<sup>196</sup>

This skill can benefit not only practicing lawyers but also law students.<sup>197</sup> Stanford Law, for example, has offered a 3-hour course teaching cognitive framing that has been popular and successful.<sup>198</sup> Lawyer assistance programs also could benefit from learning this and other resilience strategies, which have been used in addiction treatment.<sup>199</sup>

Aside from individual-level skills and strengths, developing “structural resilience” also is important, if not more important. This requires leaders to develop organizations and institutions that are resource-enhancing to help give people the wherewithal to realize their full potential.<sup>200</sup> Individual resilience is highly dependent on the context in which people are embedded. This means that initiatives to foster lawyer well-being should take a systemic perspective.

#### 8.4 Mindfulness Meditation

Mindfulness meditation is a practice that can enhance cognitive reframing (and thus resilience) by aiding our ability to monitor our thoughts and avoid becoming emotionally overwhelmed. A rapidly growing body of research on meditation has shown its potential for help in addressing a variety of psychological and psychosomatic disorders, especially those in which stress plays a causal role.<sup>201</sup> One type of meditative practice is mindfulness—a technique that cultivates the skill of being present by focusing attention on your breath and detaching from your thoughts or feelings. Research has found that mindfulness can reduce rumination, stress, depression, and anxiety.<sup>202</sup> It

<sup>190</sup> Southwick, Bonanno, Masten, Panter-Brick, & Yehuda, *supra* note 185.

<sup>191</sup> Alim, Lawson, & Neumeister, et al., *supra* note 170.

<sup>192</sup> K. J. Reivich, M. E. P. Seligman, & S. McBride, *Master Resilience Training in the U.S. Army*, 66 AM. PSYCHOLOGIST 25 (2011); C. D. Schetter & C. Dolbier, *Resilience in the Context of Chronic Stress and Health in Adults*, 5 SOC. PERSONAL PSYCHOL. COMPASS 634 (2011).

<sup>193</sup> *Id.*; R. R. SINCLAIR, & T. A. BRITT, BUILDING PSYCHOLOGICAL RESILIENCE IN MILITARY PERSONNEL: THEORY AND PRACTICE (2013).

<sup>194</sup> C. COOPER, J. FLINT-TAYLOR, & M. PEARN, BUILDING RESILIENCE FOR SUCCESS: A RESOURCE GUIDE FOR MANAGERS AND ORGANIZATIONS (2013); I. T. Robertson, C. L. Cooper, M. Sarkar, & T. Curran, *Resilience Training in the Workplace from 2003 to 2014: A Systematic Review*, 88 J. OCCUPATIONAL & ORG. PSYCHOL. 533 (2015).

<sup>195</sup> *Id.*

<sup>196</sup> R. Kalisch, M. B. Muler, & O. Tuscher, *A Conceptual Framework for the Neurobiological Study of Resilience*, 27 BEHAV. & BRAIN SCI. 1 (2014).

<sup>197</sup> C. Rosen, *Creating the Optimistic Classroom: What Law Schools Learn from Attribution Style Effects*, 42 MCGEORGE L. REV. 319 (2011).

<sup>198</sup> Stanford Law Professor Joe Bankman’s use of cognitive behavioral therapy concepts are described on the school’s website: <http://news.stanford.edu/2015/04/07/bank-man-law-anxiety-040715>. He has posted relevant materials to educate other law schools how to teach this skill: <http://www.colorado.edu/law/sites/default/files/Bankman%20-%20Materials%20for%20Anxiety%20Psychoeducation%20Course.pdf>.

<sup>199</sup> Alim, Lawson, & Neumeister, *supra* note 170.

<sup>200</sup> BRAFFORD, *supra* note 131; Southwick, Bonanno, Masten, Panter-Brick, & Yehuda, *supra* note 185.

<sup>201</sup> R. Walsh & S. L. Shapiro (2006), *The Meeting of Meditative Disciplines and Western Psychology*, 61 AM. PSYCHOL. 227 (2006).

<sup>202</sup> *E.g.*, S. G. Hoffman, A. T. Sawyer, A. A. Witt, & D. Oh, *The Effect of Mindfulness-Based Therapy on Anxiety and Depression: A Meta-Analytic Review*, 78 J. CONSULTING & CLINICAL PSYCHOL. 169 (2010); R. Teper, Z. V. Segal, & M. Inzlicht, *Inside the Mindful Mind: How Mindfulness Enhances Emotion Regulation Through Improvements in Executive Control*, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 449

also can enhance a host of competencies related to lawyer effectiveness, including increased focus and concentration, working memory, critical cognitive skills, reduced burnout, and ethical and rational decision-making.<sup>203</sup> Multiple articles have advocated for mindfulness as an important practice for lawyers and law students.<sup>204</sup> Evidence also suggests that mindfulness can enhance the sense of work-life balance by reducing workers' preoccupation with work.<sup>205</sup>

### 8.5 Rejuvenation Periods to Recover From Stress

Lawyers must have downtime to recover from work-related stress. People who do not fully recover are at an increased risk over time for depressive symptoms, exhaustion, and burnout. By contrast, people who feel recovered report greater work engagement, job performance, willingness to help others at work, and ability to handle job demands.<sup>206</sup> Recovery can occur during breaks during the workday, evenings, weekends, vacations, and even microbreaks when transitioning between projects.<sup>207</sup> And the quality of employees' recovery influences their mood, motivation, and job performance.

Researchers have identified four strategies that are most effective for recovering from work demands: (1) psychological detachment (mentally switching off from work), (2) mastery experiences (challenges and learning experiences), (3) control (spending time off as we choose), and (4) relaxation.<sup>208</sup> Falling into the second category is physical activity (exercise and sports), which may be an

especially effective form of recovery for people performing mentally demanding work—like lawyers. This is so because low-effort activities (e.g., watching TV) may actually increase subjective feelings of fatigue.<sup>209</sup>

Quality sleep is critically important in the recovery process.<sup>210</sup> Sleep deprivation has been linked to a multitude of health problems that decay the mind and body, including depression, cognitive impairment, decreased concentration, and burnout. Cognitive impairment associated with sleep-deprivation can be profound. For example, a study of over 5,000 people showed that too little sleep was associated with a decline over a five year-period in cognitive functioning, including reasoning, vocabulary, and global cognitive status. Research on short-term effects of sleep deprivation shows that people who average four hours of sleep per night for four or five days develop the same cognitive impairment as if they had been awake for 24 hours—which is the equivalent of being legally drunk.<sup>211</sup> Given lawyers' high risk for depression, it is worth noting evidence that sleep problems have the highest predictive value for who will develop clinical depression.<sup>212</sup>

### 8.6 Physical Activity

Many lawyers' failure to prioritize physical activity is harmful to their mental health and cognitive functioning. Physical exercise is associated with reduced symptoms of anxiety and low energy. Aerobic exercise has been found to be as effective at improving symptoms of depression

<sup>203</sup>A. P. Jha, E. A. Stanley, W. L. Kiyonaga, & L. Gelfand, *Examining the Protective Effects of Mindfulness Training on Working Memory Capacity and Affective Experience*, 10 *EMOTION* 56 (2010); D. Levy, J. Wobbrock, A. W. Kaszniak, & M. Ostergren, *The Effects of Mindfulness Meditation Training on Multitasking in a High-Stress Environment*, *Proceedings of Graphics Interface Conference* (2012), available at <http://faculty.washington.edu/wobbrock/pubs/gi-12.02.pdf>; M. D. Mrazek, M. S. Franklin, D. T. Phillips, B. Baird, & J. W. Schooler, *Mindfulness Training Improves Working Memory Capacity and GRE Performance While Reducing Mind Wandering*, 24 *PSYCHOL. SCI.* 776 (2013); N. E. Ruedy & M. E. Schweizer, *In the Moment: The Effect of Mindfulness on Ethical Decision Making*, 95 *J. BUS. ETHICS* 73 (2010); F. Zeidan, S. K. Johnson, B. J. Diamond, Z. David, & P. Goolkasian, *Mindfulness Meditation Improves Cognition: Evidence of Brief Mental Training*, 19 *CONSCIOUSNESS & COGNITION* 597 (2010).

<sup>204</sup>E.g., W. S. Blatt, *What's Special About Meditation? Contemplative Practice for American Lawyers*, 7 *HARV. NEGOT. L. REV.* 125 (2002); Peter H. Huang, *How Improving Decision-Making and Mindfulness Can Improve Legal Ethics and Professionalism*, 21 *J. L. BUS. & ETHICS* 35 (2014).

<sup>205</sup>A. Michel, C. Bosch, & M. Rexroth, *Mindfulness as a Cognitive-Emotional Segmentation Strategy: An Intervention Promoting Work-Life Balance*, 87 *J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL.* 733 (2014).

<sup>206</sup>See, e.g., C. Fritz, A. M. Ellis, C. A. Demsky, B. C. Lin, & F. Guros, *Embracing Work Breaks: Recovery from Work Stress*, 42 *ORG. DYNAMICS* 274 (2013); N. P. Rothbard & S. V. Patil, *Being There: Work Engagement and Positive Organizational Scholarship*, in *THE OXFORD HANDBOOK OF POSITIVE ORGANIZATIONAL SCHOLARSHIP* 56-68 (K. S. Cameron & G. M. Spreitzer eds., Oxford University Press 2012).

<sup>207</sup>S. Sonnentag, C. Niessen, & A. Neff, *Recovery: Nonwork Experiences that Promote Positive States*, in Cameron & Spreitzer, *supra* note 206.

<sup>208</sup>BRAFFORD, *supra* note 131; V. C. Hahn, C. Binnewies, S. Sonnentag, & E. J. Mojza, *Learning How to Recover from Job Stress: Effects of a Recovery Training Program on Recovery, Recovery-Related Self-Efficacy, and Well-Being*, 16 *J. OCCUPATIONAL HEALTH PSYCHOL.* 202 (2011).

<sup>209</sup>J. W. Rook & F. R. H. Zijlstra, *The Contribution of Various Types of Activities to Recovery*, 15 *EUROPEAN J. WORK & ORGANIZATIONAL PSYCHOL.* 218 (2006).

<sup>210</sup>M. Soderstrom, J. Jeding, M. Ekstedt, A. Perski, & T. Akerstedt, *Insufficient Sleep Predicts Clinical Burnout*, 17 *J. OCCUPATIONAL HEALTH PSYCHOL.* 175 (2012).

<sup>211</sup>J. E. Ferrie, M. J. Shipley, T. N. Akbaraly, M. G. Marmot, M. Kivimaki, & A. Singh-Manoux, *Change in Sleep Duration and Cognitive Function: Findings from the Whitehall II Study*, 34 *SLEEP* 565-73 (2011); B. Fryer, *Sleep Deficit: The Performance Killer*, *HARV. BUS. REV.*, Oct. 2006, available at <http://hbr.org/2006/10/sleep-deficit-the-performance-killer>; S. Maxon, *How Sleep Deprivation Decays the Mind and Body*, *THE ATLANTIC*, December 2013, available at <http://www.theatlantic.com/health/archive/2013/12/how-sleep-deprivation-decays-the-mind-and-body/282395>.

<sup>212</sup>P. L. Franzen, & D. J. Buysse, *Sleep Disturbances and Depression: Risk Relationships for Subsequent Depression and Therapeutic Implications*, 10 *DIALOGUES IN CLINICAL NEUROSCIENCE* 473 (2008).

as antidepressant medication and psychotherapy.<sup>213</sup> In a review of strategies for preventing workplace depression, researchers found that interventions to increase physical activity were among the most effective.<sup>214</sup>

Research also shows that physical exercise improves brain functioning and cognition. Physical activity, which stimulates new cell growth in the brain, can offset the negative effects of stress, which causes brain atrophy. Greater amounts of physical activity (particularly aerobic) have been associated with improvements in memory, attention, verbal learning, and speed of cognitive processing.<sup>215</sup> A growing body of evidence reflects that regular aerobic activity in middle age significantly reduces the risk of developing dementia and, in older age, can slow the progression of cognitive decline of those who already are diagnosed with Alzheimer's disease.<sup>216</sup>

### 8.7 Leader Development and Training

Leader development and training is critically important for supporting lawyer well-being and optimal performance. Low-quality leadership is a major contributor to stress, depression, burnout, and other mental and physical health disorders.<sup>217</sup> Even seemingly low-level incivility by leaders can have a big impact on workers' health and motivation. Research found harmful effects from leaders, for example, playing favorites; criticizing unfairly; and failing to provide information, listen to problems, explain goals, praise good work, assist with professional development,

and show that they cared. On the other hand, positive leadership styles contribute to subordinates' mental health, work engagement, performance, and job satisfaction.<sup>218</sup> Many studies confirm that positive leader behaviors can be trained and developed.<sup>219</sup> Training is important for all levels of lawyers who supervise others. This is so because leaders with the most direct contact with subordinates have the most significant impact on their work experience.<sup>220</sup> Subordinates' immediate leader drives almost 70 percent of their perceptions of the workplace.<sup>221</sup>

### 8.8 Control and Autonomy

As noted in Recommendation 7, feeling a lack of control over work is a well-established contributor to poor mental health, including depression and burnout. A sense of autonomy is considered to be a basic psychological need that is foundational to well-being and optimal functioning.<sup>222</sup> Research confirms that leaders can be trained to be more autonomy-supportive.<sup>223</sup> Other organizational practices that can enhance a sense of autonomy include, for example, structuring work to allow for more discretion and autonomy and encouraging lawyers to craft aspects of their jobs to the extent possible to best suit their strengths and interests.<sup>224</sup>

The benefits of autonomy-support are not limited to manager-subordinate relationships for legal employers. Research reflects that law students with autonomy-supportive professors and school cultures have higher well-being and performance.<sup>225</sup> Lawyer-client relationships also

<sup>213</sup>H. Chu, J. Buckworth, T. E. Kirby, & C. F. Emery, *Effect of Exercise Intensity on Depressive Symptoms in Women*, 2 MENTAL HEALTH AND PHYSICAL ACTIVITY 37 (2009); M. P. Herring, M. L. Jacob, C. Suveg, & P. J. O'Connor, *Effects of Short-Term Exercise Training on Signs and Symptoms of Generalized Anxiety Disorder*, 4 MENTAL HEALTH & PHYSICAL ACTIVITY 71 (2011).

<sup>214</sup>S. Joyce, M. Modini, H. Christensen, A. Mykletun, R. Bryant, P. B. Mitchell, & S. B. Harvey, *Workplace Interventions for Common Mental Disorders: A Systematic Meta-Review*, 46 PSYCHOL. MED. 683 (2016).

<sup>215</sup>A. Kandola, J. Hendrikse, P. J. Lucassen, & M. Yücel, *Aerobic Exercise as a Tool to Improve Hippocampal Plasticity and Function in Humans: Practical Implications for Mental Health Treatment*, 10 FRONTIERS IN HUMAN NEUROSCIENCE 373 (2016)

<sup>216</sup>*Id.*; J. E. Ahlskog, Y. E. Geda, N. R. Graff-Radford, & R. C. Petersen, *Physical Exercise as a Preventive or Disease-Modifying Treatment of Dementia and Brain Aging*, 86 MAYO CLINIC PROC. 876 (2011).

<sup>217</sup>BRAFFORD, *supra* note 131; R. J. BURKE AND K. M. PAGE, RESEARCH HANDBOOK ON WORK AND WELL-BEING (2017); W. Lin, L. Wang, & S. Chen, *Abusive Supervision and Employee Well-Being: The Moderating Effect of Power Distance Orientation*, 62 APPLIED PSYCHOL.: AN INT'L REV 308 (2013); E. K. Kelloway, N. Turner, J. Barling, & C. Loughlin, *Transformational Leadership and Employee Psychological Well-Being: The Mediating Role of Employee Trust in Leadership*, 26 WORK & STRESS 39 (2012).

<sup>218</sup>*E.g.*, A. Amankwaa & O. Anku-Tsede, *Linking Transformational Leadership to Employee Turnover: The Moderating Role of Alternative Job Opportunity*, 6 INT'L J. BUS. ADMIN. 19 (2015); J. Perko, U. Kinnunen, & T. Feldt, *Transformational Leadership and Depressive Symptoms Among Employees: Mediating Factors*, 35 LEADERSHIP & ORG. DEV. J. 286 (2014); M. Y. Ghadi, M. Fernando, & P. Caputi, *Transformational Leadership and Work Engagement*, 34 LEADERSHIP & ORG. DEV. J. 532 (2013).

<sup>219</sup>*E.g.*, B. J. Avolio & B. M. Bass, *You Can Drag a Horse to Water, But You Can't Make It Drink Except When It's Thirsty*, 5 J. LEADERSHIP STUDIES 1 (1998); K. E. Kelloway, J. Barling, & J. Helleur, *Enhancing Transformational Leadership: The Roles of Training and Feedback*, 21 LEADERSHIP & ORG. DEV. J. 145 (2000).

<sup>220</sup>D. J. Therkelsen & C. L. Fiebich, *The Supervisor: The Linchpin of Employee Relations*, 8 J. COMM. MGMT. 120 (2003).

<sup>221</sup>R. Beck & J. Harter, *Managers Account for 70% of Variance in Employee Engagement*, GALLUP BUS. J., April 21, 2015, available at <http://www.gallup.com/businessjournal/182792/managers-account-variance-employee-engagement.aspx>.

<sup>222</sup>BRAFFORD, *supra* note 131; Y-L. Su & J. Reeve, *A Meta-Analysis of the Effectiveness of Intervention Programs Designed to Support Autonomy*, 23 EDUC. PSYCHOL. REV. 159 (2011).

<sup>223</sup>*Id.*

<sup>224</sup>See G. R. Slemp & D. A. Vella-Brodrick, *Optimising Employee Mental Health: The Relationship Between Intrinsic Need Satisfaction, Job Crafting, and Employee Well-Being*, 15 J. HAPPINESS STUDIES 957 (2014); D. T. Ong & V. T. Ho, *A Self-Determination Perspective of Strengths Use at Work: Examining Its Determinant and Performance Implications*, 11 J. POSITIVE PSYCHOL. 15 (2016).

<sup>225</sup>*E.g.*, Sheldon & Krieger, *supra* note 5; see also G. F. Hess, *Collaborative Course Design: Not My Course, Not Their Course, But Our Course*, 47 WASHBURN L.J. 367 (2008).

can be enhanced by autonomy-supportive behaviors by both parties. Lawyers respect client autonomy by, for example, taking full account of their perspectives, not interrupting, affording choice, offering information respectfully, providing a rationale for recommendations, sharing power in decision-making (when appropriate), and accepting clients' decisions.<sup>226</sup> In the medical profession, this model of client-centered care has been found to result in better outcomes, patient satisfaction, and diminished risk of malpractice lawsuits.<sup>227</sup>

## 8.9 Conflict Management

Our legal system is adversarial—it's rooted in conflict. Even so, lawyers generally are not trained on how to constructively handle conflict and to adapt tactics based on context—from necessary work-related conflicts to inter-personal conflicts with clients, opposing counsel, colleagues, or loved ones.<sup>228</sup> Conflict is inevitable and can be both positive and negative.<sup>229</sup> But chronic, unmanaged conflict creates physical, psychological, and behavioral stress. Research suggests that conflict management training can reduce the negative stressful effects of conflict and possibly produce better, more productive lawyers.<sup>230</sup>

## 8.10 Work-Life Conflict

The stress of chronic work-life conflict can damage well-being and performance.<sup>231</sup> A study of a New Zealand law firm found that work-life conflict was the strongest predictor of lawyer burnout.<sup>232</sup> Similarly, a study of Australian lawyers found that preoccupation with work was the strongest predictor of depression.<sup>233</sup> Research in the medical profession repeatedly has found that work-life

conflict contributes to burnout.<sup>234</sup> A large scale study across a variety of occupations found that reports of work-life conflict increased the odds of poor physical health by 90 percent.<sup>235</sup> On the other hand, work-life balance (WLB) benefits workers and organizations.<sup>236</sup>

WLB is a complex topic, but research provides guidance on how to develop a WLB-supportive climate. Adopting a formal policy that endorses flexibility is a threshold requirement. Such policies foster the perception of organizational support for flexibility, which is even more important to workers' experience of WLB than actual benefit use. Policies should not be restricted to work-family concerns and any training should emphasize support for the full range of work-life juggling issues. Narrow family-focused policies can create feelings of resentment by workers who have valued non-family commitment.

WLB initiatives cannot end with formal policies or people will doubt their authenticity and fear using them. For example, nearly all large firms report having a flexible schedule policy.<sup>237</sup> But a recent survey of law firm lawyers found that use of flexibility benefits was highly stigmatizing.<sup>238</sup> To benefit from WLB initiatives, organizations must develop a WLB-supportive climate. Research has identified multiple factors for doing so: (1) job autonomy, (2) lack of negative consequences for using WLB benefits, (3) level of perceived expectation that work should be prioritized over family, and (5) supervisor support for WLB. By far, the most important factor is the last. Supervisors communicate their support for WLB by, for example, creatively accommodating non-work-related needs, being empathetic with juggling efforts, and role modeling WLB behaviors.<sup>239</sup>

<sup>226</sup>G. C. Williams, R. M. Frankel, T. L. Campbell, & E. L. Deci, *Research on Relationship-Centered Care and Healthcare Outcomes from the Rochester Biopsychosocial Program: A Self-Determination Theory Integration*, 18 FAMILIES, SYS. & HEALTH 79 (2000).

<sup>227</sup>*Id.*; see also C. White, *The Impact of Motivation on Customer Satisfaction Formation: A Self-Determination Perspective*, 49 EUROPEAN J. MARKETING 1923 (2015).

<sup>228</sup>M. T. Colatrella, *A Lawyer for All Seasons: The Lawyer as Conflict Manager*, 49 SAN DIEGO L. REV. 93 (2012).

<sup>229</sup>A. Elwork & G. A. H. Bemjamin, *Lawyers in Distress*, 23 J. PSYCHIATRY & L. 205 (1995).

<sup>230</sup>D. L. Haraway & W. M. Haraway, *Analysis of the Effect of Conflict-Management and Resolution Training on Employee Stress at a Healthcare Organization*, 83 HOSPITAL TOPICS 11 (2005); see also Colatrella, *supra* note 228.

<sup>231</sup>BRAFFORD, *supra* note 131; D. A. MAJOR & R. BURKE, *HANDBOOK OF WORK-LIFE INTEGRATION AMONG PROFESSIONALS: CHALLENGES AND OPPORTUNITIES* (2013).

<sup>232</sup>Hopkins & Gardner, *supra* note 183.

<sup>233</sup>A. D. Joudrey & J. E. Wallace, *Leisure As A Coping Resource: A Test of the Job Demand-Control-Support Model*, 62 HUMAN RELATIONS 195 (2009).

<sup>234</sup>E.g., E. Amofo, N. Hanabali, A. Patel, & P. Singh, *What Are the Significant Factors Associated with Burnout in Doctors?*, 65 OCCUPATIONAL MED. 117 (2015).

<sup>235</sup>J. Goh, J. Pfefer, & S. A. Zenios, *Workplace Stressors & Health Outcomes: Health Policy for the Workplace*, 1 BEHAV. SCI. & POL'Y. 43 (2015).

<sup>236</sup>Major & Burke, *supra* note 231; S. L. Munn, *Unveiling the Work-Life System: The Influence of Work-Life Balance on Meaningful Work*

<sup>237</sup>Press Release, *National Association for Law Placement, NALP Press Release on Part-Time Schedules* (Feb. 21, 2013), [http://www.nalp.org/part-time\\_feb2013](http://www.nalp.org/part-time_feb2013).

<sup>238</sup>K. M. Managan, E. Giglia, & L. Rowen, *Why Lawyers Leave Law Firms and What Firms Can Do About It*, L. PRAC. TODAY, April 14, 2016, <http://www.lawpracticetoday.org/article/why-lawyers-leave-law-firms-and-what-firms-can-do-about-it>.

<sup>239</sup>L. B. Hammer, E. E. Kossek, N. L. Yragui, T. E. Bodner, & G. C. Hanson, *Development and Validation of Multidimensional Measure of Family Supportive Supervisor Behaviors (FSSB)*, 35 J. MGMT. 837 (2009); L. B. Hammer, S. E. Van Dyck, & A. M. Ellis, *Organizational Policies Supportive of Work-Life Integration*, in Major & Burke, *supra* note 231; E. E. Kossek, S. Pichler, T. Bodner, & L. B. Hammer, *Workplace Social Support and Work-Family Conflict: A Meta-Analysis Clarifying the Influence of General and Work-Family-Specific Supervisor and Organizational Support*, 64 PERSONNEL PSYCHOL. 289 (2011)

To support WLB, bar associations and regulators should work with legal employers to develop best practices and relevant training. Regulators and judges should consider whether any of their practices and policies can be modified to better support lawyer WLB.

### 8.11 Meaning and Purpose

Research has found that feeling that our lives are meaningful is important for physical and psychological wellness. It provides a buffer against stress.<sup>240</sup> For example, meaning in life is associated with a reduced risk of anxiety, depression, substance use, suicidal ideation, heart attack, and stroke; slower cognitive decline in Alzheimer's patients; and lower overall mortality for older adults.<sup>241</sup>

For many lawyers, an important part of building a meaningful life is through meaningful work. Experiencing our work as meaningful means that we believe that our work matters and is valuable. A large body of research shows that meaningfulness plays an important role in workplace well-being and performance.<sup>242</sup> Evidence suggests that the perception of meaningfulness is the strongest predictor of work engagement.<sup>243</sup>

Meaningfulness develops when people feel that their work corresponds to their values. Organizations can enhance the experience of fit and meaningfulness by, for example, fostering a sense of belonging; designing and framing

work to highlight its meaningful aspects; and articulating compelling goals, values, and beliefs.<sup>244</sup>

These same principles apply in law school. Studies in the college context have found that the majority of students want their educational experiences to be meaningful and to contribute to a life purpose.<sup>245</sup> One study measured “psychological sense of community,” which was proposed as a foundation for students to find greater meaning in their educational experience. It was the strongest predictor of academic thriving in the study.<sup>246</sup> Deterioration of law students’ sense of meaning may contribute to their elevated rate of psychological distress. Research reflects that, over the course of law school, many students disconnect from their values and become emotionally numb.<sup>247</sup>

### 8.12. Substance Use and Mental Health Disorders

Recommended content for training on substance use and mental disorders is outlined above in Recommendation 8 in the body of this report.

### 8.13. Additional Topics

Many topics are possible for programming aimed at boosting work engagement and overall well-being (through resource-development) and curbing stress and burnout (by limiting demands) or otherwise promoting lawyer well-being. Additional topics to consider include: psychological

<sup>240</sup>BRAFFORD, *supra* note 131; P. Halama, *Meaning in Life and Coping. Sense of Meaning as a Buffer Against Stress*, in MEANING IN POSITIVE AND EXISTENTIAL PSYCHOLOGY 239-50 (A. Batthyany and P. Russo-Netzer eds., 2014).

<sup>241</sup>E. S. Kim, J. K. Sun, N. Park, C. Peterson, *Purpose in Life and Reduced Incidence of Stroke in Older Adults: The Health and Retirement Study*, 74 J. PSYCHOSOMATIC RES. 427 (2013); M. F. Steger, A. R. Fitch-Martin, J. Donnelly, & K. M. Rickard, *Meaning in Life and Health: Proactive Health Orientation Links Meaning in Life to Health Variables Among American Undergraduates*, 16 J. HAPPINESS STUDIES 583 (2015); M. F. Steger, P. Frazier, S. Oishi, M. Kaler, *The Meaning in Life Questionnaire: Assessing the Presence of and Search for Meaning in Life*, 53 J. COUNSELING PSYCHOL. 80 (2006).

<sup>242</sup>E.g., S. Albrecht, *Meaningful Work: Some Key Questions for Research and Practice*, in FLOURISHING IN LIFE, WORK AND CAREERS: INDIVIDUAL WELLBEING AND CAREER EXPERIENCES (R. J. Burke, K. M. Page, & C. Cooper eds., 2015); B. D. Rosso, K. H. Dekas, & A. Wrzesniewski, *On the Meaning of Work: A Theoretical Integration and Review*, 30 RES. IN ORGANIZATIONAL BEHAV. 91 (2010).

<sup>243</sup>D. R. May, R. L. Gilson, & L. M. Harter, *The Psychological Conditions of Meaningfulness, Safety and Availability and the Engagement of the Human Spirit at Work*, 77 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 11 (2004); P. Fairlie, *Meaningful Work, Employee Engagement, and Other Key Employee Outcomes: Implications for Human Resource Development*, 13 ADVANCED IN DEVELOPING HUMAN RESOURCES 508 (2011).

<sup>244</sup>BRAFFORD, *supra* note 131; M. G. Pratt & B. E. Ashforth, *Fostering Meaningfulness*, in Cameron, Dutton, & Quinn, *supra* note 32; D. J. Cleavenger & T. P. Munyon, *It's How You Frame It: Transformational Leadership and the Meaning of Work*, 56 BUS. HORIZONS 351 (2013); W. Kahn & S. Fellows, *Employee Engagement and Meaningful Work*, in PURPOSE AND MEANING IN THE WORKPLACE 105-26 (B. J. Dik, Z. S. Byrne, & M. F. Steger eds., 2013).

<sup>245</sup>S. J. DeWitz, M. L. Woolsey, W. B. Walsh, *College Student Retention: An Exploration of the Relationship Between Self-Efficacy Beliefs, and Purpose in Life among College Students*, 50 J. C. STUDENT DEV. 19 (2009); HIGHER EDUC. RES. INST., *THE SPIRITUAL LIFE OF COLLEGE STUDENTS* (2005), available at [http://spirituality.ucla.edu/docs/reports/Spiritual\\_Life\\_College\\_Students\\_Full\\_Report.pdf](http://spirituality.ucla.edu/docs/reports/Spiritual_Life_College_Students_Full_Report.pdf); see also J. K. Coffey, L. Wray-Lake, D. Mashek, & B. Branand, *A Longitudinal Examination of a Multidimensional Well-Being Model in College and Community Samples*, 17 J. HAPPINESS STUDIES 187 (2016).

<sup>246</sup>Eric James McIntosh, *Thriving in College: The Role of Spirituality and Psychological Sense of Community in Students of Color* (2012) (unpublished Ph.D. dissertation, Azusa Pacific University).

<sup>247</sup>Sheldon & Krieger, *supra* note 154.

capital (composed of optimism, self-efficacy, hope, and resilience),<sup>248</sup> psychological hardiness (composed of commitment, control, and challenge),<sup>249</sup> stress mindset,<sup>250</sup> growth mindset,<sup>251</sup> grit,<sup>252</sup> effort-reward balance,<sup>253</sup> transformational leadership,<sup>254</sup> self-determination theory,<sup>255</sup> strengths-based management,<sup>256</sup> emotional intelligence and regulation,<sup>257</sup> organizational fairness,<sup>258</sup> nutrition,<sup>259</sup> interpersonal skills,<sup>260</sup> and political skills.<sup>261</sup>

<sup>248</sup>E.g., Avey, Luthans, & Jensen, *supra* note 181.

<sup>249</sup>S. R. Maddi, S. Kahn, & K. L. Maddi, *The Effectiveness of Hardiness Training*, 50 CONSULTING PSYCHOL. J.: PRAC. & RES. 78 (1998)

<sup>250</sup>Crum, Salovey, Achor, *supra* note 50; McGonigal, *supra* note 182.

<sup>251</sup>C. S. DWECK, MINDSET: THE NEW PSYCHOLOGY OF SUCCESS (2008).

<sup>252</sup>A. DUCKWORTH, GRIT: THE POWER OF PASSION AND Perseverance (2016).

<sup>253</sup>A. Allisey, J. Rodwell, & A. Noblet, *Personality and the Effort-Reward Imbalance Model of Stress: Individual Differences in Reward Sensitivity*, 26 WORK & STRESS 230 (2012)

<sup>254</sup>M. Y. Ghadi, M. Fernando, & P. Caputi, *Transformational Leadership and Work Engagement*, 34 LEADERSHIP & ORG. DEV. J. 532 (2013).

<sup>255</sup>Krieger & Sheldon, *supra* note 5.

<sup>256</sup>D. O. Clifton & J. K. Harter, *Investing in Strengths*, in Cameron, Dutton, & Quinn, *supra* note 32.

<sup>257</sup>C. Miao, R. H., Humphrey, & S. Qian, *Leader Emotional Intelligence and Subordinate Job Satisfaction: A Meta-Analysis of Main, Mediator, and Moderator Effects*, 102 PERSONALITY AND INDIVIDUAL DIFFERENCES 13 (2016); K. Thory, *Teaching Managers to Regulate Their Emotions Better: Insights from Emotional Intelligence Training and Work-Based Application*, 16 HUMAN RESOURCE DEV. INT'L 4 (2013); R. E. Riggio, *Emotional Intelligence and Interpersonal Competencies*, in SELF-MANAGEMENT AND LEADERSHIP DEVELOPMENT 160-82 (M. G. Rothstein, R. J. Burke eds., 2010).

<sup>258</sup>J. Greenberg, *Positive Organizational Justice: From Fair to Fairer—and Beyond*, in EXPLORING POSITIVE RELATIONSHIPS AT WORK: BUILDING A THEORETICAL AND RESEARCH FOUNDATION 159-78 (J. E. Dutton & B. R. Ragins eds., 2007).

<sup>259</sup>T. RATH, EAT, MOVE, SLEEP (2013).

<sup>260</sup>J. Mencl, A. J. Wefald, & K. W. van Ittersum, *Transformational Leader Attributes: Interpersonal Skills, Engagement, and Well-Being*, 37 LEADERSHIP & ORG. DEV. J. 635 (2016).

<sup>270</sup>*Id.*; C. C. Rosen & D. C. Ganster, *Workplace Politics and Well-Being: An Allostatic Load Perspective*, in IMPROVING EMPLOYEE HEALTH AND WELL-BEING 3-23 (A. M. Rossi, J. A. Meurs, P. L. Perrewa eds., 2014); Ferris, Daniels, & Sexton, *supra* note 40.

## *Appendix to Recommendation 9: Guide and Support The Transition of Older Lawyers.*

Recommendation 9 advised stakeholders to create programs for detecting and addressing cognitive decline in lawyers, develop succession plans for aging lawyers, and develop reorientation programs to support lawyers facing retirement. Such initiatives and programs may include the following:

- Gathering demographic information about the lawyer population, including years in practice, the nature of the practice, the size of the firm in which the lawyer's practice is conducted, and whether the lawyer has engaged in any formal transition or succession planning for the lawyer's practice;
- Working with medical professionals to develop educational programs, checklists, and other tools to identify lawyers who may be experiencing incapacity issues;
- Developing and implementing educational programs to inform lawyers and their staff members about incapacity issues, steps to take when concerns about a lawyer's incapacity are evident, and the importance of planning for unexpected practice interruptions or the cessation of practice;
- Developing succession or transition planning manuals and checklists, or planning ahead guidelines for lawyers to use to prepare for an unexpected interruption or cessation of practice;<sup>262</sup>
- Enacting rules requiring lawyers to engage in succession planning;
- Providing a place on each lawyer's annual license renewal statement for the lawyer to identify whether the lawyer has engaged in succession and transition planning and, if so, identifying the person, persons or firm designated to serve as a successor;
- Enacting rules that allow senior lawyers to continue to practice in a reduced or limited license or emeritus capacity, including in pro bono and other public service representation;
- Enacting disability inactive status and permanent retirement rules for lawyers whose incapacity does not warrant discipline, but who, nevertheless, should not be allowed to practice law;
- Developing a formal, working plan to partner with Judges and Lawyer Assistance Programs to identify, intervene, and assist lawyers demonstrating age-related or other incapacity or impairment.<sup>263</sup>
- Developing "re-orientation" programs to proactively engage lawyers in transition planning with topics to include:
  - financial planning;
  - pursuing "bridge" or second careers;
  - identity transformation;
  - developing purpose in life;
  - cognitive flexibility;
  - goal-setting;
  - interpersonal connection;
  - physical health;
  - self-efficacy;
  - perceived control, mastery, and optimism.<sup>264</sup>

<sup>262</sup>See, e.g., N. M. SUP. CT. LAW. SUCCESSION & TRANSITION COMM. SUCCESSION PLANNING HANDBOOK FOR N. M. LAW. (2014), available at <http://www.nmbar.org/NmbarDocs/forMembers/Succession/SuccessionHandbook.pdf>; W. VA. STATE BAR, SUCCESSION PLANS, available at <http://wvbar.org/wp-content/uploads/2012/04/succession.pdf>; WASH. STATE BAR ASS'N, SUCCESSION PLANNING, available at <http://www.wsba.org/Resources-and-Services/Ethics/Succession-Planning>.

<sup>263</sup>See generally W. Sleese, et al., *supra* note 60.

<sup>264</sup>See, e.g., S. D. Asebedo & M. C. Seay, *Positive Psychological Attributes and Retirement Satisfaction*, 25 J. FIN. COUNSELING & PLANNING 161 (2014); Dingemans & Henskens, *supra* note 64; Houliort, Fernet, Vallerand, Laframboise, Guay, & Koestner, *supra* note 62; Muratore & Earl, *supra* note 64.

## Appendix to Recommendation 25: Topics for Legal Employers' Audit of Well-Being Related Policies and Practices

Legal employers should consider topics like the following as part of their audits of current policies and practices to evaluate whether the organization adequately supports lawyer well-being.

### MENTAL HEALTH & SUBSTANCE USE DISORDERS

- Is there a policy regarding substance use, mental health, and impairment? If so, does it need updating?
- Does the policy explain lawyers' ethical obligations relating to their own or colleagues' impairment?
- Is there a leave policy that would realistically support time off for treatment?
- Are there meaningful communications about the importance of well-being?
- Do health plans offered to employees include coverage for mental health and substance use disorder treatment?

### LAW PRACTICE MANAGEMENT PRACTICES AFFECTING LAWYER WELL-BEING

- **Assessment of Well-Being:** Is there a regular practice established to assess work engagement, burnout, job satisfaction, turnover intentions, psychological well-being, or other indicators of well-being and to take action on the results?
- **Orientation Practices:** Are orientation practices established to set new lawyers up for success, engagement, and well-being?
- **Work-Life Balance-Related Policies & Practices:** Is there a policy that allows flexibility and an organizational climate that supports it? Is it a practice to recognize lawyers and staff who demonstrate a high standard of well-being?
- **Diversity/Inclusion-Related Policies & Practices:** Diversity and inclusion practices impact lawyer well-being. Are policies and practices in place with a specific mission that is adequately funded?<sup>265</sup>
- **24/7 Availability Expectations:** Do practices allow lawyers time for sufficient rejuvenation? Are response-time expectations clearly articulated and reasonable? Is there an effort to protect time for lawyers to recover from work demands by regulating work-related calls and emails during evenings, weekends, and vacations?<sup>266</sup>

<sup>265</sup>For example, a 2015 report found that most larger firms have some type of diversity training (80 percent) and all participating firms reported having a women's affinity group. But the report also found that affinity groups were "woefully underfunded" and lacking clear goals and missions. See L. S. RIKLEEN, REPORT OF THE NINTH ANNUAL NAWL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS, NAT'L ASSOC. OF WOMEN LAWYERS FOUND. (2015), available at <http://www.nawl.org/2015nawlsurvey>.

<sup>266</sup>For example, McDonald's and Volkswagen—along with one in four U.S. companies—have agreed to stop sending emails to employees after hours. See Fritz, Ellis, Demsky, Lin, & Guros, *supra* note 206. In in the highly-demanding world of law, firms should consider the possibility of establishing new norms for lawyers that limit after-hours emails and calls to actual emergencies—especially to associates who have less work-related autonomy and, thus, are at a higher risk for fatigue and burnout.

- **Billing Policies & Practices:** Do billing practices encourage excessive work and unethical behavior?<sup>267</sup>
- **Compensation Practices:** Are compensation practices fair? And are they perceived as fair? Do they follow standards of distributive (fair outcome), procedural (fair process), interpersonal (treating people with dignity and respect), and informational (transparency) fairness? Perceived unfairness in important practices can devastate well-being and motivation. For example, a large-scale study found that people were 50 percent more likely to have a diagnosed health condition if they perceived unfairness at work.<sup>268</sup> Further, high levels of interpersonal and informational fairness should not be ignored—they can reduce the negative effect of less fair procedures and outcomes.<sup>269</sup>
- **Performance Appraisal Practices:** Are performance appraisal practices fair and perceived as fair? Are observations about performance regularly noted to use in the review? Do multiple raters contribute? Are they trained on the process and to reduce common biases?<sup>270</sup> Is feedback given in a two-way communication? Is specific, timely feedback given regularly, not just annually? Is feedback empathetic and focused on behavior not the person's worth? Is good performance and progress toward goals

regularly recognized? Is goal-setting incorporated?<sup>271</sup> Is performance feedback balanced and injected with positive regard and respect to improve likelihood of acceptance?<sup>272</sup> Are lawyers asked to describe when they feel at their best and the circumstances that contribute to that experience?<sup>273</sup> Carefully managing this process is essential given evidence that bungled performance feedback harms well-being and performance.

- **Vacation Policies & Practices:** Is there a clear vacation policy? Does the organizational culture encourage usage and support detachment from work? In their study of 6,000 practicing lawyers, law professor Larry Krieger and psychology professor Kennon Sheldon found that the number of vacation days taken was the strongest predictor of well-being among all activities measured in the study. It was a stronger predictor of well-being even than income level.<sup>274</sup> This suggests that legal employers should encourage taking of vacation—or at least not discourage or unreasonably interfere with it.

<sup>267</sup>ABA COMM'N ON BILLABLE HOURS, AM. BAR ASS'N, THE CORROSIVE IMPACT OF EMPHASIS ON BILLABLE HOURS (2001-2002), available at [http://ilta.personifycloud.com/webfiles/productfiles/914311/FMPG4\\_ABABillableHours2002.pdf](http://ilta.personifycloud.com/webfiles/productfiles/914311/FMPG4_ABABillableHours2002.pdf).

<sup>268</sup>J. Goh, J. Pfefer, & S. A. Zenios, *Workplace Stressors & Health Outcomes: Health Policy for the Workplace*, 1 BEHAV. SCI. & POL'Y. 43 (2015); see also R. M. Herr, A. Loerbroks, J. A. Bosch, M. Seegel, M. Schneider, & B. Schmidt, *Associations of Organizational Justice with Tinnitus and the Mediating Role of Depressive Symptoms and Burn-out—Findings from a Cross-Sectional Study*, 23 INT'L J. BEHAV. MED. 190 (2016).

<sup>269</sup>J. Greenberg, *Promote Procedural and Interactional Justice to Enhance Individual and Organizational Outcomes*, in Locke, *supra* note 7, 255-71; T. R. Tyler & E. A. Lind, *A Relational Model of Authority in Groups*, in *Advances in Experimental Social Psychology* 115-91 (M. P. Zanna ed., 1st ed., 1992).

<sup>270</sup>F. Luthans & A. Stajkovic, *Provide Recognition for Performance Improvement*, in Locke, *supra* note 7, 239-53.

<sup>271</sup>A. N. Kluger, & N. DeNisi, *The Effects of Feedback Interventions on Performance: A Historical Review, a Meta-Analysis, and a Preliminary Feedback Intervention Theory*, 119 PSYCHOL. BULL. 254 (1996).

<sup>272</sup>O. Bouskila-Yam & A. N. Kluger, *Strengths-Based Performance Appraisal and Goal Setting*, 21 HUMAN RES. MGMT. REV. 137 (2011).

<sup>273</sup>A. N. Kluger & D. Nir, *The Feedforward Interview*, 20 HUMAN RESOURCES MGMT. REV. 235 (2010).

<sup>274</sup>Krieger & Sheldon, *supra* note 5.

## Appendix to Recommendation 33.2: Creating a Well-Being Course and Lecture Series for Law Students

Recommendation 33.2 suggests that law schools design a lecture series dedicated to well-being topics. In 2007, the Carnegie Foundation for the Advancement of Teaching issued a report titled *Educating Lawyers: Preparation for the Profession of Law* (referred to as the “Carnegie Report”). The Carnegie Report describes three “apprenticeships” in legal education: (1) the intellectual apprenticeship, where students acquire a knowledge base; (2) the practice apprenticeship, where students learn practical legal skills; and (3) the professional identity apprenticeship, where students cultivate the attitudes and values of the legal profession.<sup>275</sup> The 2016 *Foundations for Practice Report* by the Institute for the Advancement of the American Legal System recommends that law schools teach character attributes including courtesy, humility, respect, tact, diplomacy, sensitivity, tolerance, and compassion; and self-care and self-regulation skills such as positivity and managing stress; exhibiting flexibility, adaptability, and resilience during challenging circumstances; and decision-making under pressure. A well-being course can address the *Foundations for Practice Report* recommendations while helping law students develop a professional identity that encompasses

a commitment to physical and mental well-being.

Appendix B includes topics that could be incorporated into a well-being course for law students. The list below includes additional topics and provides suggested student readings in the footnotes:

- Basic Wellbeing and Stress Reduction;<sup>277</sup>
- Cognitive Well-being and Good Nutrition;<sup>278</sup>
- Restorative Practices, such as Mindfulness, Meditation, Yoga, and Gratitude;<sup>279</sup>
- The Impact of Substances such as Caffeine, Alcohol, Nicotine, Marijuana, Adderall, Ritalin, Cocaine, and Opiates on Cognitive Function;<sup>280</sup>
- “Active bystander” training that educates students about how to detect when their fellow students may be in trouble with respect to mental health disorders, suicidal thinking, or substance use and what action to take;
- Cultivating a Growth Mindset;<sup>281</sup>
- Improving Pathway (strategies for identifying goals and plans for reaching them) and Agency (sustaining motivation to achieve objectives) Thinking;<sup>282</sup>

<sup>275</sup>SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW, CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING (2007).

<sup>276</sup>A. Gerkman & L. Cornett, *Foundations for Practice: The Whole Lawyer and the Character Quotient*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 30, 33 (2016), available at <http://iaals.du.edu/foundations/reports/whole-lawyer-and-character-quotient>.

<sup>277</sup>See L. S. KRIEGER, THE HIDDEN SOURCES OF LAW SCHOOL STRESS: AVOIDING THE MISTAKES THAT CREATE UNHAPPY AND UNPROFESSIONAL LAWYERS (2014); D. S. Austin, *Killing Them Softly: Neuroscience Reveals How Brain Cells Die from Law School Stress and How Neural Self-Hacking Can Optimize Cognitive Performance*, 59 LOY. L. REV. 791, 828-37 (2013); M. Silver, *Work & Well-Being*, in LEARNING FROM PRACTICE: A TEXT FOR EXPERIENTIAL LEGAL EDUCATION (L. Wortham, A. Scheer, N. Maurer, & S. L. Brooks eds., 2016).

<sup>278</sup>D. S. Austin, *Food for Thought: The Neuroscience of Nutrition to Fuel Cognitive Performance*, OR. L. REV. (forthcoming 2017), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2808100](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808100).

<sup>279</sup>Austin, *supra* note 277, at 837-847; see S. L. Rogers, *Mindfulness and the Importance of Practice*, 90 FLA. B. J. (April 2016); see S. L. Rogers, *Mindfulness in Law*, in THE WILEY-BLACKWELL HANDBOOK OF MINDFULNESS (A. Ie, C. Ngnoumen & E. Langer eds., 2014); see T. K. Brostoff, *Meditation for Law Students: Mindfulness Practice as Experiential Learning*, 41 L. & PSYCHOL. REV. (forthcoming 2017), online at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2836923](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2836923); see J. CHO & K. GIFFORD, THE ANXIOUS LAWYER: AN 8-WEEK GUIDE TO A JOYFUL AND SATISFYING LAW PRACTICE THROUGH MINDFULNESS AND MEDITATION (2016); see G. MUMFORD, THE MINDFUL ATHLETE: SECRETS TO PURE PERFORMANCE (2015); M. Silver, *supra* note 277.

<sup>280</sup>See D. S. Austin, *Drink Like a Lawyer: The Neuroscience of Substance Use and its Impact on Cognitive Wellness*, 15 NEV. L.J. 826 (2015).

<sup>281</sup>D. S. Austin, *Positive Legal Education: Flourishing Law Students and Thriving Law Schools*, 77 MD. L. REV. at 22-25 (forthcoming 2018), abstract available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2928329](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2928329); see C. S. DWECK, MINDSET: THE NEW PSYCHOLOGY OF SUCCESS (2008).

<sup>282</sup>Austin, *supra* note 280, at 826-27.

- Enhancing Emotion Regulation;<sup>283</sup>
- Fostering Optimism and Resilience;<sup>284</sup>
- Preparing for a Satisfying Legal Career;<sup>285</sup>
- Developing Strong Lawyering Values, such as Courage, Willpower, and Integrity;<sup>286</sup>
- Work Life Balance in the Law;<sup>287</sup> and
- Lawyers as Leaders.<sup>288</sup>

Many resources for teaching well-being skills are available to legal educators in the online AALS Balance in Legal Education Bibliography.<sup>289</sup> Expert guest speakers can be found in the AALS Balance in Legal Education section,<sup>290</sup> and at local lawyer assistance programs and lawyer well-being committees.

<sup>283</sup>See S. Daicoff, *Lawyer Personality Traits and their Relationship to Various Approaches to Lawyering*, in THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 79 (M. A. Silver ed., 2007); see D. S. Austin & R. Durr, *Emotion Regulation for Lawyers: A Mind is a Challenging Thing to Tame*, 16 WYO. L. REV. 826 (2015); M. A. Silver, *Supporting Attorneys' Personal Skills*, 78 REV. JUR. U.P.R. 147 (2009).

<sup>284</sup>See S. KEEVA, TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE (10th ed., 2011); see S. ACHOR, THE HAPPINESS ADVANTAGE: THE SEVEN PRINCIPLES OF POSITIVE PSYCHOLOGY THAT FUEL SUCCESS AND PERFORMANCE AT WORK (2010); see S. ACHOR, BEFORE HAPPINESS: THE 5 HIDDEN KEYS TO ACHIEVING SUCCESS, SPREADING HAPPINESS, AND SUSTAINING POSITIVE CHANGE (2013); see A. DUCKWORTH, GRIT: THE POWER OF PASSION AND PERSEVERANCE (2016).

<sup>285</sup>See L. S. KRIEGER, A DEEPER UNDERSTANDING OF YOUR CAREER CHOICES: SCIENTIFIC GUIDANCE FOR A FULFILLING LIFE AND CAREER (2007); see N. LEVIT & D. O. LINDER, THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW (2010); see P. H. Huang & R. Swedloff, *Authentic Happiness and Meaning at Law Firms*, 58 SYRACUSE L. REV. 335 (2008); M. Silver, *supra* note 260.

<sup>286</sup>See D. O. LINDER & N. LEVIT, THE GOOD LAWYER: SEEKING QUALITY IN THE PRACTICE OF LAW (2014); see G. Duhaime, *Practicing on Purpose: Promoting Personal Wellness and Professional Values in Legal Education*, 28 TOURO L. REV. 1207 (2012).

<sup>287</sup>L. L. Cooney, *Walking the Legal Tightrope: Solutions for Achieving a Balanced Life in Law*, 47 SAN DIEGO L. REV. 421 (2010).

<sup>288</sup>See P. H. Huang, *Can Practicing Mindfulness Improve Lawyer Decision-Making, Ethics, and Leadership?*, 55 HOUSTON L. REV. (forthcoming 2017), abstract available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2907513](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2907513); Austin, *supra* note 281, at 44-49.

<sup>289</sup>See AALS, *supra* note 145.

<sup>290</sup>See AALS, *supra* note 144.

## BIOGRAPHIES OF TASK FORCE MEMBERS AND TASK FORCE REPORT AUTHORS AND EDITORS

The Report of the National Task Force on Lawyer Well-Being was primarily authored and edited by the Task Force members, whose biographies are below. The Task Force members were assisted in the creation of the Report by a team that included liaisons, contributing authors, peer reviewers, and individuals who contributed in a variety of other important capacities. Their biographies also are provided below.

### BREE BUCHANAN (CO-CHAIR, EDITOR, AUTHOR)

Bree Buchanan, J.D., is Director of the Texas Lawyers Assistance Program of the State Bar of Texas. She serves as co-chair of the National Task Force on Lawyer Wellbeing and is an advisory member of the ABA Commission on Lawyers Assistance Programs (CoLAP). Ms. Buchanan is also the appointed chair of CoLAP for 2017-2018.

Ms. Buchanan, upon graduation from the University of Texas School of Law, practiced in the public and private sector with a focus on representing both adult and child victims of family violence. She worked on public policy initiatives and systems change at both the state and federal level as the Public Policy Director for the Texas Council on Family Violence and the National Domestic Violence Hotline. After this position, Ms. Buchanan was appointed Clinical Professor and Co-Director of the Children's Rights Clinic at the University of Texas School of Law.

Ms. Buchanan is a frequent speaker at CLE programs for national organizations, as well as for state and local bar entities. She is a graduate student at the Seminary of the Southwest where she is pursuing a Masters in Spiritual Direction, and is the proud parent of a senior at New York University. Ms. Buchanan tends to her own well-being by

engaging in a regular meditation practice, rowing, staying connected to 12-Step recovery, and being willing to ask for help when she needs it.

### JAMES C. COYLE (CO-CHAIR, EDITOR, AUTHOR)

Jim Coyle is Attorney Regulation Counsel for the Colorado Supreme Court. Mr. Coyle oversees attorney admissions, attorney registration, mandatory continuing legal and judicial education, attorney discipline and diversion, regulation of the unauthorized practice of law, and inventory counsel matters. Mr. Coyle has been a trial attorney with the Office of Disciplinary Counsel or successor Office of Attorney Regulation Counsel since 1990. Prior to that, he was in private practice. He served on the National Organization of Bar Counsel (NOBC) board of directors from 2014 – 2016. Mr. Coyle was on the Advisory Committee to the ABA Commission on Lawyer Assistance Programs and is now a member of the Commission for the 2017 – 2018 term.

Mr. Coyle is active in promoting proactive regulatory programs that focus on helping lawyers throughout the stages of their careers successfully navigate the practice of law and thus better serve their clients. This includes working on and co-hosting the first ABA Center for Professional Responsibility (CPR)/NOBC/Canadian Regulators Workshops on proactive, risk-based regulatory programs, in Denver in May 2015, in Philadelphia in June 2016, and St. Louis in June 2017; participating in the NOBC Program Committee and International Committee, including as Chair of the Entity Regulation Subcommittee, now known as the Proactive Management-Based Programs Committee; and prior service on the NOBC Aging Lawyers and Permanent Retirement subcommittees. Mr. Coyle tends to his own well-being through gardening, exercise, and dreaming about retirement.

## ANNE BRAFFORD (EDITOR-IN-CHIEF, AUTHOR)

Anne Brafford served as the Editor-in-Chief for the Task Force Report on Lawyer Well-Being. Anne is the Chairperson of the American Bar Association Law Practice Division's Attorney Well-Being Committee. She is a founding member of Aspire, an educational and consulting firm for the legal profession ([www.aspire.legal](http://www.aspire.legal)). In 2014, Anne left her job as an equity partner at Morgan, Lewis & Bockius LLP after 18 years of practice to focus on thriving in the legal profession. Anne has earned a Master's degree in Applied Positive Psychology (MAPP) from the University of Pennsylvania and now is a PhD student in positive organizational psychology at Claremont Graduate University (CGU). Anne's research focuses on lawyer thriving and includes topics like positive leadership, resilience, work engagement, meaningful work, motivation, and retention of women lawyers. She also is an Assistant Instructor in the MAPP program for Dr. Martin Seligman and, for two years, was a Teaching Assistant at CGU for Dr. Mihaly Csikszentmihalyi, the co-founders of positive psychology. Look for her upcoming book to be published this fall by the American Bar Association's Law Practice Division called *Positive Professionals: Creating High-Performing, Profitable Firms Through The Science of Engagement*. It provides practical, science-backed advice on boosting work engagement for lawyers. Anne can be reached at [abrafford@aspire.legal](mailto:abrafford@aspire.legal), [www.aspire.legal](http://www.aspire.legal).

## JOSH CAMSON (EDITOR, AUTHOR)

Josh Camson is a criminal defense attorney with Camson Law, LLC in Collegeville, Pennsylvania. He is a member of the Pennsylvania Bar Association Ethics Committee and the ABA Standing Committee on Professionalism. He is a former long-time staff writer for Lawyerist.com, a law practice management blog and the former editor of BitterLawyer.com, a comedy site for lawyers and law students.

## CHARLES GRUBER (AUTHOR)

Charles A. Gruber is a solo practitioner in Sandy, Utah. He is a graduate of the University of Texas Law School. He is licensed to practice law in Utah and California. His areas of practice are personal injury, medical malpractice, and legal malpractice.

A former attorney with the Utah State Bar Office of Professional Conduct, Mr. Gruber represents and advises attorneys on ethics issues. A former member of the NOBC,

he currently is a member of APRL. He serves on the Board of Utah Lawyers Helping Lawyers. Utah Lawyers Helping Lawyers is committed to rendering confidential assistance to any member of the Utah State Bar whose professional performance is or may be impaired because of mental illness, emotional distress, substance abuse or any other disabling condition or circumstance.

Mr. Gruber tends to his own well being by trying to remember and follow the suggestions of the 11th step of the 12 Steps.

As we go through the day we pause, when agitated or doubtful, and ask for the right thought or action. We constantly remind ourselves we are no longer running the show, humbly saying to ourselves many times each day "They will be done". We are then in much less danger of excitement, fear, anger, worry, self-pity, or foolish decisions. We become much more efficient. We do not tire so easily, for we are not burning up energy foolishly as we did when we were trying to arrange life to suit ourselves. Big Book pg. 87-88.

## TERRY HARRELL (AUTHOR)

Terry Harrell completed her undergraduate degree in psychology at DePauw University in 1986 and completed her law degree at Maurer School of Law in 1989. Following law school she practiced law with Ice Miller and then clerked for Judge William I. Garrard on the Indiana Court of Appeals.

In 1993 she completed her Master of Social Work Degree (MSW) at Indiana University. Terry is a Licensed Clinical Social Worker (LCSW), a Licensed Clinical Addictions Counselor (LCAC) in Indiana, and has a Master Addictions Counselor certification from NAADAC. In 1992 Terry began working for Midtown Community Mental Health Center. While there she worked in a variety of areas including inpatient treatment, crisis services, adult outpatient treatment, wrap around services for severely emotionally disturbed adolescents, and management. In 2000 Terry began working as the Clinical Director for JLAP and in 2002 became the Executive Director.

From 2007 through 2010 Terry served on the Advisory Committee to the American Bar Association's Commission on Lawyer Assistance Programs (CoLAP).

She served from 2010 through 2013 as a commissioner on CoLAP. She is past Chair of the Senior Lawyer Assistance Subcommittee for CoLAP and an active member of the CoLAP National Conference Planning Committee. In August 2014 Terry became the first ever LAP Director to be appointed Chair of the ABA Commission on Lawyer Assistance Programs. Locally, Terry is a member of the Indiana State Bar Association and is active with the Professional Legal Education Admission and Development Section, the Planning Committee for the Solo Small Firm Conference, and the Wellness Committee.

### DAVID B. JAFFE (AUTHOR)

David Jaffe is Associate Dean for Student Affairs at American University Washington College of Law. In his work on wellness issues among law students over the last decade, he has served on the D.C. Bar Lawyer Assistance Program including as its chair, and continues to serve on the ABA Commission on Lawyer Assistance Programs (CoLAP) as co-chair of the Law School Assistance Committee. Jaffe co-authored “Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns”, reporting the results of a survey he co-piloted in 2014. He also produced the “Getting Health, Staying Healthy” video that is used as a resource in many Professional Responsibility classes around the country, and is responsible for modernizing the “Substance Abuse & Mental Health Toolkit for Law Students and Those Who Care About Them”.

Jaffe has presented frequently on law student wellness, including to the National Conference of Bar Examiners, the ABA Academic Deans, the ABA Young Lawyers Division, CoLAP, AALS, the D.C. Bar, and NALSAP. He received the 2015 CoLAP Meritorious Service Award in recognition of his commitment to improving the lives of law students, and the 2009 Peter N. Kutulakis Award from the AALS Student Services Section for outstanding contributions to the professional development of law students. Jaffe states that he seeks self-care each day by being in the moment with each of his two daughters.

### TRACY L. KEPLER (AUTHOR)

Tracy L. Kepler is the Director of the American Bar

Association’s Center for Professional Responsibility (CPR), providing national leadership in developing and interpreting standards and scholarly resources in legal and judicial ethics, professional regulation, professionalism and client protection. In that role, she manages and coordinates the efforts of 18 staff members and 13 entities including five ABA Standing Committees (Ethics, Professionalism, Professional Regulation, Client Protection, and Specialization), the ABA/BNA Lawyers’ Manual on Professional Conduct, the Center’s Coordinating Council and other Center working committees.

From 2014-2016, Ms. Kepler served as an Associate Solicitor in the Office of General Counsel for the U.S. Patent & Trademark Office (USPTO), where she concentrated her practice in the investigation, prosecution and appeal of patent/trademark practitioner disciplinary matters before the Agency, U.S. District Courts and Federal Circuit, provided policy advice on ethics and discipline related matters to senior management, and drafted and revised Agency regulations. From 2000-2014, she served as Senior Litigation Counsel for the Illinois Attorney Registration and Disciplinary Commission (ARDC), where she investigated and prosecuted cases of attorney misconduct.

From 2009-2016, Ms. Kepler served in various capacities, including as President, on the Board of the National Organization of Bar Counsel (NOBC), a non-profit organization of legal professionals whose members enforce ethics rules that regulate the professional conduct of lawyers who practice law in the United States and abroad. Ms. Kepler also taught legal ethics as an Adjunct Professor at American University’s Washington College of Law. Committed to the promotion and encouragement of professional responsibility throughout her career, Ms. Kepler has served as the Chair of the CPR’s CLE Committee and its National Conference Planning Committee, and is a frequent presenter of ethics related topics to various national, state and local organizations. She has also served as the NOBC Liaison to the ABA CPR Standing Committees, and to the ABA Commission on Lawyer Assistance Programs (CoLAP), where she was a Commission member, a member of its Advisory Committee, the Chair of its Education and Senior Lawyer Committees, and also a member of its National Conference Planning Committee. Ms. Kepler also participates as a

faculty member for the National Institute of Trial Advocacy (NITA) trial and deposition skills programs, and served as the Administrator of the NOBC-NITA Advanced Advocates Training Program from 2011-2015. She is a graduate of Northwestern University in Evanston, Illinois, and received her law degree from New England School of Law in Boston, Massachusetts.

### PATRICK KRILL (AUTHOR)

A leading authority on the addiction and mental health problems of lawyers, Patrick is the founder of Krill Strategies, a behavioral health consulting firm exclusively for the legal profession. Patrick is an attorney, licensed and board certified alcohol and drug counselor, author, and advocate. His groundbreaking work in the field of attorney behavioral health includes initiating and serving as lead author of the first and only national study on the prevalence of attorney substance use and mental health problems, a joint undertaking of the American Bar Association Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation that was published in *The Journal of Addiction Medicine*.

Patrick is the former director of the Hazelden Betty Ford Foundation's Legal Professionals Program, where he counseled many hundreds of legal professionals from around the country who sought to better understand and overcome the unique challenges faced on a lawyer's road to recovery. He has authored more than fifty articles related to addiction and mental health, and has been quoted in dozens of national and regional news outlets, including the *New York Times*, *Wall Street Journal*, *Washington Post*, *Chicago Tribune*, and countless legal industry trade publications and blogs. As a frequent speaker about addiction and its intersection with the law, Patrick has taught multiple graduate-level courses in addiction counseling, and has spoken, lectured, or conducted seminars for over one hundred organizations throughout the United States, including professional and bar associations, law firms, law schools, and corporations.

Patrick maintains his own wellbeing by prioritizing his personal relationships and exercising daily. Whether it be hiking, yoga, or weight lifting, his secret to managing stress is a dedication to physical activity. Patrick can be reached at [patrick@prkrill.com](mailto:patrick@prkrill.com), [www.prkrill.com](http://www.prkrill.com).

### CHIEF JUSTICE DONALD W. LEMONS, SUPREME COURT OF VIRGINIA (AUTHOR)

Chief Justice Donald W. Lemons received his B.A. from the University of Virginia in 1970. Before entering law school, he served as a Probation Officer in Juvenile and Domestic Relations Court. In 1976, he earned his J.D. from the University of Virginia School of Law. From 1976 until 1978, he served as Assistant Dean and Assistant Professor of Law at the University of Virginia School of Law. Thereafter, he entered the private practice of the law in Richmond, Virginia. Chief Justice Lemons has served at every level of the court system in Virginia. He served as a substitute judge in General District Court and in Juvenile and Domestic Relations Court. In 1995, he was elected by the General Assembly to be a Judge in the Circuit Court of the City of Richmond. While serving in that capacity, Chief Justice Lemons started one of the first Drug Court dockets in Virginia. He was then elected by the General Assembly to serve as a Judge on the Court of Appeals of Virginia. In 2000, he was elected by the General Assembly as a Justice of the Supreme Court of Virginia. In 2014, the Justices of the Supreme Court of Virginia elected Justice Lemons to serve as the next Chief Justice, following the retirement of Chief Justice Cynthia D. Kinser on December 31, 2014. Chief Justice Lemons is also the Distinguished Professor of Judicial Studies at the Washington and Lee University School of Law, serves on the Board of Directors for the Conference of Chief Justices, is the former President of the American Inns of Court (2010 – 2014), and an Honorary Bencher of Middle Temple in London. He is married to Carol Lemons, and they have three children and six grandchildren. He and Carol reside in beautiful Nelson County, Virginia, in the foothills of the Blue Ridge Mountains.

### SARAH MYERS (AUTHOR)

Sarah Myers is the Clinical Director of the Colorado Lawyer Assistance Program. She received her B.A. from the University of Richmond in Virginia, her M.A. from Naropa University in Boulder, Colorado, and her J.D. at the University of Denver in Colorado. She is a Colorado licensed attorney, licensed marriage and family therapist, and licensed addiction counselor. Ms. Myers is also a licensed post-graduate level secondary teacher, certified trauma and abuse psychotherapist, and certified LGBTQ

therapist. She has over 18 years of experience as a professor and teacher, psychotherapist, clinical supervisor, and program director.

Ms. Myers specializes in stress management, psychoneuroimmunology, and psychoeducation, topics that she presents to thousands of judges, lawyers, and law students each year. In addition, she has authored hundreds of articles on wellness concepts such as compassion fatigue, professional burnout, mental health support, and life-enhancing techniques for the legal community. Ms. Myers strives to “practice what she preaches” for self-care, which includes: simple meditation throughout the day to relax her nervous system, using humor and laughter to cope with difficult situations or personalities, cultivating positive relationships with friends and family, and engaging in hobbies such as gardening, caring for numerous pets (including a koi pond), yoga, learning new things, and reading science fiction and fantasy novels.

### CHRIS L. NEWBOLD (AUTHOR)

Chris Newbold is Executive Vice President of ALPS Corporation and ALPS Property & Casualty Company. In his role as Executive Vice President, Mr. Newbold oversees bar association relations, strategic and operational planning, risk management activities amongst policyholders, human resources, and non-risk related subsidiary units. Internally at ALPS, Mr. Newbold has developed leading conceptual models for strategic planning which have driven proven results, ensured board and staff accountability, focused organizational energies, embraced change, integrated budgeting and human resource functions into the process and enabled a common vision for principal stakeholders. Externally, Mr. Newbold is a nationally-recognized strategic planning facilitator in the bar association and bar foundations worlds, conducts risk management seminars on best practices in law practice management and is well-versed in captive insurance associations and other insurance-related operations.

Mr. Newbold received his law degree from the University of Montana School of Law in 2001, and holds a bachelor’s degree from the University of Wisconsin-Madison. Following his graduation from law school, he served one year as a law clerk for the Honorable Terry N. Triewiler of the Montana Supreme Court. He began his career at ALPS

as President and Principal Consultant of ALPS Foundation Services, a non-profit fundraising and philanthropic management consulting firm. Mr. Newbold is currently a member of the State Bar of Montana, the American Bar Association, and is involved in a variety of charitable activities. Mr. Newbold resides in Missoula, Montana, with his wife, Jennifer, and their three children, Cameron (11), Mallory (9) and Lauren (5).

### JAYNE REARDON (EDITOR, AUTHOR)

Jayne Reardon is the Executive Director of the Illinois Supreme Court Commission on Professionalism. A tireless advocate for professionalism, Jayne oversees programs and initiatives to increase the civility and professionalism of attorneys and judges, create inclusiveness in the profession, and promote increased service to the public. Jayne developed the Commission’s successful statewide Lawyer-to-Lawyer Mentoring Program which focuses on activities designed to explore ethics, professionalism, civility, diversity, and wellness in practice settings. She spearheaded development of an interactive digital and social media platform that connects constituencies through blogs, social networking sites and discussion groups. A frequent writer and speaker on topics involving the changing practice of law, Jayne asserts that embracing inclusiveness and innovation will ensure that the profession remains relevant and impactful in the future. Jayne’s prior experience includes many successful years of practice as a trial lawyer, committee work on diversity and recruiting issues, and handling attorney discipline cases as counsel to the Illinois Attorney Registration and Disciplinary Commission Review Board.

Jayne graduated from the University of Notre Dame and the University of Michigan Law School. She is active in numerous bar and civic organizations. She serves as Chair of the American Bar Association’s Standing Committee on Professionalism and is a Steering Committee member of the National Lawyer Mentoring Consortium. Jayne also is active in the ABA Consortium of Professionalism Initiatives, Phi Alpha Delta Legal Fraternity, Illinois State Bar Association, Women’s Bar Association of Illinois, and the Chicago Bar Association. Jayne lives in Park Ridge, Illinois, with her husband and those of her four children who are not otherwise living in college towns and beyond.

## HON. DAVID SHAHEED (AUTHOR)

David Shaheed became the judge in Civil Court 1, Marion County, Indiana, in August, 2007. Prior to this assignment, Judge Shaheed presided over Criminal Court 14, the Drug Treatment Diversion Court and Reentry Court. The Indiana Correctional Association chose Shaheed as 2007 Judge of the Year for his work with ex-offenders and defendants trying to recover from substance abuse.

Judge Shaheed has worked as a judicial officer in the Marion County Superior Court since 1994 starting as a master commissioner and being appointed judge by Governor Frank O'Bannon in September 1999. As a lawyer, Judge Shaheed was Chief Administrative Law Judge for the Indiana Unemployment Appeals Division; Legal Counsel to the Indiana Department of Workforce Development and served as Counsel to the Democratic Caucus of the Indiana House of Representatives in 1995. He was also co-counsel for the Estate of Michael Taylor, and won a 3.5 million dollar verdict for the mother of a sixteen year-old youth who was found shot in the head in the back seat of a police car.

Judge Shaheed is an associate professor for the School of Public and Environmental Affairs (SPEA) at Indiana University in Indianapolis. He is also a member of the ABA Commission on Lawyers Assistance Programs (CoLAP). Judge Shaheed was on the board of directors for Seeds of Hope, (a shelter for women in recovery), and former officer for the Indiana Juvenile Justice Task Force and the Interfaith Alliance of Indianapolis.

## LYNDA C. SHELY (EDITOR, AUTHOR)

Lynda C. Shely, of The Shely Firm, PC, Scottsdale, Arizona, provides ethics advice to over 1400 law firms in Arizona and the District of Columbia on a variety of topics including conflicts of interest, fees and billing, trust account procedures, lawyer transitions, multi-jurisdictional practice, ancillary businesses, and ethics requirements for law firm advertising/marketing. She also assists lawyers in responding to initial Bar charges, performs law office risk management reviews, and trains law firm staff in ethics requirements. Lynda serves as an expert witness and frequently presents continuing legal education programs around the country. Prior to opening her own firm, she was the Director of Lawyer Ethics for the State Bar of Arizona. Prior to moving to Arizona, Lynda was an intellectual property associate with Morgan, Lewis & Bockius in Washington, DC.

Lynda received her BA from Franklin & Marshall College in Lancaster, PA and her JD from Catholic University in Washington, DC. Lynda was the 2015-2016 President of the Association of Professional Responsibility Lawyers. She serves on several State Bar of Arizona Committees, and as a liaison to the ABA Standing Committee on Ethics and Professional Responsibility. She is an Arizona Delegate in the ABA House of Delegates. Lynda has received several awards for her contributions to the legal profession, including the 2007 State Bar of Arizona Member of the Year award, the Scottsdale Bar Association's 2010 Award of Excellence, and the 2015 AWLA, Maricopa Chapter, Ruth V. McGregor award. She is a prior chair of the ABA Standing Committee on Client Protection and a past member of the ABA's Professionalism Committee and Center for Professional Responsibility Conference Planning Committee. Lynda was the 2008-2009 President of the Scottsdale Bar Association. She has been an adjunct professor at all three Arizona law schools, teaching professional responsibility.

## WILLIAM D. SLEASE (AUTHOR)

William D. Slease is Chief Disciplinary Counsel for the New Mexico Supreme Court Disciplinary Board. In addition to his duties as Chief Disciplinary Counsel, he serves as an adjunct professor at the University of New Mexico School of Law where he has taught employment law, ethics and trial practice skills. He currently chairs the Supreme Court of the State of New Mexico's Lawyer's Succession and Transition Committee which has developed a comprehensive set of materials for lawyers to use in identifying and responding to incapacities that affect lawyers' abilities to practice law. He is a member and the 2016-17 President of the National Organization of Bar Counsel and previously served as the Chair of the NOBC-APRL-CoLAP Second Joint Committee on Aging Lawyers charged with studying and making recommendations for addressing the so-called "senior tsunami" of age-impaired lawyers. Bill takes care of his own wellness by spending time with his family, and by fishing for trout in the beautiful lakes and streams of New Mexico.

## TASK FORCE LIAISONS

### LINDA ALBERT

Linda Albert is a Licensed Clinical Social Worker and a Certified Alcohol and Drug Counselor. She received her Master's Degree from UW-Madison in Science and Social Work. Linda has worked over the past 34 years as an administrator, consultant, trainer, program developer and psychotherapist in a variety of settings including providing services to impaired professionals.

Linda served on the ABA Commission on Lawyer Assistance Programs heading up the Research section. She co-facilitated a research project on compassion fatigue and legal professionals resulting in two peer reviewed publications and multiple articles. She is co-author of the ABA, Hazelden Betty Ford collaborative national research study on the current rates of substance use, depression and anxiety within the legal community. Linda has done multiple presentations for conferences at the local, state and national level. She loves her work and is driven by the opportunity to make a positive contribution to the lives of the individuals and the fields of practice she serves. Currently Linda is employed by The Psychology Center in Madison, Wisconsin, where she works as a professional trainer, consultant, and psychotherapist.

### DONALD CAMPBELL

Donald D. Campbell is a shareholder at Collins Einhorn Farrell in suburban Detroit, Michigan. Don's practice focuses on attorney grievance defense, judicial grievance matters, and legal malpractice defense. He has extensive experience in counseling and advising lawyers and judges regarding professional ethics. He is an adjunct professor of law at the University of Detroit School of Law, where he has taught professional responsibility and a seminar in business law and ethics. Prior to joining the Collins Einhorn firm, Don served as associate counsel with the Michigan Attorney Grievance Commission, the Michigan Supreme Court's arm for the investigation and prosecution of lawyer misconduct. He also previously served as an assistant prosecuting attorney in Oakland County, Michigan. He currently serves as the President of the Association of Professional Responsibility Lawyers (see APRL.net). Don tends to his well-being by cheering for the Detroit Lions (and he has been about as successful).

### ERICA MOESER

Erica Moeser has been the president of the National Conference of Bar Examiners since 1994. She is a former chairperson of the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association, and has served as a law school site evaluator, as a member of the Section's Accreditation and Standards Review Committees, and as the co-chairperson of the Section's Bar Admissions Committee. She served as the director of the Board of Bar Examiners of the Supreme Court of Wisconsin from 1978 until joining the Conference. Ms. Moeser holds the following degrees: B.A., Tulane University, 1967; M.S., the University of Wisconsin, 1970; and J.D., the University of Wisconsin, 1974. She was admitted to practice law in Wisconsin in January 1975. Ms. Moeser holds honorary degrees from three law schools. Ms. Moeser has taught Professional Responsibility as an adjunct at the University of Wisconsin Law School. She was elected to membership in the American Law Institute in 1992.

In 2013 Ms. Moeser received the Kutak Award, honoring "an individual who has made significant contributions to the collaboration of the academy, the bench, and the bar," from the ABA Section of Legal Education and Admissions to the Bar.

## ACKNOWLEDGEMENTS

### PAUL BURGOYNE, TERRY HARRELL, AND LYNDA SHELLEY

The Task Force gratefully acknowledges the contributions of Paul Burgoyne, immediate past president of the National Organization of Bar Counsel and Deputy Chief Disciplinary Counsel, The Disciplinary Board of the Supreme Court of Pennsylvania, as well as Terry Harrell, President of the ABA Commission on Lawyer Assistance Programs (ABA CoLAP), and Lynda Shely, past president of the Association of Professional Responsibility Lawyers (APRL), for their formal endorsement of the Task Force's formation in the spring of 2016 on behalf of their respective organizations.

### JONATHAN WHITE (AUTHOR, EDITOR)

Jonathan White is the Task Force Staff Attorney and also served as a contributing author and editor to the Report. Mr. White is a staff attorney at the Colorado Supreme Court

Office of Attorney Regulation Counsel. He is the day-to-day project manager for the Colorado Supreme Court Advisory Committee's Proactive Management-Based Program (PMBP) Subcommittee. The subcommittee is developing a program to help Colorado lawyers better serve their clients through proactive practice self-assessments. The self-assessments also promote compliance with the Colorado Rules of Professional Conduct. Mr. White rejoined the Office of Attorney Regulation Counsel in November 2016 after previously working for the office as a law clerk in 2009 and 2010.

Mr. White practiced civil defense litigation for several years before rejoining the Office of Attorney Regulation Counsel. Mr. White also served as a judicial law clerk to the Honorable Christopher Cross and the Honorable Vincent White of the Douglas County District Court in Castle Rock, Colorado. He is a 2010 graduate of the University of Colorado Law School. While in law school, he was an articles editor for the Colorado Journal of International Environmental Law & Policy. The Journal published his note, "Drilling in Ecologically and Environmentally Troubled Waters: Law and Policy Concerns Surrounding Development of Oil Resources in the Florida Straits," in 2010. In 2009, fellow law students selected him to receive the annual Family Law Clinic Award in recognition of his work in the law school's clinical program.

Mr. White received his B.A. from Middlebury College in 2003. He recently volunteered as a reading tutor to elementary school students in the Denver Public Schools during the 2015-2016 academic year.

### ED BRAFFORD, GRAPHIC DESIGNER

Edward Brafford donated his skills and talents to design the layout for the Task Force Report. Mr. Brafford designs for The Firefly Creative LLC ([www.thefireflycreative.com](http://www.thefireflycreative.com)) and can be reached at [Ed@tffcreative.com](mailto:Ed@tffcreative.com).

## CONTRIBUTING AUTHORS

### DEBRA AUSTIN, PH.D.

Dr. Austin is a law professor and lawyer wellbeing advocate. She writes and speaks about how neuroscience and positive psychology research can help law students, lawyers, and judges improve their wellbeing and

performance. Her seminal work, *Killing Them Softly*, shines a bright light on lawyer depression, substance abuse, and suicide, and its application of neuroscience to the chronic stresses of law school and law practice depicts how law students and lawyers suffer cognitive damage that impairs them from doing precisely what their studies and practices require. *Drink Like a Lawyer* uses neuroscience research to demonstrate how self-medication with substances like alcohol, marijuana, and study drugs impairs law student and lawyer thinking. *Food for Thought* examines neuroscience research that explores the relationship between diet and increased risk of cognitive damage, such as dementia and Alzheimer's disease, and describes optimal nutrition habits that build and maintain a healthy lawyer brain. *Positive Legal Education* proposes a new field of inquiry and a new method of training lawyer leaders that will enhance lawyer effectiveness and wellbeing. Dr. Austin's presentations connect lawyer wellbeing to performance and ethical obligations, and they are accredited for general and ethics CLE in multiple states.

Dr. Austin teaches at the University of Denver Sturm College of Law. She received her Bachelor of Music Education from University of Colorado; her J.D. from University of San Francisco; and her Ph.D. in Education from University of Denver. She received the William T. Driscoll Master Educator Award in 2001. To maintain her wellbeing, Dr. Austin meditates, practices yoga, and cycles on the beautiful trails around Colorado.

### HON. ROBERT L. CHILDERS

Judge Childers was the presiding judge of Division 9 of the Circuit Court of Tennessee for the 30th Judicial District from 1984 to 2017. He is a past president of the Tennessee Judicial Conference and the Tennessee Trial Judges Association. He has also served as a Special Judge of the Tennessee Supreme Court Workers' Compensation Panel and the Tennessee Court of Appeals. He served on the ABA Commission on Lawyer Assistance Programs (CoLAP) from 1999 to 2011, including serving as Chair of the Commission from 2007-2011. He is a founding member, past president and Master of the Bench of the Leo Bearman Sr. Inn of Court. The Memphis Bar Association recognized Judge Childers in 1986, 1999, and 2006 as Outstanding Judge of the Year, and he was recognized by the MBA Family Law Section in 2006. He was recognized as Outstanding

Judge of the Year by the Shelby County (TN) Deputy Sheriffs Association in 1990. He received the Judge Wheatcraft Award from the Tennessee Coalition Against Domestic and Sexual Violence for outstanding service in combating domestic violence in 2001. He has received the Distinguished Alumnus Award from the University of Memphis (2002), the Justice Frank F. Drowota III Outstanding Judicial Service Award from the Tennessee Bar Association (2012), and the Excellence in Legal Community Leadership Award from the Hazelden Foundation (2012). In 2017 he received the William M. Leech Jr. Public Service Award from the Fellows of the Tennessee Bar Association Young Lawyers Division.

Judge Childers is currently serving as president of the University of Memphis Alumni Association. He has been a faculty member at the National Judicial College at the University of Nevada-Reno, the Tennessee Judicial Conference Judicial Academy, and a lecturer at the Cecil C. Humphreys School of Law at the University of Memphis. He has also been a frequent lecturer and speaker at CLE seminars and before numerous schools, civic, church and business groups in Tennessee and throughout the nation.

## COURTNEY WYLIE

Courtney recently joined the professional development team at Drinker Biddle & Reath LLP. In this position, she designs and implements programs for the firm's attorneys on leadership, professionalism, and lawyer well-being topics. Prior to joining DBR, Courtney Wylie worked at the University of Chicago Law School as the Associate Director of Student Affairs & Programs. In this position, she was primarily responsible for the Keystone Leadership and Professional Program and the Kapnick Leadership Development Initiative. Before that Courtney worked in both the private and public sector as an attorney.

Courtney is the current appointed ABA Young Lawyer's Division Liaison to the Commission on Lawyer Assistance Programs (COLAP) and an appointed Advisory Committee Member of (COLAP). Though an initial skeptic regarding meditation and exercise, she now makes an effort to make it part of her daily practice to remain healthy, positive, focused, and centered. She similarly regularly lectures on the importance of self-care for attorneys and law students.

## PEER REVIEWERS

Carol M. Adinamis, Adinamis & Saunders, Past President Indiana State Bar Association, Indianapolis, IN

Harry Ballan, Dean and Professor of Law, Touro Law Center, Central Islip, NY

Michael Baron, MD, MPH, Medical Director, Tennessee Medical Foundation – Physician Health Program

Jonathan Beitner, Associate, Jenner & Block, Chicago, IL

Joan Bibelhausen, Executive Director, Lawyers Concerned for Lawyers, St. Paul, MN

Lowell Brown, Communications Division Director, State Bar of Texas, Austin, TX

Shannon Callahan, Senior Counsel, Seyfarth Shaw LLP, Chicago, IL

Anne Chambers, Director, Missouri Lawyers' Assistance Program, Jefferson City, MO

Robert Craghead, Executive Director, Illinois State Bar Association, Chicago and Springfield, IL

Pamela DeNueve, Law Firm Strategist, Washington, DC

Natasha Dorsey, Associate, Rimon Law, Chicago, IL

Douglas Ende, Chief Disciplinary Counsel, Washington State Bar Association, Seattle, WA

Barbara Ezyk, Executive Director, Colorado Lawyer Assistance Program, Denver, CO

Patrick Flaherty, Executive Director, Colorado & Denver Bar Associations, Denver, CO

Amy M. Gardner, Executive Coach and Consultant, Apochromatik, Chicago, IL

Tanya Gaul, Visiting Assistant Professor of Public Policy, Graduate Studies Program, Trinity College, Hartford, CT

Chip Glaze, Director, Lawyers & Judges Assistance Program, The Mississippi Bar, Jackson, MS

Doris Gundersen, M.D, Medical Director, Colorado Physician Health Program, and Forensic Psychiatrist, Denver, CO

Cecile (Cecie) B. Hartigan, Executive Director, New Hampshire Lawyers Assistance Program, Concord, NH

Will Hornsby, Staff Counsel, ABA Division for Legal Services, Chicago, IL

Jerome Larkin, Administrator, Attorney Registration & Disciplinary Commission of the Supreme Court of Illinois, Chicago, IL

Jim Leipold, Executive Director, National Association for Law Placement, Washington, DC

Roseanne Lucianek, Director, ABA Division for Bar Services, Chicago, IL

Laura McClendon, MA, CEAP, Executive Director, Tennessee Lawyers Assistance Program, Nashville, TN

Anne McDonald, Executive Director, Kansas Lawyers Assistance Program, Topeka, KS

Robynn Moraites, Director, North Carolina Lawyer Assistance Program, Charlotte, NC

Vincent O'Brien, Executive Director, Colorado Bar Association CLE, Denver, CO

Hon. Randall T. Shepard, Chief Justice, Indiana Supreme Court (Ret.), Indianapolis, IN

Marjorie Silver, Director of Externship Programs and Professor of Law, Touro Law Center, Central Islip, NY

Mary Spranger, LCSW, WisLAP Manager, State Bar of Wisconsin, Madison, WI

Janet Stearns, Dean of Students and Lecturer, University of Miami School of Law, Coral Gables, FL

Nancy Stek, Assistant Director, New Jersey Lawyers Assistance Program, New Brunswick, NJ

Joseph (Buddy) E. Stockwell III, Executive Director, Louisiana Judges and Lawyers Assistance Program, Inc., Mandeville, LA

Kathleen M. Uston, Assistant Bar Counsel, Virginia State Bar, Richmond, VA

Tish Vincent, MSW, JD, Program Administrator, Lawyers and Judges Assistance Program, Michigan Bar, Lansing, MI

Carol P. Waldhauser, EAP, SAP, Executive Director, Delaware Lawyers Assistance Program, Wilmington, DE

Elizabeth Winiarski, Associate, Jones Day, Chicago, IL

## OUR CHALLENGES



21-36% problem drinkers



28% depression



19% anxiety



23% elevated stress



25% work addiction



High suicide rate



Sleep deprivation



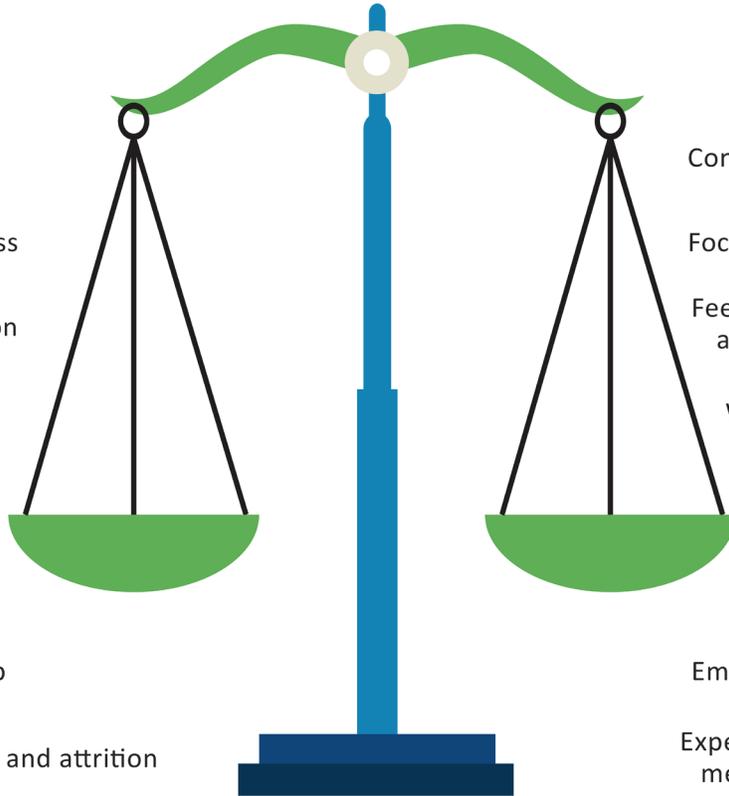
Work-life conflict



Avoid seeking help



Job dissatisfaction and attrition



## OUR POTENTIAL

Physically healthy



Mentally thriving



Contributing to society



Focusing on client care



Feeling connected and a sense of belonging



Willing to seek help



Engaged at work



Continually seeking intellectual growth



Emotionally intelligent



Experiencing a sense of meaning and purpose



# THE PATH TO LAWYER WELL-BEING: Practical Recommendations For Positive Change

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 21, 2018  
**From:** Policy & Governance Committee  
**Re:** Event Anti-Harassment Policy

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### **Action Recommended**

Adopt an event anti-harassment policy, consistent with Article 10 of the OSB Bylaws.

### **Background**

It has long been the policy of the Oregon State Bar, as memorialized in OSB Bylaw Article 10, to maintain an environment at bar events and functions free from all forms of discrimination and harassment. This memorandum proposes that the board consider adopting an anti-harassment policy to help effectuate the bar's long standing prohibition of harassment at bar events.

To date, while the bar has adopted an anti-harassment employment policy, the bar has not adopted an anti-harassment policy that squarely applies to all bar-sponsored events.<sup>1</sup> The proposed harassment policy would apply to individuals who participate in bar meetings, events and functions, as well as to bar leaders who attend specialty bar or community events in their official capacities. The policy outlines the bar's anti-harassment stance and provides a transparent explanation of how the bar will investigate and respond to complaints it receives.

Without a policy in place, the bar will be left respond to any complaints received on an *ad hoc* basis. The lack of a transparent process for reporting and responding to complaints may make it less likely that the bar will learn of harassment promptly, and could result in inconsistent handling of complaints when received.

The Policy & Governance Committee reviewed a number of examples of anti-harassment policies adopted by other bars and government entities that extend beyond the employment context. What follows is a policy that the Committee proposes that the Board of Governors adopt for the Oregon State Bar.

### **Proposed OSB Event Anti-Harassment Policy**

The Oregon State Bar is dedicated to providing a harassment-free experience for everyone at bar-sponsored events, meetings and functions. OSB seeks to provide an environment in which diverse attendees may learn, network and enjoy the company of colleagues in a professional atmosphere. The bar does not tolerate harassment of members or attendees at bar-sponsored events in any form.

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<sup>1</sup>The bar's employment policies apply broadly to individuals who interact with bar employees. Policy 6.4 from the Bar's employment handbook provides, "Harassing and intimidating behavior is prohibited by and toward bar employees, visitors, members, contracts, and vendors of all kinds."

**Definition of Harassment:**

Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual or an individual's relatives, friends, or associates; that has the purpose or effect of creating an intimidating, threatening, hostile, or offensive environment; has the purpose or effect of unreasonably interfering with an individual's attendance at or participation in an event. Prohibited harassment may include, but is not limited to:

- Verbal conduct such as epithets, derogatory comments, negative stereotyping, jokes, or slurs;
- Visual conduct such as derogatory posters, photography, cartoons, drawings, or gestures;
- Physical conduct such as assault, unwanted touching, blocking normal movement, or interfering with participation in an event, directed at an individual because of any protected basis; or
- Placement anywhere at an event premises of written or graphic material that denigrates or shows hostility or aversion toward an individual or group.

**Definition of Sexual Harassment:**

Sexual harassment refers to verbal, physical, and visual conduct of a sexual nature that is unwelcome and offensive to the recipient. By way of example, sexual harassment may include such conduct as sexual flirtations, advances, or propositions; verbal comments or physical actions of a sexual nature; sexually degrading words used to describe an individual; an unwelcome display of sexually suggestive objects or pictures; sexually explicit jokes; and offensive, unwanted physical contact such as patting, pinching; grabbing, groping, or constant brushing against another's body.

**Scope of Policy:**

This Event Anti-Harassment Policy applies to all attendees at bar-sponsored meetings and events, including bar members, bar leaders, event participants, guests, contractors, and exhibitors. For purposes of this policy, meetings and events organized by the Board of Governors, CLE Seminars, bar sections, bar committees, or the Oregon New Lawyers Division are considered bar-sponsored.

This policy also applies to bar leaders who attend community, local bar, or specialty bar events as an official representative of the bar, even if the event is not bar-sponsored. For purposes of this policy, bar leaders include officers and members of the Board of Governors.

**Reporting an Incident:**

If you are being harassed, notice that someone else is being harassed, or have any other concerns related to this policy, please contact an OSB staff member immediately.

OSB staff are available to help attendees contact venue security or local law enforcement, or accompany individuals to a safe space, as appropriate based on the specific circumstances.

**Response:**

Once received by a bar staff member, all reports of harassment are to be directed immediately to the bar staff liaison on site and to be shared with the OSB's Chief Executive Officer. Bar staff may consult with and engage other bar staff and legal counsel as appropriate. Event security and/or local law enforcement may be involved, as appropriate based on the specific circumstances.

The OSB treats all complaints seriously by conducting a prompt investigation. If a complaint involves a member of the OSB Board of Governors, the OSB's Chief Executive Officer or OSB General Counsel may enlist the assistance of a third-party investigator to investigate the complaint, when appropriate.

In response to a report of harassment, bar staff may take any interim action deemed appropriate under the circumstances to address the immediate behavior, which may range from a verbal caution to ejection from an event. Attendees asked to stop any harassing behavior are expected to comply immediately. After investigation, the bar may take reasonable and appropriate action, dependent upon the circumstances, to prevent a reoccurrence of the harassment.

The bar prohibits retaliation against individuals who come forward in good faith with complaints under this policy. Complaints of retaliation may also be directed to any OSB staff member, the OSB staff liaison, or the OSB General Counsel.

(Note: Any bar employee who is subject to or is aware of workplace harassment or intimidation should report the information immediately to the employee's manager or director, the Director of Human Resources, the Chief Executive Officer, or any other manager or director with whom the employee feels comfortable communicating. There is no need to observe any particular chain of command.)

## **Options**

**1. Adopt policy as written.** This option would create a transparent process for investigating and responding to complaints received by the Oregon State Bar about conduct at bar-sponsored events or at community events when BOG members are acting in their official capacity.

**2. Engage in additional study and consider amendments to proposed policy.** If the committee has additional concerns or questions about the policy as written, we could seek additional information prior to proceeding.

**3. Take no action.** This option would keep the status quo, but would leave the bar without a protocol in the event a complaint is received.

# OREGON STATE BAR

## Board of Governors Agenda

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**From:** Policy & Governance Committee  
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# OREGON STATE BAR

## Board Development Committee Agenda

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**Meeting Date:** September 21, 2018  
**Memo Date:** August 28, 2018  
**From:** Dawn M. Evans, Disciplinary Counsel  
**Re:** Recommendations for appointment to the State Professional Responsibility Board

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There are three openings for 2019 on the State Professional Responsibility Board (SPRB) – one lawyer position each for Region 6 and Region 7, and one public position. In addition, a chair must be selected. With changes to the Bar Rules that were effective January 1, 2018, the Board of Governors makes recommendations to the Supreme Court for these positions. With the exception of the chair recommendation (who is a current member), the other people identified came from the volunteer pool of applicants through the Bar’s website.

The chair is typically a lawyer member serving in his or her fourth year on the SPRB. There are two lawyer members whose terms expire at the end of 2019; however, only one of them will be serving in her fourth year. Richard Weill was appointed on June 20, 2018, to serve an unexpired term, so will have about six months’ experience coupled with a one-year term served in 2015 as of January 2019. The other member, **Carolyn Alexander**, will be serving her fourth year in 2019 and has expressed both interest in and willingness to serve as chair. Ms. Alexander, who began her term a few months after having retired from many years’ service at the Department of Justice Appellate Division, has been a conscientious and thoughtful member. She is well-respected by her co-members and will be a fair-minded and even-tempered chair. She is recommended for appointment as chair for 2019.

Of the applicants from Region 6, **David Carlson** (Salem), who would be replacing Elaine D. Smith-Koop from Salem, practices in the areas of estate planning, elder law, and probate. He is a nationally-certified guardian and is routinely appointed by the court to act as guardian and/or conservator for persons who are no longer able to manage their own affairs. As these subject matter areas arise with some regularity in complaints reviewed by the SPRB, the SPRB would benefit from Mr. Carlson’s expertise. Mr. Carlson is a past treasurer and chair of the Solo and Small Firm Section of the Bar; a past treasurer and chair of the New Lawyers Division; and former member and chair of a Local Professional Responsibility Committee. He is recommended for a four-year term beginning 1/1/19 and ending 12/31/22, representing Region 6.

Of the applicants from Region 7, **Michael Wu** (Lake Oswego), who would be replacing Ankur Doshi from Portland, practices in the area of criminal law, which is a frequent subject matter of complaints. He has previously served on the Advisory Committee on Diversity and Inclusion and is former member and chair of Oregon’s Board of Pardon and Post-Prison

Supervision. He also worked for eight years at the Clackamas County District Attorney's Office. He is recommended for a four-year term beginning 1/1/19 and ending 12/31/22, representing Region 7.

For the public member, Dr. **Mary Moffit**, an associate professor in the psychiatry department of Oregon Health and Science University, who has a Ph.D. in clinical psychology from The Wright Institute in Berkeley, California, has expressed an interest in serving. Dr. Moffit is a licensed clinical psychologist in Oregon and has been working at OHSU in various capacities for more than twenty years. In addition to teaching, she is Director of the Resident and Faculty Wellness Program and of the Peer Support Program. Her expertise will benefit the SPRB, which is frequently confronted with lawyers who are addressing mental health and substance use issues. She is recommended for a four-year term beginning 1/1/19 and ending 12/31/21, as a public member at large.



## MEMORANDUM

**DATE:** August 27, 2018  
**TO:** BOG Development Committee  
**FROM:** PLF Board of Directors  
Carol J. Bernick, Chief Executive Officer  
**RE:** 2019 Board Appointments

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The Board of Governors is charged with appointing the PLF Board members. For the 2019-2023 Board term, the BOG must appoint one lawyer and one public member.

Article 3.4 provides that:

By October 31 of each year the Board of Directors will forward to the Board of Governors a list of recommended Director nominees equal to or greater than the number of available positions on the Board in the coming year. The Board will seek nominees according to qualifications determined by the PLF Board. **These may include, but are not limited to, consideration of gender, minority status, ability, experience, type of law practice, and region.**

In general, past PLF boards have felt that in-house corporate attorneys, attorneys in positions that do not require the practice of law, out of state attorneys, attorneys with less than ten-years' experience, and attorneys who have not been in private practice were less likely to have the experience most helpful to the PLF. This has been especially true when other candidates meet the PLF's geographic, subject matter and diversity criteria.

This year, 13 individuals expressed interest in serving on the PLF board. As part of the selection process, the names of potential board members were circulated to PLF staff, informal inquiries were made and, when appropriate, inquiries were made to OSB staff. Carol Bernick met either by phone or in person with all interested applicants. The PLF Board Nominating Committee met to discuss the nominations and settled on its recommendation to the Board. Finally, the full Board discussed the qualified applicants at its August 24, 2018 meeting and adopted the recommendations of the Nominating Committee.

Our current Board demographics (with the departure of the two members whose terms are expiring) are:

Geography<sup>1</sup>

- Four Portland lawyers; one Portland public member
- One Mid-Valley lawyer
- One Central/Eastern Oregon lawyer

Gender

- Five women
- Two men

Firm Size

- Zero large (20+)
- Three medium (10-20)
- Two small (2-6)
- One solo

Practice Area

- Domestic Relations
- Complex Litigation (insurance defense)
- Litigation (plaintiff)
- Mediation
- Criminal
- Estate Planning
- Small Business

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<sup>1</sup>Our departing lawyer member is a male plaintiff's personal injury attorney in a small firm in Medford. Our departing public member is from Salem.

Based on the due diligence of the work described above, the PLF Board recommends the BOG appoint one of the following individuals to the PLF Board **(in order of preference)**:

## **LAWYER MEMBER**

**Gina A. Johnnie.** OSB #872630, Salem.

Gina is a creditor's rights and banking lawyer in Salem at Sherman Sherman Johnnie & Hoyt, a seven lawyer firm. She is a 1987 graduate of Willamette University College of Law. Before moving to a transactional practice, Gina did construction litigation. Her primary focus now is putting together and, when necessary, taking apart commercial loans. She also serves as outside counsel to many small businesses. Gina is a former BOG member (2008-2011), president of the Marion County Bar and an active volunteer in many community organizations. Bankruptcy and creditor's rights are frequent areas for claims. As the law in this area is quite specialized, it is helpful for Claims Attorneys to have bankruptcy expertise on our board.

**Carolyn G. Wade.** OSB #832120, Salem/Eugene.

Carolyn is a 1983 graduate of the University of Oregon School of Law. After clerking for Lane County Judge Merten for a year, she was in private practice for 25 years in Eugene at a number of firms (including her own), practicing for all sides in debtor/creditor relations. Her last private firm employment was with Hershner Hunter where she remained until in 2000 when she left to join the Oregon Department of Justice in the Civil Enforcement/Recovery Division. She is now the lead bankruptcy counsel for the state. Although Carolyn is not currently in private practice, she was for most of her career, is actively interested in serving on the PLF Board, comes highly recommended by Julia Manela (former Board Chair) and practices in an area that would be particularly useful to the Claims Attorneys.

**Tom Kranovich.** OSB #824497, Lake Oswego.

Tom is a seasoned Clackamas County civil litigator (primarily insurance defense). He began his practice in 1979. In 1982 he moved in-house for an insurance company for 15 years. He remained an active trial lawyer during that time. He also served as a pro tem Circuit Judge. He returned to private practice in 2002. Tom is an active volunteer in a variety of bar activities, both with Clackamas County and for the Oregon State Bar, including serving on the BOG from 2010-2014, the last year as President. He is a strong advocate for the unified (mandatory) Bar and for the PLF. He wants to serve on the PLF board in part due to what he sees as increasing attacks on our legal institutions, including the Oregon State Bar. He is interested in the challenges ahead for the PLF with the possible licensing of paralegals to perform limited legal work and changes to bar admission (e.g. allowing people to sit for the bar without attending law

school). Tom is particularly active in and has been recognized by the Bar for his commitment to and work towards diversity, equity and inclusion.

## **PUBLIC MEMBER**

We only had two applications for the open public member position. Both are qualified. The PLF Board recommends the BOG appoint one of the following public members to the PLF Board **(in order of preference)**:

**Patrick Hocking.** Medford.

Patrick retired as the Chief Finance and Administrative Officer of Asante Health System in 2017, where he had worked for thirty years. Before joining Asante in 1987 as the Director of Finance, he was an auditor for four years at Deloitte Haskins & Sells. He has a Bachelors of Science in Business with an accounting emphasis from Southern Oregon University (1983) and a Masters in Finance from Northeastern University (2012). The PLF Board has greatly benefitted from the finance expertise of current Board member, Tom Newhouse.

**Michael B. Batlan.** Salem.

Michael's professional career has mostly been as a Chapter 7 and Chapter 11 Bankruptcy Trustee. He retired in 2017, although is wrapping up some cases. His interest in the position stems from his work with lawyers professionally as well as the fact that he is "surrounded by lawyers" at home. His wife, Kathy Evans, is an estate planning lawyer in Salem and a former BOG president. His daughter is also a practicing lawyer. He met PLF staff and BOD members when his wife was on the BOG and found the work of the PLF interesting. His has an MBA from Willamette University (1981) and a BS in Economics from Willamette. He is also a Pac-12 football referee. Although he will no longer be in the field, he will be in San Francisco most Saturdays in the fall to serve in the centralized playback booth.

### Attachments

1. List of all Applicants (copies of resumes for any applicants notlisted above are available by request)
2. Resumes for applicants listed above

CJB/clh

# OREGON STATE BAR

## Budget and Finance Committee

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Meeting Date: September 21, 2018  
 From: Keith Palevsky, Director of Finance and Operations  
 Subject: 2019 Budget

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### Background

In preparation for the upcoming fiscal calendar year, attached is the first draft of the 2019 Budget covering the period from January 1<sup>st</sup> through December 31<sup>st</sup>, 2019. At present, this version of the 2019 budget is balanced for the fiscal year and incorporates the following:

- Increase in total Revenues over the 2018 budget due to:
  - Conservative 2018 budget, and a slight Increase in total 2019 membership of .2%.
  - Previously approved Increase of \$5.00 in the Client Security Fund assessment.
  - Already implemented increase in the Admissions application fee from \$625 to \$750.
  - Increase in Referral services revenue of 20%.
  - Increase in Fanno Creek revenue of 6%.
- Salary pool increase of 3.5%, offset with a generic attrition rate of -1%.
- Overall decrease of -5% in direct department expenditures.

### Summary of Key Activities

#### Membership Fees

Other than the \$5.00 increase to the Client Security Fund line item, there are no further changes to the membership fee structure for 2019, as reflected in the following table, including late fees.

Category	2018 Fee through January 31st	2018 Fee effective February 1st	2019 Fee through January 31st	2019 Fee effective February 1 <sup>st</sup>
Active Over 2 Years	\$552.00	\$652.00	\$557.00	\$657.00
Active Under 2 Years *	\$465.00	\$565.00	\$470.00	\$570.00
Active Pro-Bono	\$125.00	\$125.00	\$125.00	\$125.00
Inactive	\$125.00	\$175.00	\$125.00	\$175.00
Retired	\$125.00	\$175.00	\$125.00	\$175.00

Fee Breakdown:

General	\$ 477.00
Subscription	\$ 10.00
CSF	\$ 15.00
AAP	\$ 45.00
LRAP	\$ 10.00
<b>Total</b>	<b>\$ 557.00</b>

### Admissions

While admissions is anticipating a 2.2% drop in applications from the 2018 budget to 880 total, the application fee increase from \$625 to \$750 has been in effect from August 1, 2018. Thus, revenues from application fees should total \$660K (up 13% from 2018 budget). This coming year is also the first year that attorneys can become members of the Oregon State Bar through reciprocity, which should generate a small increase in investigation fees. Last, an increase in the rebate revenue for exams taken by laptop. The overall net generated by Admissions (after ICA) is expected to increase from \$42K to \$95K.

### Referral Services

Revenue from Referral Services is on pace to exceed \$900K in 2018 (against a budget of \$830K) and continues a strong upward trend. Of particular note are calls that go unattended due to being short-handed on staff. The budget for 2019 comprehends addressing RIS staffing shortage and is projecting revenue of \$994K.

### Fanno Creek

A new tenant has signed a 7 year lease to occupy the vacancy in Suite 175 starting October 1<sup>st</sup>, 2018, and will bring the building to full occupancy for all of 2019. The revenue budget for 2019 is therefore increased \$57K over 2018, however this amount is partially offset by increased maintenance expenses. The next opening in our tenant roster under contract occurs in 2020, when we have 2 tenants whose leases are set to expire; one in June and one in September.

### Wages and Benefits

Total wages and benefits expenses are forecasted to end 2018 at approximately \$9,623K. This is down \$220K from the budget due to preceding long standing employee resignations (and therefore reduced applied pension expense), and the time to fill those and other positions requiring backfill. The total salary expense projected for 2019 is \$9.850M, and is \$227K higher than the total forecasted expense for 2018. This increase is based on a 3.5% salary pool increase, and incorporates a 1% rate of attrition.

### Direct Program Expenses

Direct program expenditures have been reduced significantly in this year's budget, generating a total savings of more than \$400K, through a combination of already in-process cost reduction efforts and other newly identified actions. These activities range from continued focus efforts on the part of staff to operate "paperless" and reduce copying expenditures, lower total postal expenditures, reduction in CLE video expenses, and consolidation of various I/T activities into one central department.

### Other Key activities and Operating Objectives

A critical project objective for the Bar is to continue to upgrade our overall I/T infrastructure while reducing expenses. The implementation of Aptify will be mostly completed by December 31<sup>st</sup> 2018, with some module completion taking place in the first half of 2019. The total cost of the Aptify project at completion is estimated to be \$1.2M, and will be depreciated over a 5 year

period. This will add \$200K of non-cash expense to the P&L. This expense and neutral impact on cash is comprehended in the 2019 budget and the five year projection.

A line item has been included in the 2019 budget (and in the five year projection), to migrate from biennial to an annual audit cycle. This should add at most, approximately \$10K to the total audit fees over a two year period as opposed to conducting a single audit every two years. This would reduce the burden considerably on internal staff in supporting the audit.

### **Five Year Projection**

The five year projected budget has been built with the following base conditions:

- Flat membership revenues from 2019 through 2023.
- Salary pool increases of 3.5%, offset by a -1.0% attrition rate.
- Flat direct program expenditures.
- Decrease in operating expenses starting in 2020 of -\$100K due to loan refinancing
- Increase in the G&A offset due to Section assessment increase to \$9.50 in 2020.

Included in the five year projection is a modest refinancing of the current \$13M mortgage loan, to lower the overall annual payments from \$934K to \$790K. This loan has an interest rate of 5.99%, for which we make monthly payments totaling \$934K annually. Interest rates available to the Bar are currently at 4.875% (and likely better). Refinancing the loan, in conjunction with a \$1M - \$2M further pay down of loan principal has the potential to reduce the annual payments from \$934K to \$634K annually. The terms of the current loan carry a balloon payment that is due in 2023. The Director of Finance is researching available refinancing options.

The cumulative impact of these factors, at present, suggests a balanced budget will be attained in the Years 2020 and 2021, however a deficit appears in the Years 2022 and 2023. In the absence of identifying additional sources of revenue in the interim to cover those deficits, executing a favorable refinancing of the mortgage loan, or significant expense savings being identified, a minor increase in fees will need to be approved.

It is the objective of the Bar executive management to present a request for a fee increase only as an option of last resort.

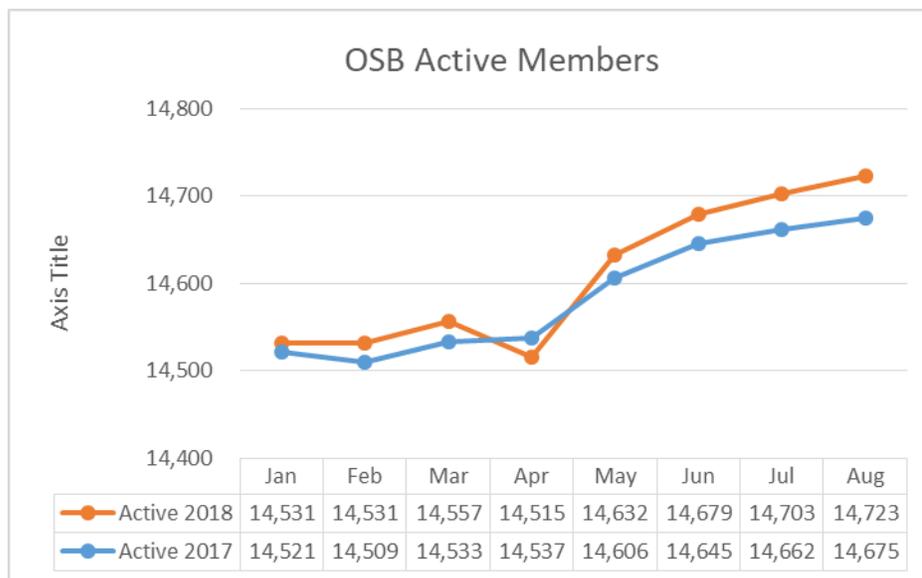
### **Next Steps**

Bar management will continue to review the proposed 2019 budget in further detail over the next month before preparing the final budget for approval at the November 2<sup>nd</sup> meeting. While there may be some minor adjustments to expenses within specific departments and programs, there are presently no significant changes anticipated that would prevent a balanced budget being presented for approval.

## Five Year Projection:

Description	Budget 2018	Budget 2019	Budget 2020	Budget 2021	Budget 2022	Budget 2023	
Membership Fees	\$7,968,200	\$8,143,955	\$8,143,955	\$8,143,955	\$8,143,955	\$8,143,955	Inc 2019 to 2018(F), then flat
Program Fees	3,817,755	4,103,343	4,133,343	4,163,343	4,193,343	4,223,343	Adm +100K/Ref +160K, then +30K/yr
Investment Income	238,766	241,200	230,000	230,000	230,000	230,000	Flat
PLF Grant	200,000	200,000	200,000	200,000	200,000	200,000	Flat
Fanno Creek Place	906,796	957,488	986,212	1,015,799	1,046,273	1,077,661	+49K (Suite 175), and then 3% YoY increase in 2019, then flat
Departments	7,248,800	7,306,660	7,306,660	7,306,660	7,306,660	7,306,660	
<b>TOTAL REVENUE</b>	<b>20,380,317</b>	<b>20,952,645</b>	<b>\$21,000,170</b>	<b>\$21,059,756</b>	<b>\$21,120,230</b>	<b>\$21,181,618</b>	
<b>EXPENSES</b>		3.5%	3.5%	3.5%	3.5%	3.5%	Raise %
		-1.0%	-1.0%	-1.0%	-2.0%	-2.0%	Attrition %
Salaries	6,984,548	7,261,491	7,443,028	7,629,104	7,743,540	7,859,694	
Taxes and Benefits	2,858,665	2,588,399	2,653,109	2,719,437	2,760,228	2,801,632	
<b>Salaries and Benefits</b>	<b>9,843,213</b>	<b>9,849,890</b>	<b>10,096,137</b>	<b>10,348,540</b>	<b>10,503,769</b>	<b>10,661,325</b>	
<b>Direct Program Expense</b>	<b>9,245,486</b>	<b>8,845,199</b>	<b>8,845,199</b>	<b>8,845,199</b>	<b>8,845,199</b>	<b>8,845,199</b>	-\$400K 2019, then flat
<b>Operating Expense</b>	<b>376,840</b>	<b>382,348</b>	<b>384,378</b>	<b>392,065</b>	<b>399,907</b>	<b>407,905</b>	+2% / yr
Depreciation	513,400	761,807	766,807	771,807	776,807	781,807	\$75K capital budget / year
Meeting Rooms Marketing	1,500	1,500	1,500	1,500	1,500	1,500	flat
Mortgage Interest	646,462	628,739	530,000	530,000	530,000	530,000	< refinancing of mortgage loan in 2020
<b>Non-Operating Expense</b>	<b>1,161,362</b>	<b>1,392,046</b>	<b>1,298,307</b>	<b>1,303,307</b>	<b>1,308,307</b>	<b>1,313,307</b>	
<b>General and Administrative Expense</b>	<b>836,258</b>	<b>1,021,757</b>	<b>836,258</b>	<b>836,258</b>	<b>836,258</b>	<b>836,258</b>	flat
Indirect Cost Allocation Net	0	1,899	-	-	-	-	
Less: Support Assessment - Sections	(138,700)	(138,700)	(164,050)	(164,050)	(164,050)	(164,050)	fee increase to \$9.50/member in 2020
Less: Expense offsets	(76,925)	(49,151)	(76,925)	(76,925)	(76,925)	(76,925)	flat
Less: Service Reimbursements	(13,250)	(14,040)	(13,250)	(13,250)	(13,250)	(13,250)	flat
<b>Net General &amp; Admin Offsets</b>	<b>(228,875)</b>	<b>(199,993)</b>	<b>(254,225)</b>	<b>(254,225)</b>	<b>(254,225)</b>	<b>(254,225)</b>	
Contingency	25,000	25,000	25,000	25,000	25,000	25,000	
<b>TOTAL EXPENSE</b>	<b>21,259,284</b>	<b>21,316,248</b>	<b>21,231,054</b>	<b>21,496,145</b>	<b>21,664,215</b>	<b>21,834,769</b>	
<b>NET OPERATING REVENUE (EXP)</b>	<b>(878,967)</b>	<b>(363,603)</b>	<b>(230,885)</b>	<b>(436,389)</b>	<b>(543,985)</b>	<b>(653,151)</b>	
Unrealized Investment Gains /(Losses)	(579,588)	0	-	-	-	-	forecast neutral
Realized Investment Gains/(Losses)	639,417	0	-	-	-	-	forecast neutral
<b>NET REVENUE (EXPENSE)</b>	<b>(819,138)</b>	<b>(363,603)</b>	<b>(230,885)</b>	<b>(436,389)</b>	<b>(543,985)</b>	<b>(653,151)</b>	
Revenue (Expense) 2018 forecast	842,000						
Addback: Depreciation	513,400	761,807	761,807	771,807	776,807	781,807	
Subtract: Capital Projects	(189,000)	(86,495)	(125,000)	(75,000)	(75,000)	(75,000)	
Subtract: Mortgage Principal	(287,846)	(305,569)	(259,507)	(259,507)	(259,507)	(259,507)	
Net Cash Contribution	59,416	6,141	146,416	911	(101,684)	(205,851)	

## Membership:



## Opportunities:

- More robust Non-Bar memberships, for which we can charge \$225 per member.
- Developing other “exchange” based products.
- Charge active fee to over 50-year members.
- Comity Certificate Fee (\$25).
- Reconfigure existing space to allow for more rentable office suites to tenants.

## Challenges

- Wage and Benefits expenses continue to comprise a larger % of the budget.
- High cost of mortgage, interest plus principal equals \$934K annually.
- Reducing travel expenditures and reimbursements.
- Building maintenance.
- Decreasing Legal Publications revenue.

Ms. Danielle Iordanou  
Aon Benfield  
425 Market Street, Suite 2700  
San Francisco, CA 94105  
USA

Hannover, August 13, 2018  
vH/cd

**Underwriting Audit at Oregon State Bar  
Professional Liability Fund – June 5 – 6, 2018**

Dear Danielle,

It was a pleasure for Peter Olszak to visit the Oregon State Bar Professional Liability Fund's office. Peter appreciated the hospitality and the effort Emilee Preble spent organizing the audit files and providing an overview on the file structure and content. Peter also appreciated Carol Bernick's and Jeff Crawford's input and commentary during the kick-off meeting and the wrap-up discussions.

During the brief audit wrap-up, meeting Peter noted the following observations from the file review process:

The risk analysis process has been improved with the business supplement and Dan Keppler's consultant reports that provide details of the business law exposures. The new process enhances the information development for the firms with moderate and higher hazard areas of practice.

The terms and conditions continue to be well documented and relayed to the insureds and applicants on a timely basis.

Pricing was easy to assess based upon the quote calculation worksheets that form a part of the underwriting documentation.

The claim history by firm and by individual attorney serves to benefit the underwriting decision process on the excess program.

It was noted that claim surcharges are diligently applied to accounts with active claims.

The account handling is efficient and well handled.

Please note that confidential information has been redacted from this page.

The following recommendations were discussed in an effort to improve focused areas in the underwriting process:

- The underwriting documentation did not always provide complete transparency into the resolution of underwriting concerns and actions taken to address the identified concerns. For example on the [REDACTED] file, the 2017 underwriting documentation noted that there were concerns regarding a lack of communication between the firm management and attorneys performing legal work for businesses. These concerns were relayed to the firm and debits were applied to the premium due to these concerns. Notes for the 2018 underwriting file indicate that the firm took PLF's concerns to heart and took action and the associated debit that was applied in 2017 was removed in the 2018 pricing. However, there is no file documentation that specifies what action was taken by the firm to address PLF's communication concerns. It is recommended that the underwriting documentation be enhanced to provide greater transparency into actions taken by insureds to address and alleviate underwriting concerns.
- The current underwriting documentation does specify the length of time the insured has purchased excess coverage from the PLF but it does not specify the length of the primary coverage period with the insured. PLF may want to consider developing a table of data reflecting the history of the insured's relationship with the PLF. A suggestion on the format and content of the table follows:

Insured	1st Year Insured with PLF				Per Attorney			Incurred Loss Ratio
	2001				Premium	Premium Change	Claims	
Policy Year	Number of Attorneys	Exposure Change	Limits	Premium	Per Attorney Premium	Change	Claims	Loss Ratio
1/1/2018 to 1/1/2019	2	100.00%	\$700,000	2,982	\$1,491	114.43%		0.00%
1/1/2017 to 1/1/2018	2	100.00%	\$700,000	2,606	\$1,303	124.33%		0.00%
1/1/2016 to 1/1/2017	2	100.00%	\$700,000	2,096	\$1,048	101.95%		0.00%
1/1/2015 to 1/1/2016	2		\$700,000	2,056	\$1,028		\$756	73.54%
<b>Totals</b>					<b>\$4,870</b>		<b>\$756</b>	<b>15.52%</b>

- It was noted that none of the files audited contained OFAC notices or sanctions exclusions with the policy language. Carol Bernick looked into this issue and stated that the PLF is exempt from the Oregon insurance code and therefore OFAC would not apply to them. Peter was uncertain whether an exemption from the State of Oregon's insurance code extended to an exemption from OFAC regulations. Carol advised she would look into this again. Peter's interpretation of the OFAC regulations as a federal enforcement guideline there is no provision of exemption based upon corporate structure at the state level. The PLF might be insulated from having to confirm that none of their insureds are on the OFAC list because the onus would fall to the bar licensing arm to confirm this. However, on the claims end, the PLF would still need to verify they are not issuing any claim payments to anyone on the OFAC list in order to avoid paying any fines or penalties. PLF should investigate the OFAC compliance topic and determine whether they need to develop a compliance process that fully addresses OFAC regulations. If they need to engage some third party vendors that offer compliance solutions some companies that might be able to assist in this endeavor are: Ignite Controls, Penley Company and Stone River Freedom. We are not endorsing these specific vendors we are only offering them as a comparative solution for OFAC compliance.

We would appreciate very much your passing these comments on to Oregon State Bar Professional Liability Fund for their comments. Please return any feedback they may have to us.

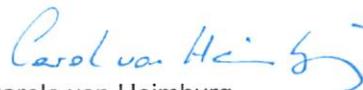
If you have additional questions, please do not hesitate to let us know and we will respond promptly.

Thanks again for your very helpful and resourceful assistance.

Best regards,



Thomas Windheim  
Senior Vice President



Carola von Heimburg  
Senior Vice President

US CASUALTY TREATY DEPARTMENT – TD11

cc: Barry Johnson, Hannover Re Services USA, Itasca



# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 21, 2018  
**Memo Date:** August 27, 2018  
**From:** PLF Board of Directors  
**Re:** PLF Primary Coverage Plan

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### Action Recommended

The PLF Board of Directors requests the BOG approve the following changes to the PLF Primary Coverage Plan for 2019. Because the Primary Plan is incorporated into the Excess Plan, these changes would also apply to the Excess Plan for 2019.

#### 1. Amendment of the Defense Provision

We propose to amend the defense provision to make it less confusing to some of our Covered Parties. This is simply a change to the order of the language on page 1 of the 2018 Plan. We do not intend this change to have any substantive effect.

#### B. Defense

1. The PLF will defend a Covered Party against any Suit seeking Damages to which this Plan applies until ~~Until the Claims Expense Allowance and the Limit of Coverage are exhausted, the PLF will defend a Covered Party against any Suit seeking Damages to which this Plan applies.~~ The PLF is not bound by any Covered Party's agreement to resolve a dispute through arbitration or any other alternative dispute resolution proceeding and has no duty to defend or indemnify regarding any dispute handled or resolved in this manner without its consent.

**Suit** means a civil lawsuit. **Suit** also includes an arbitration or other alternative dispute resolution proceeding only if the PLF expressly consents to it.

## 2. Amendment of Exclusion 2 – Wrongful Conduct

The PLF issues Plans individually, to each lawyer. Under the more recent Plan language, the only Covered Parties under each of these Plans are the individual lawyer, named on the Declaration page, and any Law Entity that is legally liable for any Claim against that individual lawyer. Exclusion 2, on page 8 of the 2018 Plan, excluding certain wrongful acts, contains a provision intended to say that innocent Covered Parties are not subject to Exclusion 2. We would like to clarify this provision in order to state the PLF's intent as to when a Law Entity, sued for the wrongful conduct of a member of the firm, qualifies as an innocent Covered Party. To clarify the PLF's intent in this regard, we propose the following amendment:

2. **Wrongful Conduct.** This Plan does not apply to any **Claim** based on or arising out of:
- a. any criminal act or conduct;
  - b. any knowingly wrongful, dishonest, fraudulent or malicious act or conduct;
  - c. any intentional tort; or
  - d. any knowing or intentional violation of the Oregon Rules of Professional Conduct (ORPC) or other applicable code of ethics.

Exclusion 2 applies ~~even if the Covered Party did not intend to cause~~ ~~regardless of whether any actual or alleged~~ harm or damages. ~~were intended.~~ However, it does not apply to any **Covered Party** who did not commit or participate in any acts or conduct set forth in subsections (a) through (d), had no knowledge of any such acts or conduct at the time they occurred and did not acquiesce or remain passive after becoming aware of such acts or conduct.

~~However, it~~ This Exclusion 2 does not apply to **You** if **You**: did not commit or participate in any acts or conduct set forth in subsections (a) through (d); had no knowledge of any such acts or conduct at the time they occurred; and did not acquiesce or remain passive after becoming aware of such acts or conduct.

Exclusion 2 does not apply to any **Law Entity** covered under this Plan unless a member of the **Control Group** of the **Law Entity**:

- (1) committed or participated in any acts or conduct set forth in subsections (a) through (d); or

- (2) had knowledge of any such acts and acquiesced in them or failed to take, or attempt to take, corrective action.

Control Group includes all persons who are managers or officers of the Law Entity, and/or all persons with authority to act, make decisions or enter into agreements on behalf of the Law Entity.

### 3. Amendment of Exclusion 6 – Business Interests

The intent of Exclusion 6 is to ensure that the Plan excludes claims where the lawyer has a significant connection with the business enterprise making the Claim, beyond providing legal representation or services, or had such significant connection with the business enterprise at the time of the acts errors or omissions on which the Claim is based. To allow coverage under those scenarios invites collusion as the Covered Party may essentially be both the plaintiff and the defendant, or the Covered Party may have an incentive not to defend the Claim. Recently, we concluded that this long-standing intent was not articulated as clearly as would be ideal and therefore recommend the following change:

6. **Business Interests.** ~~This Plan does not apply to any Claim relating to or arising out of any business enterprise:~~
- a. ~~In which **You** are a general partner, managing member, or employee, or in which **You** were a general partner, managing member, or employee at the time of the alleged acts, errors, or omissions on which the **Claim** is based;~~
  - b. ~~That is controlled, operated, or managed by **You**, either individually or in a fiduciary capacity, including the ownership, maintenance, or use of any property in connection therewith, or was so controlled, operated, or managed by **You** at the time of the alleged acts, errors, or omissions on which the **Claim** is based; or~~
  - c. ~~In which **You** either have an ownership interest, or had an ownership interest at the time of the alleged acts, errors, or omissions on which the **Claim** is based unless: (i) such interest is solely a passive investment; and (ii) **You**, those controlled by **You**, **Your** spouse, parent, stepparent, child, sibling, or any member of **Your** household, and those with whom **You** are regularly engaged in the practice of law, collectively own, or previously owned, an interest in the business enterprise of less than 10%.~~
6. **Business Interests.** This Plan does not apply to any **Claim** by a business enterprise:

- a. In which **You** have an **Ownership Interest**; or in which **You** are a general partner, managing member, or employee; or in which **You** control, operate or manage, either individually or a fiduciary capacity, any property that is owned, managed or maintained by the business enterprise; or
- b. At the time of the alleged acts, errors or omissions on which the **Claim** is based: **You** had an **Ownership Interest** in the business enterprise; **You** were a general partner, managing member, or employee of the business enterprise; or **You** controlled, operated or managed, either individually or a fiduciary capacity, any property that was owned, managed or maintained by the business enterprise.

**Ownership Interest** means either **You**, those controlled by **You**, **Your** spouse, parent, stepparent, child, stepchild, sibling, any member of **Your** household, or those with whom **You** are regularly engaged in the practice of law collectively own more than 10% of the business enterprise or owned more than 10% of the business enterprise at the time of the alleged acts, errors or omissions on which the **Claim** is based.

#### 4. Amendment of Exclusion 16 – Harassment and Discrimination

The current language of Exclusion 16, on page 16 of the 2018 Plan, is overly broad because, for example, it could apply to employment lawyers who work on investigations for clients regarding workplace harassment or discrimination. We propose to narrow the language of the exclusion as follows:

16. **Harassment and Discrimination.** This Plan does not apply to any **Claim** based on or arising out of harassment or discrimination by any Covered Party on the basis of race, creed, age, religion, sex, sexual orientation, sexual identity, disability, pregnancy, national origin, marital status, or any ~~other~~ basis protected by law.

**Oregon State Bar  
Professional Liability Fund  
Financial Statements  
7/31/2018**

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**Oregon State Bar  
Professional Liability Fund  
Combined Primary and Excess Programs  
Statement of Net Position  
7/31/2018**

<u>ASSETS</u>		
	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Cash	\$2,575,905.64	\$4,848,423.58
Investments at Fair Value	60,319,444.15	55,131,529.46
Assessment Installment Receivable	3,156,584.00	3,218,210.32
Due from Reinsurers	1,342,312.69	139,900.50
Other Current Assets	63,997.15	60,097.72
Net Fixed Assets	477,773.35	597,987.39
Claim Receivables	113,828.17	27,181.82
PERS Deferred Outflow of Resources	1,151,573.46	2,000,296.00
Other Long Term Assets	<u>2,500.00</u>	<u>9,863.85</u>
<b>TOTAL ASSETS</b>	<b><u>\$69,203,918.61</u></b>	<b><u>\$66,033,490.64</u></b>
 <u>LIABILITIES AND FUND POSITION</u>		
	<u>THIS YEAR</u>	<u>LAST YEAR</u>
<b>Liabilities:</b>		
Accounts Payable and Other Current Liabilities	\$113,815.20	\$62,624.17
Due to Reinsurers	\$495,722.00	\$481,914.88
PERS Pension Liability	4,931,707.98	4,994,537.00
Liability for Compensated Absences	380,963.74	414,472.04
Liability for Indemnity	11,253,719.00	12,453,980.77
Liability for Claim Expense	13,414,351.54	12,465,217.54
Liability for Future ERC Claims	2,900,000.00	3,100,000.00
Liability for Suspense Files	1,500,000.00	1,600,000.00
Liability for Future Claims Administration (AOE)	2,300,000.00	2,600,000.00
Excess Ceding Commission Allocated for Rest of Year	398,396.65	361,063.43
Primary Assessment Allocated for Rest of Year	<u>10,148,668.33</u>	<u>10,181,608.75</u>
<b>Total Liabilities</b>	<b><u>\$47,837,344.44</u></b>	<b><u>\$48,715,418.58</u></b>
<b>Change in Net Position:</b>		
Retained Earnings (Deficit) Beginning of the Year	\$20,094,730.19	\$10,865,963.00
Year to Date Net Income (Loss)	<u>1,271,843.98</u>	<u>6,452,109.06</u>
<b>Net Position</b>	<b><u>\$21,366,574.17</u></b>	<b><u>\$17,318,072.06</u></b>
<b>TOTAL LIABILITIES AND FUND POSITION</b>	<b><u>\$69,203,918.61</u></b>	<b><u>\$66,033,490.64</u></b>

**Oregon State Bar  
Professional Liability Fund  
Primary Program  
Statement of Revenues, Expenses, and Changes in Net Position  
7 Months Ended 7/31/2018**

	YEAR TO DATE <u>ACTUAL</u>	YEAR TO DATE <u>BUDGET</u>	<u>VARIANCE</u>	YEAR TO DATE <u>LAST YEAR</u>	<u>ANNUAL BUDGET</u>
<b><u>REVENUE</u></b>					
Assessments	\$14,022,338.75	\$13,669,887.00	(\$352,451.75)	\$14,063,378.00	\$23,434,087.00
Installment Service Charge	185,796.92	192,206.00	6,409.08	190,874.25	329,500.00
Other Income	70,871.14	26,831.00	(44,040.14)	109,108.28	46,000.00
Investment Return	<u>797,865.80</u>	<u>1,568,875.00</u>	<u>771,009.20</u>	<u>4,236,741.89</u>	<u>2,689,496.00</u>
<b>TOTAL REVENUE</b>	<b><u>\$15,076,872.61</u></b>	<b><u>\$15,457,799.00</u></b>	<b><u>\$380,926.39</u></b>	<b><u>\$18,600,102.42</u></b>	<b><u>\$26,499,083.00</u></b>
<b><u>EXPENSE</u></b>					
<b>Provision For Claims:</b>					
New Claims at Average Cost	\$9,936,800.00			\$10,909,500.00	
Actuarial Adjustment to Reserves	(552,270.45)			(3,079,536.23)	
Coverage Opinions	105,904.70			49,512.01	
General Expense	43,679.07			13,376.66	
Less Recoveries & Contributions	(97,906.77)			(26,181.30)	
Budget for Claims Expense		<u>\$10,473,750.00</u>			<u>\$17,955,000.00</u>
<b>Total Provision For Claims</b>	<b><u>\$9,436,206.55</u></b>	<b><u>\$10,473,750.00</u></b>	<b><u>\$1,037,543.45</u></b>	<b><u>\$7,866,671.14</u></b>	<b><u>\$17,955,000.00</u></b>
<b>Expense from Operations:</b>					
Administrative Department	\$1,540,346.97	\$1,592,914.00	\$52,567.03	\$1,540,693.39	\$2,755,781.00
Accounting Department	545,169.80	555,285.00	10,115.20	506,876.79	933,603.00
Loss Prevention Department	1,196,091.40	1,343,246.00	147,154.60	1,170,128.84	2,301,102.00
Claims Department	1,564,728.16	1,650,165.00	85,436.84	1,584,684.11	2,826,393.00
Allocated to Excess Program	(556,621.94)	(556,617.00)	4.94	(632,263.31)	(954,209.00)
<b>Total Expense from Operations</b>	<b><u>\$4,289,714.39</u></b>	<b><u>\$4,584,993.00</u></b>	<b><u>\$295,278.61</u></b>	<b><u>\$4,170,119.82</u></b>	<b><u>\$7,862,670.00</u></b>
Depreciation and Amortization	\$90,850.83	\$93,735.00	\$2,884.17	\$91,577.02	\$160,689.00
Allocated Depreciation	(12,833.31)	(12,831.00)	2.31	(11,870.81)	(22,000.00)
<b>TOTAL EXPENSE</b>	<b><u>\$13,803,938.46</u></b>	<b><u>\$15,139,647.00</u></b>	<b><u>\$1,335,708.54</u></b>	<b><u>\$12,116,497.17</u></b>	<b><u>\$25,956,359.00</u></b>
<b>NET POSITION - INCOME (LOSS)</b>	<b><u>\$1,272,934.15</u></b>	<b><u>\$318,152.00</u></b>	<b><u>(\$954,782.15)</u></b>	<b><u>\$6,483,605.25</u></b>	<b><u>\$542,724.00</u></b>

**Oregon State Bar  
Professional Liability Fund  
Primary Program  
Statement of Operating Expense  
7 Months Ended 7/31/2018**

<b><u>EXPENSE:</u></b>	<b><u>CURRENT</u></b>	<b><u>YEAR</u></b>	<b><u>YEAR</u></b>	<b><u>VARIANCE</u></b>	<b><u>YEAR</u></b>	<b><u>ANNUAL</u></b>
	<b><u>MONTH</u></b>	<b><u>TO DATE</u></b>	<b><u>TO DATE</u></b>		<b><u>TO DATE</u></b>	<b><u>BUDGET</u></b>
		<b><u>ACTUAL</u></b>	<b><u>BUDGET</u></b>		<b><u>LAST YEAR</u></b>	<b><u>BUDGET</u></b>
Salaries	\$364,211.37	\$2,626,780.84	\$2,754,682.00	\$127,901.16	\$2,665,797.40	\$4,722,311.00
Benefits and Payroll Taxes	143,008.93	1,023,512.07	1,102,412.00	78,899.93	946,071.15	1,884,103.00
Investment Services	0.00	24,466.43	24,000.00	(466.43)	24,675.75	48,000.00
Legal Services	240.00	9,833.10	5,831.00	(4,002.10)	7,136.50	10,000.00
Financial Audit Services	0.00	24,000.00	24,500.00	500.00	19,000.00	24,500.00
Actuarial Services	0.00	8,855.00	12,500.00	3,645.00	10,875.00	25,000.00
Information Services	6,800.47	34,002.42	37,912.00	3,909.58	38,994.50	65,000.00
Document Scanning Services	0.00	870.94	13,125.00	12,254.06	24,399.32	22,500.00
Other Professional Services	5,764.45	53,195.71	44,051.00	(9,144.71)	58,924.29	75,500.00
Staff Travel	153.60	2,153.41	8,575.00	6,421.59	5,226.26	14,700.00
Board Travel	1,917.95	14,439.04	32,375.00	17,935.96	20,090.04	55,500.00
NABRICO	929.33	1,179.33	0.00	(1,179.33)	2,154.80	15,650.00
Training	2,419.84	21,851.50	23,940.00	2,088.50	20,420.51	41,000.00
Rent	45,849.50	328,607.94	335,531.00	6,923.06	327,930.74	575,194.00
Printing and Supplies	4,305.66	62,011.58	36,757.00	(25,254.58)	57,685.58	63,000.00
Postage and Delivery	1,843.52	7,309.71	7,462.00	152.29	14,224.53	12,800.00
Equipment Rent & Maintenance	1,440.04	19,576.08	25,956.00	6,379.92	32,162.87	44,500.00
Telephone	4,136.45	29,059.97	29,750.00	690.03	31,350.83	51,000.00
L P Programs (less Salary & Benefits)	28,338.15	240,070.89	308,413.00	68,342.11	190,762.32	528,621.00
Defense Panel Training	0.00	127.52	0.00	(127.52)	7,315.68	0.00
Bar Books Grant	16,666.67	116,666.69	116,669.00	2.31	116,666.69	200,000.00
Insurance	3,318.33	27,117.82	26,250.00	(867.82)	27,558.45	45,000.00
Library	125.00	21,192.40	19,250.00	(1,942.40)	18,508.67	33,000.00
Subscriptions, Memberships & C/C Charç	11,569.35	149,441.19	151,669.00	2,227.81	134,451.25	260,000.00
Allocated to Excess Program	(79,517.42)	(556,621.94)	(556,617.00)	4.94	(632,263.31)	(954,209.00)
<b>TOTAL EXPENSE</b>	<b><u>\$563,521.19</u></b>	<b><u>\$4,289,699.64</u></b>	<b><u>\$4,584,993.00</u></b>	<b><u>\$295,293.36</u></b>	<b><u>\$4,170,119.82</u></b>	<b><u>\$7,862,670.00</u></b>

**Oregon State Bar  
Professional Liability Fund  
Excess Program  
Statement of Revenue, Expenses, and Changes in Net Position  
7 Months Ended 7/31/2018**

	<u>YEAR TO DATE ACTUAL</u>	<u>YEAR TO DATE BUDGET</u>	<u>VARIANCE</u>	<u>YEAR TO DATE LAST YEAR</u>	<u>ANNUAL BUDGET</u>
<b><u>REVENUE</u></b>					
Ceding Commission	\$548,353.23	\$513,331.00	(\$35,022.23)	\$504,283.17	\$880,000.00
Installment Service Charge	49,938.00	56,000.00	6,062.00	49,306.00	56,000.00
Investment Return	(14,268.57)	49,637.00	63,905.57	95,697.52	85,094.00
<b>TOTAL REVENUE</b>	<b><u>\$584,022.66</u></b>	<b><u>\$618,968.00</u></b>	<b><u>\$34,945.34</u></b>	<b><u>\$649,286.69</u></b>	<b><u>\$1,021,094.00</u></b>
<b><u>EXPENSE</u></b>					
Operating Expenses (See Page 6)	\$572,279.52	\$581,987.00	\$9,707.48	\$668,912.07	\$997,700.00
Allocated Depreciation	<u>\$12,833.31</u>	<u>\$12,831.00</u>	(\$2.31)	<u>\$11,870.81</u>	<u>\$22,000.00</u>
<b>NET POSITION - INCOME (LOSS)</b>	<b><u>(\$1,090.17)</u></b>	<b><u>\$24,150.00</u></b>	<b><u>\$25,240.17</u></b>	<b><u>(\$31,496.19)</u></b>	<b><u>\$1,394.00</u></b>

**Oregon State Bar  
Professional Liability Fund  
Excess Program  
Statement of Operating Expense  
7 Months Ended 7/31/2018**

	<u>CURRENT</u> <u>MONTH</u>	YEAR <u>TO DATE</u> <u>ACTUAL</u>	YEAR <u>TO DATE</u> <u>BUDGET</u>	<u>VARIANCE</u>	YEAR <u>TO DATE</u> <u>LAST YEAR</u>	<u>ANNUAL</u> <u>BUDGET</u>
<b><u>EXPENSE:</u></b>						
Salaries	\$39,499.33	\$276,495.31	\$277,081.00	\$585.69	\$347,503.31	\$475,000.00
Benefits and Payroll Taxes	15,101.42	105,709.94	95,081.00	(10,628.94)	116,762.87	163,000.00
Investment Services	0.00	1,026.07	119.00	(907.07)	74.25	200.00
Office Expense	0.00	0.00	0.00	0.00	87.29	0.00
Allocation of Primary Overhead	24,916.67	174,416.69	173,250.00	(1,166.69)	167,997.13	297,000.00
Reinsurance Placement & Travel	96.42	4,763.31	4,669.00	(94.31)	7,727.42	8,000.00
Training	0.00	0.00	294.00	294.00	0.00	500.00
Printing and Mailing	0.00	919.82	2,331.00	1,411.18	3,549.25	4,000.00
Program Promotion	795.00	6,490.00	9,331.00	2,841.00	8,035.00	16,000.00
Other Professional Services	0.00	1,155.00	10,500.00	9,345.00	13,353.70	18,000.00
Software Development	<u>651.70</u>	<u>1,303.38</u>	<u>9,331.00</u>	<u>8,027.62</u>	<u>3,821.85</u>	<u>16,000.00</u>
<b>TOTAL EXPENSE</b>	<b><u>\$81,060.54</u></b>	<b><u>\$572,279.52</u></b>	<b><u>\$581,987.00</u></b>	<b><u>\$9,707.48</u></b>	<b><u>\$668,912.07</u></b>	<b><u>\$997,700.00</u></b>

**Oregon State Bar  
Professional Liability Fund  
Combined Investment Schedule  
7 Months Ended 7/31/2018**

	CURRENT MONTH <u>THIS YEAR</u>	YEAR TO DATE <u>THIS YEAR</u>	CURRENT MONTH <u>LAST YEAR</u>	YEAR TO DATE <u>LAST YEAR</u>
<b>Dividends and Interest:</b>				
Short Term Bond Fund	\$17,015.73	\$128,951.17	\$9,782.42	\$58,557.57
Intermediate Term Bond Funds	36,422.35	233,907.02	31,650.67	225,949.91
Bank Loans	10,595.45	62,520.20	6,986.10	13,500.08
Domestic Common Stock Funds	0.00	107,151.22	0.00	108,858.45
International Equity Fund	0.00	5,083.85	0.00	15,144.31
Real Estate	0.00	75,278.19	0.00	70,164.85
Hedge Fund of Funds	0.00	0.00	0.00	0.00
Real Return Strategy	<u>0.00</u>	<u>66,971.02</u>	<u>0.00</u>	<u>57,310.55</u>
<b>Total Dividends and Interest</b>	<b><u>\$64,033.53</u></b>	<b><u>\$679,862.67</u></b>	<b><u>\$48,419.19</u></b>	<b><u>\$549,485.72</u></b>
<b>Gain (Loss) in Fair Value:</b>				
Short Term Bond Fund	(\$16,513.32)	(\$129,139.76)	\$6,036.10	(\$27,222.35)
Intermediate Term Bond Funds	(41,558.38)	(273,000.83)	18,410.68	233,990.18
Bank Loans	8,176.75	(444.28)	4,049.52	(4,023.13)
Domestic Common Stock Funds	432,407.74	737,564.19	226,831.09	1,121,620.74
International Equity Fund	342,538.28	(166,713.78)	466,159.47	1,940,092.52
Real Estate	0.00	110,724.33	0.00	55,620.56
Hedge Fund of Funds	0.00	0.00	0.00	0.00
Real Return Strategy	<u>0.00</u>	<u>(175,255.31)</u>	<u>0.00</u>	<u>462,875.17</u>
<b>Total Gain (Loss) in Fair Value</b>	<b><u>\$725,051.07</u></b>	<b><u>\$103,734.56</u></b>	<b><u>\$721,486.86</u></b>	<b><u>\$3,782,953.69</u></b>
<b>TOTAL RETURN</b>	<b><u>\$789,084.60</u></b>	<b><u>\$783,597.23</u></b>	<b><u>\$769,906.05</u></b>	<b><u>\$4,332,439.41</u></b>
<b>Portions Allocated to Excess Program:</b>				
Dividends and Interest	\$1,075.76	\$24,886.55	\$1,602.68	\$16,650.56
Gain (Loss) in Fair Value	<u>12,180.86</u>	<u>(39,155.12)</u>	<u>23,881.22</u>	<u>79,046.96</u>
<b>TOTAL ALLOCATED TO EXCESS PROGRAM</b>	<b><u>\$13,256.62</u></b>	<b><u>(\$14,268.57)</u></b>	<b><u>\$25,483.90</u></b>	<b><u>\$95,697.52</u></b>

**Oregon State Bar  
Professional Liability Fund  
Excess Program  
Balance Sheet  
7/31/2018**

**ASSETS**

	<b><u>THIS YEAR</u></b>	<b><u>LAST YEAR</u></b>
Cash	\$171,189.71	\$284,585.79
Assessment Installment Receivable	578,027.00	574,019.32
Due from Reinsurers	1,342,312.69	139,900.50
Other Assets	0.00	5,241.29
Investments at Fair Value	<u>789,103.92</u>	<u>1,900,488.17</u>
<b>TOTAL ASSETS</b>	<b><u>\$2,880,633.32</u></b>	<b><u>\$2,904,235.07</u></b>

**LIABILITIES AND FUND EQUITY**

	<b><u>THIS YEAR</u></b>	<b><u>LAST YEAR</u></b>
<b>Liabilities:</b>		
Accounts Payable & Refunds Payable	\$795.00	\$884.45
Due to Primary Fund	\$126.38	(\$13,094.79)
Due to Reinsurers	495,722.00	481,914.88
Ceding Commission Allocated for Remainder of Year	<u>398,396.65</u>	<u>361,063.43</u>
<b>Total Liabilities</b>	<b><u>\$895,040.03</u></b>	<b><u>\$830,767.97</u></b>
<b>Net Position</b>		
Net Position (Deficit) Beginning of Year	\$1,986,683.46	\$2,104,963.29
Year to Date Net Income (Loss)	<u>(1,090.17)</u>	<u>(31,496.19)</u>
<b>Total Net Position</b>	<b><u>\$1,985,593.29</u></b>	<b><u>\$2,073,467.10</u></b>
<b>TOTAL LIABILITIES AND FUND EQUITY</b>	<b><u>\$2,880,633.32</u></b>	<b><u>\$2,904,235.07</u></b>

**Oregon State Bar  
Professional Liability Fund  
Primary Program  
Balance Sheet  
7/31/2018**

**ASSETS**

	<b><u>THIS YEAR</u></b>	<b><u>LAST YEAR</u></b>
Cash	\$2,404,715.93	\$4,563,837.79
Investments at Fair Value	59,530,340.23	53,231,041.29
Assessment Installment Receivable	2,578,557.00	2,644,191.00
Due From Excess Fund	126.38	(13,094.79)
Other Current Assets	63,870.77	67,951.22
Net Fixed Assets	477,773.35	597,987.39
Claim Receivables	113,828.17	27,181.82
Other Long Term Assets	2,500.00	9,863.85
PERS Deferred Outflow of Resources	1,151,573.46	2,000,296.00
<b>TOTAL ASSETS</b>	<b><u>\$66,323,285.29</u></b>	<b><u>\$63,129,255.57</u></b>

**LIABILITIES AND FUND EQUITY**

	<b><u>THIS YEAR</u></b>	<b><u>LAST YEAR</u></b>
<b>Liabilities:</b>		
Accounts Payable and Other Current Liabilities	\$112,893.82	\$74,834.51
PERS Pension Liability	4,931,707.98	4,994,537.00
Liability for Compensated Absences	380,963.74	414,472.04
Liability for Indemnity	11,253,719.00	12,453,980.77
Liability for Claim Expense	13,414,351.54	12,465,217.54
Liability for Future ERC Claims	2,900,000.00	3,100,000.00
Liability for Suspense Files	1,500,000.00	1,600,000.00
Liability for Future Claims Administration (ULAE)	2,300,000.00	2,600,000.00
Assessment and Installment Service Charge Allocated for Remainder of Year	10,148,668.33	10,181,608.75
<b>Total Liabilities</b>	<b><u>\$46,942,304.41</u></b>	<b><u>\$47,884,650.61</u></b>
<b>Net Position</b>		
Net Position (Deficit) Beginning of the Year	\$18,108,046.73	\$8,760,999.71
Year to Date Net Income (Loss)	1,272,934.15	6,483,605.25
<b>Total Net Position</b>	<b><u>\$19,380,980.88</u></b>	<b><u>\$15,244,604.96</u></b>
<b>TOTAL LIABILITIES AND FUND EQUITY</b>	<b><u>\$66,323,285.29</u></b>	<b><u>\$63,129,255.57</u></b>



# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 21, 2018  
**Memo Date:** August 27, 2018  
**From:** PLF Board of Directors  
**Re:** 2019 PLF Budget, 2019 Assessment, and 2019 PLF Payment Deadlines

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### **I. Action Recommended**

The PLF Board of Directors approved the following actions at its August 24, 2018 meeting and requests the BOG also approve them:

1. The 2019 PLF budget as attached as Exhibit A
2. The 2019 PLF Assessment of \$3,300
3. The deadlines for payments of the PLF assessment

### **II. Executive Summary**

1. The PLF Board of Directors is recommending a 4.0% salary pool. The Bureau of Labor Statistics report for Urban areas in the Western Region (Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming) states the CPI has increased 3.6% from a year ago. In large urban areas, the rate is 3.9%. The salary pool is separate from budgeted dollars for salary reclassifications (explained in detail on page 4).
2. Indicators point toward a larger increase to the cost of medical benefits in 2019 than was experienced in 2018. The increase from 2017 to 2018 was approximately 7.1%. The budgeted increase for 2019 is 8.0%.
3. PERS Tier 1 and 2 rates increased by almost 5% from the biennium ending June 30, 2017 to the one ending June 30, 2019. The increase for OPSRP employees was 3.5%. We anticipate this trend will continue. Therefore, we are budgeting a 5.42% increase for Tiera ½ employees and 3.48% for the OPSRP group.

4. Operations expenses are budgeted to increase in 2019 by about 14%. This is due largely to increased healthcare premiums; increased PERS contributions; and budgeting the PERS pension and interest expense for the first time.
5. The PLF ended 2017 approximately \$7 million above its net position goal of \$13.3 million. In light of that, the BOD recommends reducing the 2019 assessment to \$3,300.

### **III. 2019 PLF Budget**

#### **Number of Covered Attorneys**

We have provided the number of covered attorneys by period for both the Primary and Excess Programs. (The figures are found on pages 1 and 8 of the budget document.) These statistics illustrate the changes in the number of lawyers covered by each program and facilitate period-to-period comparisons.

For the Primary Program, new attorneys paying reduced primary assessments and lawyers covered for portions of the year have been combined into “full pay” attorneys. We project 6875 “full-pay” attorneys for 2019. The actual number of covered parties in 2019 is budgeted at 7150.

In 2019 the PLF Excess Program will be focused on reducing exposure within the current book of business. The number of budgeted covered attorneys in 2019 will decrease by approximately 1.5% from the 2018 total to 2036 attorneys. Ceding commission is budgeted to remain flat from the 2018 projection.

#### **Allocation of Costs between the Excess and Primary Programs**

The Excess Program assets, liabilities, revenues and expenses are accounted separately from the Primary Program. The Excess program reimburses the Primary Program for services to ensure the Primary Program does not subsidize the cost of the Excess Program. A portion of Primary Program salary, benefits, and other operating costs are allocated to the Excess Program. Salary and benefit allocations are based on a review of the time PLF staff spends on Excess Program activities. The Excess Program also pays for some direct costs, including printing, promotion, and reinsurance related travel.

#### **Primary Program Revenue**

Projected assessment revenue for 2019 is based upon a reduced basic assessment of \$3300, down from \$3500. There are 6875 “full pay” attorneys budgeted for 2019, bringing the annual assessment revenue to \$22,687,500, down by 5.96% from the 2018 projected assessment

revenue. The difference in revenue for 2019 between a \$3500 assessment and a \$3300 assessment is \$1,375,000. The PLF outside actuaries support a reduction in our assessment.

Investment returns have been down considerably in 2018 compared to 2017. Additionally, the FMV of the portfolio has decreased in value. Mid-term elections, increased import/export tariffs, and destabilization of the European economy could all lead to a volatile market in 2019. We are being conservative in our expected return for 2019 setting it at 1.5%. Based on the value of the portfolio at June 30, 2018, a .5% change in the rate of return equates to approximately \$287,651.

### **Primary Program Claims Expense**

The most significant cost category for the PLF is claim costs for indemnity and defense. Since claims often do not resolve quickly, these costs are often paid over several years after the claim is first made. The ongoing calculation of estimated claim costs, along with investment results are the major factors in determining the Primary Program's positive/negative in-year net position.

Budgeted claims expense is the estimated cost of new claims. When claims develop in a positive or negative way, reserves are released or need to be increased. For 2019, we are estimating a release of reserves of \$500,000. This number is comparable to the release of reserves in June of 2018.

Our projections of claim costs for 2019 are based on a projected claim count of 850 claims. At August 31, 2018 the PLF annualized claim count was 835. The cost of each new claim in 2019 has been budgeted at \$21,000, slightly above the June 30, 2018 actuarial recommendation of \$20,800. The claims frequency anticipated for 2019 is 11.9%. By way of reference, a .05% difference in the number of claims equates to 42.5 claims or \$892,500.

### **Full-time Employee Statistics (Staff Positions)**

We have included "full-time equivalent" or FTE statistics to show PLF staffing levels from year to year. On the Budget document, each department is shown prior to Excess staff allocations. The FTE net of Excess allocations is shown below.

	<b><u>2018 Projections</u></b>	<b><u>2019 Budget</u></b>
Administration	7.3 FTE	6.45 FTE
Claims	19.72 FTE	19.72 FTE
Loss Prevention (includes OAAP)	13.8 FTE	13.8 FTE
Accounting	7.34 FTE	7.34 FTE
Excess Allocations	<u>2.67 FTE</u>	<u>2.52 FTE</u>
<b>Total</b>	<b>50.83 FTE</b>	<b>49.83 FTE</b>

## Salary Pool for 2019

We recommend a 4% cost of living increase for 2019. The Bureau of Labor Statistics no longer provides a CPI for Portland. Instead, it reports a CPI for the Western Region. The July 2018 report reflects an increase of 3.6% for all western states and 3.9% for large urban areas in the West. Last year, the year over year increase was 4.4% and the PLF Board and BOG agreed to a 4% salary pool. Our finance committee discussed the 4% pool at some length. PLF CFO Betty Lou Morrow reported that over the last five years, although the average salary pool increase was 3%, actual salary costs have increased only 1.96% due to attrition and how the salary pool was allocated. Moreover, the evidence shows that the delta between wages and housing costs in Portland is among the highest in the country. The blended “Western States” statistic does not fully reflect that. The National Low Income Housing Coalition recently issued a report concluding that to afford a 2 bedroom house or apartment in Portland requires an income of \$53,830 per year. Eight PLF employees make less than that and six others are within 10% of that rate. Finally, for those employees who have their spouse and/or children on our health plan, their out of pocket costs continue to go up by more than our average salary pool, essentially reducing the effect of their increase.

The budget also reflects planned reclassifications with a cost of \$25,000. The salary reclassification includes the following:

1. Those employees who changed status (e.g. Claims Attorney I to Claims Attorney II).
2. An increase to salaries for recently hired employees hired at “probationary salaries.”
3. Address a historical lack of parity between the salaries of employees in positions with equivalent responsibilities.
4. Salaries for entry-level hires of exempt positions are significantly lower than experienced staff. As new staff members become proficient, their salaries are adjusted appropriately.

## Benefit Expense

The employer cost of PERS and Medical/Dental insurance are the two major cost drivers for PLF benefits.

The employer contribution rates for PERS will increase on July 01, 2019. The table below reflects these estimated changes.

	2017-2019	2019-2021	Difference
<b>Tier 1 and 2</b>	17.84%	23.26%	5.42%
<b>OPSRP</b>	10.78%	14.26%	3.48%

Unlike most state and local employers, the PLF does not “pick up” the mandatory 6% employee contribution to PERS. PLF employees have the 6% employee contribution deducted from their biweekly remuneration.

The PLF covers the cost of medical and dental insurance for PLF employees. We are budgeting for an 8% increase to the employer's portion of the healthcare premiums.

A new budget item for 2019 is recognition of the development of pension usage through reserve increase and decreases. For 2019 the PLF is estimating an increase to reserves of \$700,000. In 2017, the reserves increased by \$741,371. We are projecting an increase to reserves of \$700,000 for 2018 as well. Another new budget item, also related to PERS is recognition of PERS interest expense. This is the interest allocated to the PLF for unfunded actuarial PERS debt. In 2017 this expense was \$44,000. We are budgeting the same amount for 2019. The State of Oregon annually supplies relevant data on which the calculations for these two expenses are calculated.

### **Capital Budget Items**

The 2019 budget is for replacement of office furniture, desktop computers, network servers and printers. This budget also includes anticipated repurposing of office space and the costs associated with that work.

### **Primary Operating Expenses with Changes from 2018 Budget +/- 10%**

Overall, operating expenses are increasing by 14.1% (approximately \$1.2M). The primary drivers of the increase are explained below.

#### **Benefits and Payroll Taxes**

As noted previously, there are budgeted increases to healthcare premiums as well as PERS contributions. Additionally, there is recognition for the PLF's portion of PERS liabilities and interest on unfunded PERS liabilities. Benefits and payroll taxes increased by \$883,289 from the 2018 budgeted level.

#### **Office Expense**

Beginning with the 2019 renewal season, a new payment portal will be implemented that offers covered parties' access to additional methods of payment, and offers Excess firms the ability to make payments online. There are approximately \$36,000 in additional fees associated with this software.

**Defense Panel Program** occurs bi-annually. There was no conference in 2018. The conference for 2019 is budgeted at \$50,000.

### **Excess Program Budget**

The major revenue item for the Excess Program is ceding commissions. These commissions represent the portion of the Excess premium that the PLF retains and is shown in the table below.

<b>Coverage Limits</b>	<b>Ceding Commission</b>
Up to \$1.7 Million	17.50%
Up to \$4.7 Million	15.00%
Up to \$9.7 Million	15.00%
Increased Cyber Limits	20.00%

A portion of the Excess premium (10.5%) goes to the PLF brokers, AON Benfield. However, the largest portion of the premium goes to the reinsurers who cover the cost of excess claims. We are budgeting \$945,000 for 2019 ceding commissions.

Excess investment earnings are calculated using a formula that allocates investment revenue based on contribution to cash flow from the Excess Program.

#### **IV. Assessment**

The PLF assessment remained at \$3,500 for nine years, the longest period without a change in the PLF's history. At the end of 2018, the PLF had over \$20 million in its net position ("retained earnings"). Two years ago, the PLF established a net position goal of \$13.3 million. Given that, the PLF Long Range Planning Committee met to evaluate the assessment. The Committee evaluated a number of points, including the components of the net position goal, analyses about future trends in claim development, claim frequency and number of Covered Parties. The Committee and the Board concluded that a reduction of the assessment to \$3,300 would be economically prudent, releasing excess funds to the Covered Parties while maintaining PLF financial stability. The Board values keeping a stable assessment and felt reasonably confident we could maintain this assessment level for at least three years, even if investment income and/or claim development is somewhat worse than predicted.

#### **V. Deadlines**

The BOD asks the BOG to approve the following deadlines for payment of the 2019 PLF assessment.

- |            |  |
|------------|--|
| January 10 | Deadline to pay full assessment or first quarterly assessment with finance and service charges, or file exemption. |
| April 10   | Deadline for second quarterly assessment.  |
| July 10    | Deadline for third quarterly assessment.   |
| October 10 | Deadline for fourth quarterly assessment.  |



# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 21, 2018  
**Memo Date:** August 27, 2018  
**From:** PLF Board of Directors  
**Re:** PLF Policy 5.150 Fidelity Bond

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### Action Recommended

We request the BOG approve the elimination of PLF policy requiring a Financial Institution Bond. The fidelity bond is expensive, duplicative of coverage we already have, and is unnecessary given the other safeguards we have in place.

### Background

The 2018 Bylaws and Policy Manual states the following:

#### **5.150 FIDELITY BOND**

The Professional Liability Fund will maintain a fidelity bond with limits for any single defalcation of not less than \$1 million. If financially advantageous, the PLF may purchase a fidelity bond jointly with the Oregon State Bar.

Our fidelity bond is consistent with what a fidelity bond typically covers:

- dishonest or fraudulent acts committed by employees acting alone or in collusion with others;
- losses resulting from burglary, robbery, misplacement, or mysterious unexplainable disappearance of property (except while in transit). Damage to our furniture or fixtures resulting from the above-listed acts is also covered under our Insuring Agreement (unless caused by fire);
- losses of certain defined property, including money, while in transit. Losses must be a direct result of robbery, larceny, theft, misplacement, mysterious unexplainable disappearance, damage or destruction to the property;
- losses resulting from counterfeit currency, received in good faith;
- losses resulting from false securities.

The annual cost of our fidelity bond is \$6,330 (50.4% of total portfolio premium). The per incident limits are \$2,000,000 with a \$25,000 deductible.

As you can surmise, much of this is inapplicable to the PLF with the exception of the first category. We already have coverage under our general liability plan which provides for computer fraud, employee theft, forgery or altercation, money and securities, and counterfeit money orders and currencies. These components of the coverage have per incident limits ranging from \$25,000 to \$250,000 with a \$25,000 deductible. The total cost of our general liability coverage is \$6,238. While the per incident coverage under our general liability plan is significantly lower than what the fidelity bond provides, we believe the internal controls at the PLF, as well as those at Wells Fargo and with our investment funds (as described below) make the risk of loss in any of these areas so remote that a higher limit is not warranted.

The fidelity risk – employee dishonesty and/or fraud – component of the policy is covered not only by the property policy, but internal and banking controls as well. Moreover, the PLF is protected from large value transaction fraud by means of dual custody controls on all outgoing wires, regardless of amount. There are also safeguards on our investment portfolio that prohibits any transfer to any account other than the PLF primary bank account.

Wells Fargo ensures that banking transactions are subject to electronic scrutiny for any anomalies. “**Positive Pay**” is the comprehensive secure service provided by Wells Fargo to protect all check transactions. The PLF no longer accepts cash for assessments. Any cash received is in such small amounts (\$50-\$100 per deposit) so as not to total anything near the deductible on the policy.

Our risk of loss on our investment portfolio is also small given our use of an outside investment consulting firm which vets all investments and only places us in well established funds.

The requirement for a fidelity bond has been in place at least since 1990 and likely earlier.<sup>1</sup> These requirements were not uncommon for commercial financial institutions, including insurance providers, which is presumably why the requirement was placed on the PLF. But, for the reasons set forth above, we believe the cost of the bond is not warranted and thus recommend deleting it from our by-laws.

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<sup>1</sup> We do not seem to have copies of our Bylaws and Policy Manuals before 1990.



## OREGON STATE BAR Board of Governors Agenda

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**Meeting Date:** September 21, 2018  
**Memo Date:** August 29, 2018  
**From:** PLF Board of Directors  
**Re:** Excess Program –Changes to PLF Policy 7.600(H)(2) Regarding  
Midyear Changes

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### **Action Recommended**

The PLF Board of Directors requests that the BOG approve the following recommendations regarding changes to PLF Policy 7.600(H)(2) pertaining to midyear changes for the Excess Program. The PLF Board of Directors approved the recommendations at its August 24, 2018 board meeting.

### **Background**

The excess coverage year runs from January 1 (or the date of application) until December 31 of a given year. Changes that occur after January 1, or the firm's application date, are considered midyear changes. Presently, firms are required to notify the Excess Program of midyear changes as set forth in PLF Policy 7.600(H)(2). We propose the following changes to these Policies to address changing issues in underwriting risk.

- (2) Firms are required to notify the PLF after the start of the Coverage Period if:
- (a) The total number of current attorneys in the firm either increases by more than 100 percent or decreases by more than 50 percent from the number of current attorneys at the start of the Coverage Period.
  - (b) There is a firm merger. A firm merger is defined as the addition of one attorney who practiced as a sole practitioner or the addition of multiple attorneys who practiced together at a different firm (the "merging firm") immediately before joining the firm with PLF excess coverage (the "current firm"). It is only necessary to report a firm merger to the PLF if the current firm is seeking to add the merging firm as a predecessor firm or specially endorsed predecessor firm to the current firm's Excess Plan.
  - (c) There is a firm split. A firm split is defined as the departure of one or more attorneys from a firm with PLF Excess Coverage if one or more of the departing attorneys form a new firm which first seeks PLF Excess Coverage

- during the same Coverage Period.
- (d) An attorney joins or leaves an existing branch office of the firm outside of Oregon.
  - (e) The firm establishes a new branch office outside of Oregon.
  - (f) The firm ~~or a current attorney with the firm~~ enters into an “of counsel” relationship with another firm ~~or with an attorney who was not listed as a current attorney at the start of the Coverage Period.~~
  - (g) An attorney continuing to practice law with, or maintaining an affiliation with, a Law Entity other than the Law Entity listed on the Excess Declarations joins or leaves the firm.
  - (h) A non-Oregon attorney joins, or leaves the firm.
  - (i) An attorney practicing in areas that present risk of claims (including aiding and abetting) under Oregon Securities Law joins or leaves the firm.

In each case under this subsection (2), the firm’s coverage will again be subject to underwriting, and a prorated adjustment may be made to the firm’s excess assessment.

The changes to subsections (f) and (g) work to clarify when it is important for firms to notify us of “of counsel” additions or departures to a firm. The addition of subsection (i) reflects our growing need to be aware of changes in firms relating to Oregon Securities risk such that we can adequately underwrite, and charge for, that risk.

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** July 27 and August 4, 2018  
**Memo Date:** September 10, 2018  
**From:** Jennifer Nicholls, Oregon New Lawyers Division Chair  
**Re:** ONLD Report

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The ONLD Executive Committee held a meeting in Corvallis June 29-30. This was the first time that the ONLD had traveled to Corvallis in recent memory (if ever). On Friday, we hosted a networking event for local bar members with approximately 30 in attendance. In keeping with our theme of promoting attorney wellness, this event was open to families, and we had a few families (including kids) attend. The social was co-sponsored by the Linn County Bar Association.

At the Saturday meeting, the Executive Committee was provided an update on the BOG review of the ONLD, celebrated the success of the ONLD in its Second Place Award for the ABA YLS Embracing Diversity Challenge, discussed upcoming events (see below), and reviewed the ONLD budget process for 2019.

On Saturday, following the Executive Committee meeting, the ONLD hosted a family-friendly picnic and hike/nature walk at Avery Park. Approximately 24 attended -- including four children and two dogs. Local members of the bar expressed gratitude to the ONLD and OSB for hosting an event in Corvallis, noting that the OSB offers few activities in Corvallis.

The ONLD Executive Committee has called a virtual meeting on July 26 to discuss the P&G Committee and CEO's comments on proposed amendment to the ONLD bylaws and mission statement. The ONLD Chair shared the Executive Committee feedback at the July P&G Committee, and the Executive Committee appreciates the opportunity to provide feedback.

On June 27, the ONLD co-sponsored a networking social with the Business Law Section. This was the first time that the ONLD partnered with the section. Approximately 25 attended.

On August 3-4 the ONLD met in Welches, to allow ONLD Executive Committee members to participate in the OLIO orientation. Two ONLD proposals were accepted as panels -- including "So, You're the First Lawyer You Know" and "Sexual Harassment in the Wake of #MeToo" (co-sponsored with OWLS). In addition to these panels, ONLD members were on hand at the orientation to actively engage with law students during meals, game night, the OLIO Olympics, and other events.

At the August meeting, the Executive Committee discussed the BOG Policy and Governance Committee's proposed changes to the ONLD By-laws and the Committee structure. The Executive Committee supports the creation of the three Committees under review by the P&G Committee, but also believes that there is value in a fourth, Student Outreach Committee.

At the August meeting, the Executive Committee spent a great deal of time discussing the 2019 ONLD budget. Proposed reductions to the budget were forwarded to the OSB CFO, and are also attached hereto. The ONLD understands that the CFO incorporated those proposed reductions into the OSB budget.

The ONLD is also pleased to inform the BOG that the ONLD Embracing Diversity award from the ABA YLS will be featured on all of the ABA electronic media in October.

Here are some additional upcoming events:

The Fourteenth Annual Pro Bono Fair will be held at the World Trade Center on October 25th. This event features three exciting and crucial components: (1) free CLEs designed to encourage and empower new attorneys to engage in pro bono work; (2) recognizing Oregon attorneys for their commitment to pro bono work; and (3) opportunities for attorneys to learn about pro bono opportunities through our volunteer fair. This year, the CLEs will explore domestic violence and pro bono service for nonprofit organizations. Chief Justice Martha Walters will present the Pro Bono Awards recognizing the hundreds of hours that are donated by the winning attorneys and firms. The winners will also be profiled in the October Multnomah Lawyer, with ONLD Pro Bono Committee members composing these profiles.

We are also proud to report that we are expanding the reach of our simulcast of the CLEs. This year, we will be simulcasting in Salem, Bend, St Helens, Eugene, Medford and McMinnville (NEW!). Each simulcast will follow with a small networking event for local attorneys. Simulcasts began two years ago with just two locations. We are very excited to be able to offer this service to more and more cities in Oregon, and is part of the ONLD's commitment to outreach efforts around the state.

On Wednesday, October 24 the ONLD is holding a CLE and Financial Literacy Fair. New lawyers face huge hurdles in paying their student debt and opening offices. This CLE is designed to ease some of the stress of those concerns. Entitled Money Matters: Managing Student Loans and Making Smart Financial Decision, the event is held at and co-hosted with Lewis and Clark Law School.

The ONLD is one of the co-hosts of the PLF Technology Fair scheduled for September 26, along with the Solo and Small Firm Section. This is an all-day event focusing on new technologies available to attorneys, held at the Bar.

*Recent and Upcoming CLEs:*

August 9: Advocating for Clients through Social Media

September 14: Perjury Trap: Preparing Clients for Depositions CLE in Bend, with networking event following

September: Immigration Law (title TBA, but focusing on how new lawyers can get involved to represent Oregon's immigrant community)

October 11: CLE Summary Judgments

Oct 19: Part 5 of the ONLD's Uncommonly Discussed Veterans Issues CLE Series - Examining issues related to homelessness and housing insecurity faced by Oregon's veterans  
Wednesday, October 26: CLE co-sponsored with the Litigation Section, details pending

The ONLD CLE Subcommittee is actively working on other CLEs to encourage and train new attorneys to engage in pro bono volunteer work.

*Recent and Upcoming Networking Events:*

July 25: networking event at Xport in downtown Portland (co-sponsored with OAPABA)  
August 24: family friendly picnic in disability-accessible Portland park in partnership with OWLs - Queen's Bench (postponed due to weather)  
September 26: Networking event at TBD location in partnership with OSB Disability Law Section

*Other Events*

September 27: Reception co-sponsored with the Military Veterans Law Section, Washington County Bar, and the Department of Diversity and Inclusion, which will include an update on Washington County's veterans' court

Diversity Dinner: We are currently planning 50-person fall dinner event with D&I department (date: TBD)

Planning is also underway for our Second Annual Classroom to Courtroom project, which will partner high school students from North Salem High School with local attorneys. The date is still to be secured with high school staff.

We welcome BOG attendance at all of our events.

# OREGON STATE BAR

## Legal Services Program Committee

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**Meeting Date:** Sept 21, 2018

**Memo Date:** Sept 6, 2018

**From:** Legal Services Program Committee

**Re:** Disbursing Unclaimed Client Funds from the Legal Services Program

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### **Action Recommended**

- 1) Increase the reserve target for the Annual Unclaimed Fund to \$200,000.
- 2) Disburse \$215,000 from the unclaimed client fund but to hold the funds until the legal aid providers make a recommendation for when to disburse the funds and a method for allocation between providers.

### **Background**

Unclaimed or abandoned client funds held in lawyers' trust accounts are sent to the Oregon State Bar (OSB), pursuant to ORS 98.386. Revenue received is used for the funding of legal services by legal aid providers, the payment of claims, and the payment of expenses incurred by the OSB in the administration of the Legal Services Program.

In 2012 the committee and subsequently the BOG approved a recommendation regarding the distribution of unclaimed client funds. The distribution method is that the LSP will hold \$100,000 in reserve to cover potential claims and distribute the revenue that arrives each year above that amount. The amount disbursed has changed from year to year depending on the unclaimed funds received and claims made (see attached ULTA 2017 Report). In addition, the OSB entered into an agreement with the legal aid providers in which the legal aid providers agreed to reimburse the OSB if the remaining reserve gets diminished or depleted.

In January 2014, the LSP received approximately \$520,000 unclaimed client funds from the Strawn v Farmers Class Action. The BOG initially approved distributing these funds in equal amounts over three years. 1/3 of the funds were disbursed in 2014 and 1/3 in 2015. In 2016 and 2017, the BOG did not disburse any funds from the Strawn v Farmers Fund because of remaining potential claims.

### ***Annual Unclaimed Fund***

At the end of 2017, there was \$532,402 in the Annual Unclaimed Fund (see attached ULTA 2017 Report). The fund balance grew in 2017 largely due to a receipt of \$360,000 related to foreign insurance companies. There are two recommendations regarding Annual Unclaimed Funds.

1. It is recommended that the reserve policy be increased to a \$200,000.

When the previous reserve target of \$100,000 was adopted in 2012, there was a potential known claims liability of approximately \$334,000 for the Annual Unclaimed Fund. Since that time, the fund has received additional money. With additional money also comes additional potential claims; the potential known claims liability of the Annual Unclaimed Fund has increased to approximately \$900,000<sup>1</sup> at the end of 2017. The increase in potential claims liability indicates that it is time to increase the reserve target.

2. It is recommended that \$215,000 be distributed from the annual fund to the legal aid providers and held by the OSB until the providers request disbursement and advise on an allocation method between the providers. This will leave the annual fund reserve of \$200,000 and approximately \$150,000 as an additional reserve that can be also be used for Strawn Farmers Class Action Claims.

### ***Strawn Farmers Class Action Claims***

During 2017, \$84,849 was paid in Strawn Famers Class Action Claims; this is a ten-fold increase over the amount paid out in 2016. Prior to 2017, a total of \$35,153 had been claimed. The increase in claims appears to be a result of the Department of State Lands sending letters to potential claimants of the Strawn v Farmers Fund during 2017. It is unclear if the Department of State Lands will repeat their mailing in 2018.

As noted above, after the two recommended actions approximately \$150,000 beyond the annual fund reserve will be held and can be used for Strawn Famers Class Action Claims without diminishing the amounts held as an annual unclaimed fund reserve.

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<sup>1</sup> \$900,000 includes potential claims liability for the amount received related to foreign insurance companies. It is expected that these funds are of lower likeliness to be claimed than most. Without the potential claims related to foreign insurance companies, the potential claims liability at the end of 2017 for the Annual Unclaimed Fund was \$536,000.

# OREGON STATE BAR

## Board of Governors Agenda

**Meeting Date:** September 21, 2018  
**From:** Helen Hirschbiel, CEO  
**Re:** CEO Report-Operations and Activities

### Finance and Operations (Keith Palevsky)

	YTD	YTD	* B/(W)	Year	%	
\$M	July	Budget	YTD Variance	Budget	Attain	YTD Target
Revenue	12,420	11,889	532	20,380	61%	≥ 58.3%
Total Expense	11,748	12,401	654	21,252	55%	≤ 58.3%
Net Operating Profit	717	(513)	1,230	(872)	100%	≥ 58.3%

<i>Legend:</i>	
Good	
Fair	
Bad	

- Through the end of July, financial performance is better than budget on both revenue and expense by a wide margin. Over the next 5 months, the positive performance will close considerably due to several primary factors:
  - D&I spending is heavily loaded toward the back-end of the year.
  - CLE experiences heavier class registrations and expenses in the 2<sup>nd</sup> half of the year.
  - IT spending will be heavily weighted toward the 2<sup>nd</sup> half of the year as we continue AMS implementation and complete other needed system upgrades.
  - We experienced several A/C failures affecting various areas of the building this year and are poised to complete several maintenance and repair items prior to 12/31.

### Operations

- A new tenant (Ameriprise Financial) has signed a lease to occupy Suite 175 starting October 1<sup>st</sup> for a seven year term. A build out that will cost appx \$14.5K is required for the new tenant, contractor has been identified and essential work is scheduled to be completed on time. Upon move-in, all rentable space will be fully occupied.
- A/C unit repairs were completed for two separate hard failures affecting the south end of the building in August. An additional motor failure affecting tenant Pavilion Construction was completed September 5<sup>th</sup>. The frequency of repairs underscores the importance of proper maintenance for the building and will be comprehended in the 2019 budget.

### Investments

- Ending balance 7/31 was \$6,138K, up \$115K over June and down \$195K from December 2017. Total portfolio split remains 50/50 (appx) between Becker Capital (i.e. Washington Trust) and Columbia Trust.

## **General Counsel’s Office**

**(includes Client Assistance Office, MCLE, and Disciplinary Board)  
(Amber Hollister)**

- General Counsel’s Office is entering high-season for ethics CLEs and Abuse Reporting CLEs.
- At its public meeting on September 5, the Supreme Court adopted the MCLE Committee’s proposed rule change requiring one hour of MCLE credit in Mental Health and Substance Use Education per reporting period. We received the court’s order, and will begin communicating with members about the new requirement.
- The Professional Adjudicator held his first disciplinary trial, and has several more trial panels scheduled throughout the remainder of the year.
- Client Assistance Office is recruiting for an Assistant General Counsel. In the meantime, former disciplinary counsel Martha Hicks is providing invaluable part-time contract assistance.

## **Public Affairs**

**(Susan Grabe)**

- In light of pending budget reductions for courts, staff is reviving the Citizens’ Campaign for Court Funding. A breakfast meeting with Chief Justice Walters, bar leaders, legislators and members of the business community has been scheduled to discuss legislative funding for the courts.
- Public Affairs submitted 13 legislative concepts for bill drafting purposes. The Board will review the concepts in the Law Improvement Package again this fall to determine whether they should continue to move forward.
- Public Affairs is updating its legislative grassroots network.
- Public Affairs staff have increased outreach and engagement with judiciary system partners and bar groups. Discussions around the OSB Attorney Referral Workgroup, proposals from OJD, DOJ, legal aid, indigent defense, and numerous Oregon Law Commission workgroups (including Workplace Harassment) are taking place.

## **Communications**

**(including Creative Services, RIS, Public Services)  
(Kay Pulju)**

- The August/September edition of the Bulletin introduced Chief Justice Martha Walters. The October edition will include features on the new field of online privacy law and the experiences of newer lawyers practicing in Northeast Oregon.
- Coordinated efforts to inform members of the new MCLE rule regarding substance use, mental health and cognitive impairment are taking place.

- Section websites continue to be transitioned to the WordPress platform. This is designed to reinforce accessibility for our audience, promote consistent branding and optimize display on a changing variety of devices.
- Projects currently underway include efforts to make the bar’s public information materials more accessible and increasing support to self-represented litigants.
  - Pursuant to the Diversity Action Plan, members of the Public Service Advisory Committee are reviewing and editing all public information materials to meet a targeted 8<sup>th</sup>-grade reading level.
  - The Legal Q&A video library, which features Oregon lawyers answering a single legal question per video, now includes 115 titles.
  - Working with other members of the Self-Navigators Group, staff are developing a script to help self-represented litigants understand courthouse procedures.

#### Referral & Information Services (RIS)

- Lawyer Referral Service (LRS) has approximately 500 attorneys now in rotation. Registration fees generally produce around \$100,000 in revenue from July through September.
- RIS continues to implement the Diversity Action Plan by conducting an outreach campaign with community partners. The goal is to raise awareness of the Modest Means Program and other bar services to underserved communities in Oregon.
- LRS revenue is on track to exceed budget projections for 2018. Total percentage fee revenue through August is \$589,277, which is 82% of projected revenue for the year. Total revenue since percentage fee implementation is \$3,766,925. This represents over \$31,000,000 in legal fees LRS attorneys have billed and collected from LRS-referred cases since October of 2012.

#### Human Resources

##### (Christine Ford)

- Began the process for conducting a pay equity audit to be in compliance with Oregon’s Pay Equity Law.
- Continue preparations for the Cultural Assessment Survey.
- Completed the evaluation of categories used for measuring staff diversity and began using the expanded list of categories.
- Revised the resources used for attracting a diverse pool of job applicants and began notifying several additional organizations of OSB job openings.

#### Information Technology

##### (Gonzalo Gonzalez)

- Aptify Admissions products – paying for application fee online has been tested and ready to go live

- Migrated the Exchange email system to the Microsoft Cloud 365

## **Disciplinary Counsel’s Office and Regulatory Services**

### **(Dawn Evans)**

#### Admissions

- A total of 421 persons took the July bar examination. Exam results will be posted on the Bar’s website on September 21 at 2:00 p.m.
- The BBX is recommending changes to two admission rules – RFA 4.05 and RFA 7.05 – to the Supreme Court at its October public hearing.
  - The changes to RFA 4.05 will provide the BBX chair some flexibility in extending the application filing deadline in exigent circumstances and will clarify that, when a deadline falls on a Saturday, Sunday, or holiday, the deadline will extend to the next day.
  - The changes to RFA 7.05 will standardize the deadlines for usage of an MPRE score across applicant types. Whether the applicant is taking the Oregon bar, a UBE transfer applicant, or a house counsel applicant, the applicant will be able to use a passing score (85) obtained within 36 months prior to the application. When an applicant has been admitted in another jurisdiction that requires the MPRE, the applicant may use a passing score on the MPRE from that jurisdiction taken at any time so long as the applicant has practiced for at least 12 months in that jurisdiction at the time of the application.

#### Disciplinary Counsel’s Office

- The State Professional Responsibility Board (SPRB) took action on some 49 separate matters.
- Investigations opened during 2018 as of the end of August are comparable to the number received during 2016, which was a high water mark dating back through 2012. In five out of eight months this year, the number of files opened exceeded the same month in 2017. At present, trial settings on formal proceedings are being scheduled in 2019, well within the timelines set forth in the Bar Rules.

## **Member Services**

### **(including ONLD, New Lawyer Mentoring and LRAP)**

#### **(Danielle Edwards)**

- Judicial preference poll ballots will be distributed on September 13 for five contested races appearing in the Oregon General Election. Active members in Jackson, Linn, Multnomah, Union, Wallowa, and Yamhill Counties will be polled.
- Voting will open on October 1 for the contested BOG election races in Regions 4, 5, 6, and 7. The candidate list is available [here](#) and results will be available on October 16.

- More than 250 members and 30 non-lawyers expressed an interest in volunteering on more than 30 OSB boards, committees, and councils. Between September and November the Board Development Committee will review volunteer preferences and slate approximately 200 volunteers for service beginning in 2019.

#### New Lawyer Mentoring Program

- Approximately 175 new lawyers completed the program requirements since January 1 of this year.

Mentor recruitment continues to be a focus, particularly with the October swearing-in of new bar members. Nearly 100 new mentors have been added to the program since January 1 of this year.

#### **CLE Seminars (Karen Lee)**

- Sponsored an Introductory Access to Justice seminar that addressed barriers to legal services, including national origin and sexual orientation
- Convened a vision committee with the Litigation Section to take a look at how future institutes might be shaped, as the demographics of the bar, section membership, and trial practice continues to change.
- Recorded videos on how to conduct effective components of a trial for participants. This will assist them with preparations for their mock trial sessions for the Oregon Trial Advocacy College.

#### **Legal Publications (Linda Kruschke)**

- Completed the PLF book *Oregon Statutory Time Limitations*. The PLF will print and distribute in September.
- The 2018 *Joint Oregon and Washington Cannabis Codebook* has been released.
- Received the ACLEA Award of Outstanding Achievement for *Juvenile Law: Dependency*, which was published in 2017.
- Scheduled for release in 2018:
  - *Fee Agreement Compendium*, revision
  - *Administering Oregon Estates*, legislative supplement
  - *Oregon Formal Ethics Opinions*, supplement
  - *Oregon Rules of Professional Conduct Annotated*, supplement
  - *Advising Oregon Businesses, vol. 3 & 4*, revision

**Legal Services Program**  
**(includes Pro Bono and Oregon Law Foundation)**  
**(Judith Baker)**

- Engaged in reviewing the effectiveness of the providers in meeting the needs of individual clients and the larger client community in the Legal Aid programs assuring compliance.
- The LSP Committee is recommending to the BOG that \$215,000 in unclaimed funds be disbursed to the legal aid providers.
- Oregon will celebrate National Pro Bono Week with a fair on October 25 at the World Trade Center. Lawyers in the Libraries coordinated by the Pro Bono Committee are giving know your rights on various areas of law in Multnomah County, Eugene and Hood River.
- The Oregon Law Foundation (OLF) has received a preliminary report that summarizes the survey data from their research partner. It is anticipated that the study will be published in the Fall of 2018.

**Executive Director’s Activities**

<b>Date</b>	<b>Event</b>
6/21-23	<i>BOG Meeting- Strategic Planning- Bend</i>
6/26-28	<i>Local Bar Tours</i>
7/11	<i>Meeting- Gillette, Dozono, Wilker</i>
7/12	<i>CC- John Mitchell re BOG retreat</i>
7/13	<i>Breakfast Meeting- Kevin Gillespie, CEO of Text a Lawyer</i>
7/18	<i>Executive Directors- Breakfast</i>
7/18	<i>Campaign for Equal Justice-Board Meeting</i>
7/19	<i>WMAA- Sussman, Shank</i>
7/20	<i>MCLE Committee Meeting</i>
7/22	<i>CC-Professor Gillian Hadfield</i>
7/23	<i>BOG Prep for meeting with Affinity Bars</i>
7/26	<i>Lunch Meeting- Linda Odermott</i>
7/26	<i>WSBA/BOG dinner- Vancouver, WA</i>
7/27	<i>BOG Committee Meetings</i>
7/31-8/3	<i>NABE conference- Chicago</i>
8/8	<i>Lunch Meeting- Steve Friedland</i>
8/9	<i>CC- Tara Millan</i>
8/10	<i>Breakfast Meeting- Ira Zarov</i>
8/13	<i>Affinity Bar Meeting</i>
8/14	<i>Meeting with Steve Berman</i>
8/15	<i>Executive Directors Breakfast</i>
8/15	<i>Willamette University Professional Program</i>
8/16	<i>CC- WMAA</i>
8/21	<i>Meeting with Peggy Nagae</i>

8/21	<i>Lunch Meeting- Steve Friedland, Jonathan Puente</i>
8/22	<i>Meeting- Rotary Club- Salem</i>
8/22	<i>1L Professionalism Orientation – Lewis &amp; Clark Law School</i>
8/23-24	<i>PLF Meetings- Astoria</i>
8/28-31	<i>ILLACE Conference- Ottawa, Canada</i>
9/4	<i>Litigation Communication Strategy Meeting</i>
9/5	<i>Oregon Supreme Court Public Meeting- Salem</i>
9/5	<i>CC - Jennifer Lewin re BOG Retreat</i>
9/6	<i>Breakfast- TB</i>
9/6	<i>Meeting- CEJ Board, Advisory Committee and Leadership</i>
9/7	<i>Meeting- CJ Walters- Salem</i>
9/7	<i>Dinner- Awards- OR Law- OSB President received award- Eugene</i>
9/8	<i>Legal Ethics Committee Meeting</i>
9/10	<i>CC – Lovely Dhillon re Pro Bono opportunities for OR lawyers</i>
9/10	<i>WMAA Meeting- Sussman Shank</i>
9/10	<i>Attorney Referral Fees Committee Meeting</i>
9/10	<i>Nominating Committee Meeting</i>
9/11	<i>Litigation Communication Strategy Meeting</i>
9/18	<i>PuMP Webinar</i>
9/19	<i>LSC Reception-Ater Wynne</i>

*Oregon Judicial Department's*

***Civil Justice Improvements  
Task Force***

***Report to the Chief Justice***



*June 20, 2018*

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**OREGON JUDICIAL DEPARTMENT**  
**CIVIL JUSTICE IMPROVEMENTS (CJI) TASK FORCE**  
**REPORT TO THE CHIEF JUSTICE**

**1.0 Introduction**

While state court improvement efforts understandably often focus on criminal and family law cases, civil cases -- which account for a significant percentage of cases filed in state courts -- tend to receive less attention. In recent years, however, questions have arisen about how to more effectively and efficiently manage civil cases of all kinds, to the benefit of the litigants and the courts alike.

This report evaluates civil case management in the Oregon state courts and makes recommendations for civil justice improvements in a variety of areas. As will be seen, Oregon courts already have many tools and practices in place to help ensure effective case management. The recommendations in this report are intended to recognize both what is currently working well and what could be improved; to address identified gaps; to promote statewide consistency where appropriate; and to improve access to justice and procedural fairness in the courts.

**2.0 Call to Action Report and Recommendations**

With the support of the National Center for State Courts (NCSC), the Conference of Chief Justices (CCJ) in 2014 appointed a Civil Justice Improvements Committee (CJIC), chaired by Oregon Supreme Court Chief Justice Thomas A. Balmer, to research and prepare recommendations on improvements in processing and resolving civil cases in state courts. In 2016, the CJIC issued its report, entitled *Call to Action: Achieving Civil Justice for All* (July 2016), which was intended to serve as "a roadmap for restoring function and faith" in the civil justice system.<sup>1</sup> *Call to Action* 4.

As part of its work, the CJIC undertook a multijurisdictional, statistical study of the civil litigation landscape in general jurisdiction courts ("*Landscape*"), which "presented a very different picture of civil litigation than most lawyers and judges envisioned based on their own experiences and on common criticisms of the American civil justice system." *Id.* at 8. Specifically, "[a]lthough high-value tort and commercial contract disputes are the predominant focus of contemporary debates, collectively they comprised only a small proportion of the *Landscape* caseload." *Id.* Instead, high-volume civil cases filed in state courts today most often involve debt collection, landlord-tenant disputes, mortgage foreclosures, and small claims. Notably, those types of

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<sup>1</sup> The full CCJ *Call to Action* report and recommendations, together with an Executive Summary, appendices, and related materials, are available at <http://www.ncsc.org/Microsites/Civil-Justice-Initiative/Home/CCJ-Reports.aspx>.

cases tend to involve smaller amounts at stake than more traditional tort or contract cases, such that the cost of litigation often exceeds the monetary value of the case. *Id.* at 9. They also frequently involve at least one self-represented litigant, who often is procedurally disadvantaged when compared to institutional or represented litigants on the opposing side. *Id.* at 10. The *Landscape* also revealed that most civil cases are resolved through a nonadjudicative process, such as default judgment or dismissal. *Id.* at 9. Finally, the *Landscape* showed that, other than small claims cases, most cases filed in state courts tend not to comply with the nationally adopted Model Time Standards for State Trial Courts. *Id.* at 10.<sup>2</sup>

Drawing from the realities of the *Landscape*, *Call to Action* emphasizes several imperative responses on the part of the courts, to ensure efficient and effective civil case management. First, the entire court -- judges together with staff working as a team -- must lead the process of case management and moving a case forward to resolution, instead of allowing lawyers to control the pace of litigation. *Id.* at 12. Second, a "one-size-fits-all" approach -- for example, one set of inflexible procedural rules that applies to all types of cases -- prevents courts from effectively managing cases not suited to such rules. "Instead, cases should be 'right-sized' and triaged into appropriate pathways at filing," and those pathways should remain sufficiently flexible to permit reassignment if the needs of the case change over time. *Id.* Finally, courts must pay close attention to high-volume dockets, to ensure that cases do not languish unnecessarily for long periods of time for no reason, and to engage the parties in the process. *Id.* at 14.

*Call to Action* sets out 13 specific recommendations that are intended to reshape how courts approach civil case management. In general, the recommendations urge the courts to exercise ultimate responsibility in case management; to triage case filings with mandatory pathway assignments; to strategically deploy court personnel and resources; to use technology wisely; to focus attention on high-volume dockets and uncontested cases; and to provide superior access for litigants. *Id.* at 15.

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<sup>2</sup> The Model Time Standards for State Trial Courts were approved in 2011 by the CJC, the Conference of State Court Administrators, the ABA, and the National Association for Court Management. They were the product of a joint effort involving those groups, as well as the NCSC and the State Justice Institute. See <http://www.ncsc.org/Services-and-Experts/Technology-tools/~media/Files/PDF/CourtMD/Model-Time-Standards-for-State-Trial-Courts.ashx>.

### **3.0 OJD CJI Task Force, Mission and Membership**

#### **3.1 Mission**

Following the 2016 release of *Call to Action*, in May 2017, Chief Justice Balmer, together with a small Oregon planning group that included a trial court judge, a private lawyer, a legal aid lawyer, a trial court administrator, and two lawyer staff from the Oregon Judicial Department (OJD), attended a three-day Western Regional Summit presented by the National Center for State Courts. At the Summit, the planning group learned about proposals and best practices working in other states to improve civil case management -- from filing to resolution -- and to improve access and uniformity for litigants.

In August 2017, Chief Justice Balmer issued Chief Justice Order (CJO) 17-046, which created and appointed the OJD Civil Justice Improvements (CJI) Task Force. See [Appendix A](#) (setting out CJO 17-046). The Task Force was established to:

- (1) Review the *Call to Action* recommendations;
- (2) Review civil justice reforms implemented or under consideration in other state courts;
- (3) Consider other related concepts for civil justice reform in Oregon; and
- (4) Make recommendations to OJD, to the extent feasible, necessary, and appropriate to implement improvements to Oregon's civil justice system.

Pursuant to CJO 17-046, the Task Force was directed to formulate and develop, without limitation, recommendations for:

- (1) Concrete actions that can be taken to increase and improve access to civil justice, improve procedural fairness in civil cases, and reduce cost and delay in civil cases;
- (2) Consistent statewide standards to ensure appropriate case management and timely disposition of civil cases, including, without limitation:
  - (a) Enforcing the requirements set out in Uniform Trial Court Rule (UTC) 7.020, Oregon's statewide rule for managing civil cases from filing to disposition;
  - (b) Setting firm trial dates; and

- (c) Determining appropriate pathways for managing different types of cases, including high-volume cases that often involve self-represented parties;
- (3) Proposed rules, procedures, or best practices for civil case management within each case pathway; and
- (4) Leveraging available technology to facilitate civil case processing improvements.

CJO 17-046 additionally provided:

"The Task Force's recommendations should be based on existing Oregon statutes and the Oregon Rules of Civil Procedure, although the Task Force may identify recommended statutory or rule changes where appropriate. Recommendations may form the basis for new or revised Uniform Trial Court Rules (UTCs); Chief Justice Orders (CJOs); Supplementary Local Rules (SLRs); or Statements of Best Practices directed toward increasing and improving access to Oregon's courts, and ensuring the fair, timely, and cost-effective disposition of cases. In developing recommendations for case management practices, the Task Force may consider the need for local court flexibility as appropriate. In assessing feasibility, the Task Force should assume that judicial, staff, and other resources available within the Oregon Judicial Department will remain at current levels."

### 3.2 Membership

The Task Force members and staff are:

<b>Co-Chairs</b>	
Honorable Stephen Bushong	Presiding Judge, Multnomah County
Dana Sullivan	Attorney, Portland
<b>Members</b>	
Honorable Scott Shorr	Judge, Court of Appeals
Honorable Benjamin Bloom	Judge, Jackson County
Honorable Brett Pruess	Judge, Coos County
Melissa Bobadilla	Attorney, Beaverton
Dominic Campanella	Attorney, Medford
Emily Teplin Fox	Attorney, Oregon Law Center, Portland
Jeff Hall	Trial Court Administrator, Deschutes County
Helen Hirschbiel	Oregon State Bar, Chief Executive Officer, Tigard
Linda Hukari	Trial Court Administrator, Benton County
Michelle Freed	Attorney, Portland
Megan Livermore	Attorney, Eugene
J. Christian Malone	Attorney, Bend
Daniel Skerritt	Attorney, Portland
Julie Vacura	Attorney, Portland
<b>Lead OJD Staff</b>	
Lisa Norris-Lampe	Oregon Supreme Court, Appellate Legal Counsel
<b>Other OJD Staff</b>	
Sam Dupree	eServices Legal Liaison, OJD
Daniel Parr	Appellate Court Administrator/Director
Sarah Smith	Management Assistant, OJD

#### **4.0 Work of the OJD CJI Task Force**

The Task Force met eight times from September 2017 through May 2018, with additional subgroup meetings. Its work included the following:

- (1) Reviewing *Call to Action* and its Appendices, and each of its 13 recommendations for civil justice improvements in state courts of general jurisdiction;
- (2) Reviewing Oregon-specific statistical information similar to the *Landscape* contained in *Call to Action*;
- (3) Reviewing various studies, reports, articles, and recommendations relating to *Call to Action* and civil justice improvements, including -- but not limited to -- reports and resources developed by the National Center for State Courts (NCSC), the Institute for the Advancement of the American Legal System (IAALS), and the State Justice Institute (SJI); and reports, recommendations, proposed rules, model forms, and lessons learned from other states;
- (4) Reviewing Oregon statutes, Oregon Uniform Trial Court Rules (UTCs) and Supplementary Local Rules (SLRs), and federal court rules on several topics, including various statutory deadlines; mandatory arbitration; establishing timelines for proof of service and motions for default orders based on defendant's failure to appear; setting trial dates; complex cases and complex litigation court; expedited civil jury trials; discovery; various other procedural requirements; specific statutory timelines and related requirements in small claims and residential foreclosure cases; and new Oregon legislation relating to debt buyers and court facilitation programs;
- (5) Gaining an understanding about various components of the statewide Oregon eCourt system, including automated case management deadlines and ticklers; reporting; eFiling; statewide printable and interactive forms; online resources (particularly for self-represented litigants); and public access;
- (6) Gaining an understanding of OJD's website (available at <http://www.courts.oregon.gov/Pages/default.aspx>) and an ongoing website redesign project; and of other ongoing OJD initiatives, such as the OJD Time-to-Disposition Standards and the Oregon Docket Management Initiative; various local court initiatives, and the use of mediation in the courts;
- (7) Gaining an understanding of current OJD and local court training programs for new judges, all judges, and court staff;

- (8) Obtaining information about the 2017 Oregon State Bar (OSB) Futures Task Force Report, including recommendations about paraprofessional licensing and self-navigators in the courts, and the creation of a joint web team to coordinate online resources for self-navigators; as well as other OSB programs and initiatives, such as the Lawyer Referral Service, the Modest Means Program, and online public-education video content;
- (9) Discussing how various statewide Uniform Trial Court Rules (UTCRRs) that govern timelines and procedures in civil cases operate in practice in the courts, including local expedited civil jury trial pilot programs;
- (10) Discussing and identifying differences in a variety of case management processes across the state, including judicial assignments; case management conferences; setting trial dates; court staff responsibilities; court notifications; dismissals; communications with parties; and conducting trials;
- (11) Discussing and identifying a variety of difficulties faced by lawyers and self-represented litigants involved in cases across the state, and local efforts to address some of those difficulties;
- (12) Discussing low-cost innovations by the courts and their justice partners that are intended to address issues of efficient case management and procedural fairness to litigants; and
- (13) Deliberating on each of the 13 *Call to Action* recommendations and reaching consensus decisions about related recommendations for the Oregon state courts, including the drafting two UTCRR proposals, all of which are set out in this Report.

## 5.0 Oregon Circuit Courts, 2016 Statistical Data

Under ORS 1.001, Oregon's judicial branch of government -- unlike in many other states -- is organized as a unified state court system that includes two appellate courts, the Oregon Tax Court, and all the county circuit courts, which are arranged into 27 judicial districts encompassing Oregon's 36 counties. For administrative purposes, all the state courts are managed as part of the Oregon Judicial Department (OJD); the Chief Justice of the Oregon Supreme Court is the administrative head of OJD. ORS 1.002. The circuit courts, whose work is the subject of this Report, are trial courts of general jurisdiction that handle a wide array of cases, generally covering the following areas: criminal, civil, family, juvenile, and probate.

As part of its initial work, the Task Force evaluated the *Landscape* compiled in *Call to Action*, which showed that, in state courts across the country, high-value tort and commercial contract disputes that so often are the focus of uniform court rules compose only a small proportion of the overall civil caseload in general jurisdiction courts. By contrast, the vast majority of civil cases filed in state courts are debt collection, landlord-tenant, mortgage foreclosure, and small claims cases. *Call to Action* 8.

The Task Force reviewed Oregon statewide circuit court statistics for the year 2016 and observed similar trends. See [Appendix B](#) (setting out Oregon statistics). For example, in the traditional category of "civil" cases filed in Oregon that are addressed in *Call to Action*, almost half were small claims cases, followed by about 24% that were contract cases (which can include collections cases not filed as small claims cases), and about 16% that were residential landlord-tenant cases. Only 6% were tort cases.<sup>3</sup> [Appendix B](#), Figure 1. Other notable 2016 Oregon circuit court statistics include the following:

- *Amount of Relief Sought:* The vast majority of contract cases -- 86% --sought less than \$10,000. [Appendix B](#), Figure 2.

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<sup>3</sup> The following notes accompany the Oregon statistics:

- As in *Call to Action*, the Task Force focused on traditional "civil" case types, as listed in [Appendix B](#). Family law cases are outside the scope of the Task Force's mission statement, as are other "civil" cases of a more unique nature -- such as petitions for post-conviction relief, appeals of agency rulings, and actions seeking remedial contempt sanctions.
- Oregon's designated case types do not always precisely match some of the case categories discussed in *Call to Action*. For example, a "collection" case could be filed in Oregon as a "contract" case or as a "small claims" case, and a "mortgage foreclosure" case is a subset of the cases filed in Oregon as "property foreclosure" cases.

- *Self-Represented Parties:* The vast majority of the parties in residential landlord-tenant cases and property foreclosure cases -- 85% and 68%, respectively -- were self-represented. In small claims cases, 99% of the parties were self-represented.<sup>4</sup> [Appendix B](#), Figure 3.
- *Dismissals:* Depending on the case type, either almost half, or more than half, of almost all types of civil cases were disposed of by dismissal (reasons could include failure to serve the defendant with the complaint, failure of the defendant to appear, settlement, or some other reason). For example: Between 84-92% of all tort cases ended in a dismissal. Similarly, 54% of residential landlord-tenant cases, 44% of contract cases, and 43% of property foreclosures ended in dismissal. By contrast, small claims cases had the lowest rate of dismissal (30%). [Appendix B](#), Figure 4.
- *Jury Trials:* A little more than half (52%) of all civil jury trials were held in in general tort cases (excluding malpractice, products liability, and wrongful death); 24% were held in contract cases. Other categories made up comparatively small percentages of the total. [Appendix B](#), Figure 6. The number of jury trials also, of course, varies by county. For example, in the first nine months of 2017, Multnomah County (Oregon's largest county) held 80 civil jury trials, while Jackson County held about 12. (Those totals are fairly comparable based on a per capita comparison of the population of the two counties.)
- *Time to Resolution:* A significant percentage of "civil - general" cases (excluding landlord-tenant and small claims) -- 88% -- were resolved within 12 months of filing, and 95% were resolved within 18 months of filing. As to landlord-tenant and small claims cases, 70% were resolved within 75 days of filing. [Appendix B](#), Figure 7.

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<sup>4</sup> Under ORS 55.090(1), unless the court consents, lawyers are not permitted to become involved in, or in any manner interfere with the prosecution or defense of, the litigation in a small claims case.

## 6.0 OJD CJI Task Force Recommendations

### 6.1 Call to Action Recommendation 1: Courts must take responsibility for managing civil cases from time of filing to disposition.

*Call to Action* begins by emphasizing that the court, not the parties, must exercise ultimate responsibility for managing civil cases from filing to disposition. Effective case management includes effectively communicating the case requirements to litigants, setting a firm date for commencing trial, and enforcing rules designed to promote the just, prompt, and inexpensive resolution of civil cases. *Call to Action* 16.

In discussing Recommendation 1, the Task Force repeatedly returned to the cornerstone of civil case management in Oregon: Uniform Trial Court Rule (UTCR) 7.020. As discussed below, consistent statewide application of UTCR 7.020 is a key tool for the Oregon circuit courts in ensuring court-centered civil case management.

#### 6.1.1 **Moving Cases Toward Resolution Under UTCR 7.020**

Current UTCR 7.020 establishes a series of mandatory statewide deadlines and procedural steps in civil cases, including timelines for setting a trial date. See [Appendix C](#) (setting out UTCR 7.020). The key provisions are:

- **Proof of Service:** After filing the complaint, the plaintiff has 63 days to file a return or acceptance of service. *If not:* The court must notify the plaintiff that it will dismiss the case within 28 days, *unless* (1) proof of service is filed; (2) the plaintiff moves for more time (with good cause shown); or (3) the defendant has appeared. UTCR 7.020(2).
- **Defendant Nonappearance/Default:** If the plaintiff has filed a return or acceptance of service, the defendant has 91 days to appear (from filing of complaint). *If not:* the case is deemed "not at issue" and the court must notify the plaintiff that it will dismiss as to any nonappearing defendant within 28 days, *unless* (1) the plaintiff applies for an order of default; (2) the plaintiff moves for continuing the case (with good cause shown); or (3) the defendant has appeared. UTCR 7.020(3).
- **Case "At Issue:"** If all defendants timely appear, then the case is deemed "at issue" at the earlier of (1) 91 days after complaint filed; or (2) when the pleadings are complete. UTCR 7.020(4).
- **Firm Trial Date:** The trial date "must be" no later than one year from filing (or six months from filing of a third-party complaint, ORCP 22 C, whichever is later), unless good cause is shown to the presiding judge or designee. UTCR 7.020(5). The parties may agree with the presiding judge, or designee, on a particular trial date (via conference or otherwise), so long as it is within the timeframe just set out, ORS 7.020(6); if not, the court will calendar within that timeframe, ORS 7.020(7).

UTCR 7.020 thus establishes, as a matter of statewide policy, a series of required mechanisms intended to move all civil cases forward toward resolution -- whether that resolution ultimately be dismissal for failure to provide proof of service, dismissal due to failure to move for an order of default, judgment based on a defendant's default, settlement, trial, or some other resolution. That rule is a critical tool on which Oregon circuit courts already rely to achieve Recommendation 1 in *Call to Action* -- that courts take responsibility for managing civil cases from filing to disposition.

Many cases filed in the Oregon circuit courts, including a significant number of the high-volume types of cases identified in *Call to Action*, resolve before the time for setting a trial date occurs under UTCR 7.020(5). But, if a court does not adhere to each of the timelines and procedural steps mandated under UTCR 7.020(2) and (3), those cases may languish at various procedural steps longer than they should. By way of example, the Task Force discussed that lawyers sometimes do not receive the time-scheduled notices that the court is required to issue under UTCR 7.020(2) and (3). As a fundamental best practice, the circuit courts should consistently apply all provisions of UTCR 7.020.<sup>5</sup>

**➔ Task Force Recommendation, Best Practices:**

**6.1.1.1**      *Each court should consistently apply all provisions of UTCR 7.020, in all cases in which that rule applies.*

**6.1.2**            **Setting Firm Trial Dates**

A second important element of UTCR 7.020 is the "firm trial date" provision set out in subsection (5). That subsection provides that, once a case is at issue, trial must be scheduled no later than one year from the date of filing (or six months from the filing of a third-party complaint, whichever is later), absent good cause shown. In reviewing *Call to Action*, it appeared to the Task Force that many states lack a mechanism for consistently and timely scheduling cases for trial, and that, as a result, cases may languish unnecessarily. Oregon has such a mechanism, however, in UTCR 7.020(5). As noted in the recommendation above, if courts consistently set firm trial dates once a case is at issue under UTCR 7.020(5), then cases that have not resolved at that point in the process will move towards trial (or settlement). And, as provided in the rule, the Task Force agreed that the courts and the parties alike benefit when the parties are allowed to select an agreed-upon trial date that also is workable for the court, and is

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<sup>5</sup> As part of Recommendation 1, *Call to Action* states that courts must "effectively communicate to litigants all requirements for reaching just and prompt case resolution." *Call to Action* 16. As described later in this Report, using automated time standards and templates incorporated in the Oregon eCourt system, court staff generate and send form notices to litigants under UTCR 7.020(2) and (3), explaining the next required action under those rules and the results of noncompliance. OJD also has online form packets with instructions, for filings in high-volume cases, that explain the required steps under UTCR 7.020. OJD strives to draft all statewide forms at an eighth-grade reading level.

within the established time limit. Engaging the parties in the process of trial date selection minimizes the need to reschedule a trial date due to a party's unavailability on the date selected by the court.

Of course, the concept of setting a "firm trial date" is undercut if scheduled trial dates are regularly continued. In discussing setting firm trial dates, the Task Force considered various reasons for continuances. In some counties, trials are rescheduled due to resource issues -- for example, given the significant criminal workload in the courts, courtrooms or judges sometimes are not available for a scheduled civil trial. Rescheduling in that instance can result in cost increases for the litigants, because it is expensive to prepare for trial multiple times, and can cause the parties to opt for settlement in lieu of trial.

The Task Force also discussed the "good cause" exception in UTCR 7.020(5), which permits continuance of a scheduled trial date. The Task Force identified a key issue with that exception: practices vary widely from court to court, and from judge to judge, as to what qualifies as "good cause." For example, one court may grant a continuance based on a representation of settlement only if the parties have agreed to the terms but need time to finalize the documentation, whereas another court may grant a continuance if the parties generally state that they are working on a settlement (when, in reality, they may be far apart in their negotiations). The Task Force agreed that resolution of the case -- through trial or settlement -- is what is ultimately desired, but there should be clear time standards for achieving that resolution. Setting firm trial dates in a consistent manner is an overarching goal that drives effective case management, and the courts therefore should strive for greater statewide consistency in granting continuances.<sup>6</sup>

**➔ Task Force Recommendations, Best Practices:**

**6.1.2.1** *Courts should set firm trial dates and adhere to them, with only limited exceptions.*

**6.1.2.2** *Each court should designate the most appropriate point of time in the case management process, for that court, for setting a firm trial date, and then consistently set trial dates at that time.*

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<sup>6</sup> Throughout its work, the Task Force observed that *Call to Action* points out that courts in many states have difficulty moving civil cases to trial in a timely manner, due to onerous discovery and other issues, resulting in increased costs in litigation. UTCR 7.020 helps to limit the difficulty of establishing a trial date in Oregon. In addition, as noted elsewhere in this Report, Oregon's discovery rules are not as burdensome as in other jurisdictions -- most notably, Oregon has no interrogatory requirement, and expert discovery is not permitted.

**6.1.2.3** *Each court should establish its own transparent practice for continuing a scheduled trial date. Guidelines should include:*

- *Permissible justifications:*
  - *Joint party motion for continuance, when parties represent that they have agreed on material terms of settlement, but they need more time to negotiate remaining details.*
  - *True emergencies affecting the availability of lawyers, parties, or witnesses.*
- *Impermissible justifications:*
  - *Joint party motion to continue, generally stating that parties intend to settle or are settling.*
  - *Some or all parties seek additional time to conduct discovery.*

**6.1.3** ***Additional Considerations, Court Management of Cases to Timely Disposition***

The Task Force discussed additional topics relating to courts taking responsibility for civil case management. One such topic was the practice of holding case management conferences. The Task Force discussed that some cases -- such as complex cases, discussed later in this Report -- naturally benefit from an early case management conference, but others do not, depending on the nature of the case, the parties, and the progress of the case at different points in time. Also, in some counties, regularly holding case management conferences works well for the court and the parties -- for example, once a judge is assigned based on individual docketing, an early conference permits the court and the lawyers to meet face to face and identify the issues.<sup>7</sup> In other counties, however, case management conferences are often not a good use of the court's or the parties' time -- for example, they can be premature based on how a particular case is progressing, and many cases settle early anyway. The Task Force declined to make a statewide recommendation about holding case management conferences, except as noted later in this Report pertaining to complex cases. See section 6.5.1.

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<sup>7</sup> As discussed later in this Report, some Oregon circuit courts assign judges to civil cases early in the case using individual docketing, but others assign judges based on central docketing, such that one or more judges might resolve motions in a case, and then a different judge is later assigned for trial.

The Task Force also discussed the Oregon circuit courts' longstanding Standards for Timely Disposition (adopted in 1990 by the Oregon Judicial Conference). See [Appendix D](#) (setting out Standards). Those Standards expressly state that, when evaluating a request for postponement of any proceeding, the court's obligation is to meet the Standards, and so the court must constantly monitor the age of pending cases -- both from a court-driven case management perspective and so that parties can rely on the timelines for disposition of filed actions.<sup>8</sup> The Standards for civil cases, based on the time for resolution by settlement, trial, or otherwise, are as follows:

General civil cases:

- 90% resolved within 12 months of filing (in 2016, 88% reached that goal)
- 98% resolved within 18 months of filing (in 2016, 95% reached that goal)
- Remainder resolved within 24 months of filing (in 2016, 98% reached that goal)

Summary civil cases (such as small claims and landlord-tenant cases):

- 100% resolved within 75 days after filing (in 2016, 70% reached that goal).

OJD is currently in the process of reviewing those Standards, with each county setting a goal to complete a percentage of cases falling within each Standard. The group agreed that, as part of that work, courts that are reaching the goals set under the Standards should share strategies for what is working well with other courts.

The Task Force discussed additional issues that affect moving a case to trial or other resolution, including cases referred to arbitration,<sup>9</sup> with recommendations noted below.

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<sup>8</sup> OJD also created, in 2014, a workgroup for an Oregon Docket Management Initiative, which is evaluating OJD's docket management system and case flows. Each court is developing case management improvements as part of the Initiative, including reviewing the Standards for timely dispositions to see how to improve court processing and to establish best practices.

<sup>9</sup> As discussed later in this Report, by statute, Oregon has mandatory arbitration for civil cases involving \$50,000 or less.

➔ **Task Force Recommendations, Best Practices:**

- 6.1.3.1**      *When arbitration is required, courts should refer cases to arbitration quickly, and arbitrators should schedule and hold the arbitration quickly.*
- 6.1.3.2**      *Courts should set a standard timeline for dismissal for cases working toward settlement, if a proposed judgment is not submitted within 30-60 days, absent good cause, following notification to court of the parties' settlement effort.*
- 6.1.3.3**      *Courts that are achieving their goals under OJD's Standards for Timely Disposition should share strategies of what is working with other courts.*
- 6.1.4**            ***Additional Considerations, Litigant Expectations about Case Management and Trial Processes***

The Task Force identified additional steps that courts could take to ensure that parties know what to expect as part of moving a civil case to trial. For example, at least three counties -- Multnomah, Jackson, and Clackamas -- have adopted "civil motion consensus" documents that are available on each county's website. Those consensus documents notify parties about the court's standard practices in granting different types of motions regularly filed in civil cases. See [Appendix E](#) and [Appendix F](#) (setting out examples from Multnomah and Jackson counties). Given differences among the circuit courts, the Task Force does not recommend adoption of a statewide consensus statement, but it does encourage each court to draft such a statement, made available on its website, to promote consistency in rulings and address practitioner expectations.

The Task Force also discussed mandatory disclosures in discovery, which is required in the federal courts under Federal Rule of Procedure 26. Some aspects of mandatory disclosures are beneficial -- for example, in certain types of cases, there is some information that is always logically necessary at the outset, and receiving that information early can help each side assess the strengths and weaknesses of their cases. The Task Force does not recommend establishing statewide requirements for mandatory disclosures, however -- in part due to past evaluations of that topic by interested practice groups and also in light of Oregon's unique rules of civil procedure, which do not permit expert discovery and do not provide for the use of interrogatories. See *generally* Oregon Rules of Civil Procedure 36, 39-40 (general provisions governing discovery and specific deposition provisions; none permit interrogatories or expert discovery). In addition, developing a workable list of appropriate mandatory disclosures for different types of civil cases is beyond the scope of the Task Force's work. The Task Force does think, however, that early production of basic presumptive categories of documents for different types of cases could be developed as a best practice, which would streamline discovery in many cases.

Also along the lines of managing expectations and eliminating confusion, the Task Force discussed one aspect of "trial by ambush" in Oregon -- that is, not learning until trial is underway the identity of the opposing side's experts. Although the Task Force makes no recommended changes to the procedural rules regarding nondisclosure of expert identity, it does think it useful, from a trial management perspective, for the court to determine the appropriate point in time during the trial when expert disclosure is appropriate, and to so inform the parties.

The Task Force also identified varying court practices regarding the treatment of confidential and sealed documents, noting some confusion both in the courts and among practitioners about when a document should be treated as sealed, confidential, or neither. Eliminating confusion in that area is a worthwhile goal.

➔ **Task Force Recommendations, Best Practices:**

**6.1.4.1** *Each court should draft and regularly update a "civil motion consensus" document that includes the court's motion standards in civil cases, including the issuance of protective orders in discovery. Each court should make that document available on its website.*

**6.1.4.2** *If a case goes to trial, the parties and the court should agree, at or before the start of trial, when experts must be identified to the other side (e.g., at the start of trial, or on the day before the expert's testimony, or during the last break before that testimony, etc.).*

➔ **Task Force Recommendations, To OJD:**

**6.1.4.3** *OJD should work with the Oregon State Bar (OSB) to request that appropriate OSB sections each develop a statewide "Best Practices" list of presumptive categories of early discovery that should be disclosed in certain case types, akin to Federal Rule of Civil Procedure 26(a)(1) (Initial Disclosures) and District of Oregon Local Rule 26-7 (Initial Discovery Protocols for Employment Cases Alleging Adverse Action). Lawyers should be encouraged to make those disclosures and other appropriate voluntary disclosures, in noncomplex cases.*

**6.1.4.4** *OJD should develop a statewide "Best Practices" document about "sealed" and "confidential" documents, to improve statewide consistency.*

**6.2 Call to Action Recommendation 2: Beginning at the time each civil case is filed, courts must match resources with the needs of the case.**

*Call to Action* explains that general jurisdiction courts often take a one-size-fits all approach to case management, with a single set of procedural rules that apply in all cases regardless of size, complexity, or the nature of the dispute. Recommendation 2, by contrast, calls for the "right-sizing" of court resources, such that a court expends only the resources necessary to manage each case, depending on the needs of that case. A key component of Recommendation 2 is that each case have an appropriate plan, from the date of filing, and then the entire court system must execute that plan until resolution. *Call to Action* 18.

The Task Force discussed Recommendation 2 at length. Many of the recommendations set out elsewhere in this Report are designed to meet the goal of "right-sizing" and executing plans for effective and consistent case management. See, e.g., Report Recommendations 6.1.1.1 (consistent application of UTCR 7.020), 6.1.2.1 (setting firm trial dates under UTCR 7.020(5)), 6.1.4.1 (civil motions consensus documents), 6.5.1.3-4 (case management conferences in complex cases), 6.6.2.1-2 (process for establishing trial readiness and resolving discovery disputes in General Pathway cases), 6.7.1.1-2 (court staff responsibility to monitor cases and ensure compliance with statutory and rule-based deadlines), 6.8.1.1 (court plans for right-sized case management, within available resources), 6.9.1.1 (evaluation of judicial assignment processes), 6.10.1.1, 6.12.1.2 (running system reports based on UTCR 7.020 and other deadlines), 6.12.1.1 (institutional commitment to using UTCR 7.020 as case management tool). Those recommendations are incorporated here by reference.

The Task Force adds the recommendations set out below, regarding matching court resources with case needs.

**➔ *Task Force Recommendations, Best Practices:***

- 6.2.1** *Courts should have a useful, easy, and frequent means of sharing information with other courts about strategies that are working for keeping cases on track.*
- 6.2.2** *Court should continue to utilize pro tem judges, law clerks, and law student interns, to assist with judicial decision-making and legal research and writing.*

### **6.3 Call to Action Recommendation 3: Courts should use a mandatory pathway-assignment system to achieve right-sized case management.**

*Call to Action* recommends that courts utilize a three-pathway approach to managing cases: Streamlined, Complex, and General. Cases should be triaged and assigned to a pathway at filing, based on case characteristics and issues presented, although courts must include flexibility in the pathways so that a case can be transferred from one pathway to another if significant needs arise or circumstances change. *Call to Action* 19.

The Task Force generally agreed with this recommendation, but with some variation. Some cases filed in the Oregon courts already are readily identified at or near the outset as having the characteristics fitting a particular pathway -- including certain "streamlined" cases based on case type and accompanying statutory or rule-based requirements (residential landlord-tenant actions and small claims cases) or based on the use of a current "expedited jury trial" rule, UTCR 5.150 (see section 6.4, Streamlined Pathway); and also "complex" cases so designated early in the process via a different rule, UTCR 7.030 (see section 6.5, Complex Pathway). However, other cases that begin as "general" pathway cases subject to generally applicable processing timelines ultimately may be processed in a "streamlined" manner by operation of UTCR 7.020(2) or (3) -- that is, within a relatively short time after filing, a case may be dismissed for failure to file proof of service or failure to move for a default order or judgment, or may be resolved by default judgment. Also, cases that begin as "general" pathway cases later may be designated as "complex" under UTCR 5.150.<sup>10</sup>

The Task Force makes the recommendations set out below, concerning the pathway-assignment system as a general matter. More particular recommendations about each pathway are set out in sections 6.4, 6.5, and 6.6 of this Report.

#### **➔ *Task Force Recommendations:***

- 6.3.1** *Applying the updated practices recommended in this Report, courts should utilize the following case management pathways: Streamlined (section 6.4), Complex (section 6.5), and General (section 6.6).*

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<sup>10</sup> The Task Force also discussed the use of cover sheets that could be completed by litigants to assist in assigning a case to the appropriate pathway upon filing, and it reviewed cover sheets used in other jurisdictions. The Task Force declines to make a recommendation about cover sheets, for two reasons. First, many self-represented litigants read at or below an eighth-grade reading level, and cover sheets thus would be difficult for many litigants to complete correctly. Second, cover sheets are unnecessary in light of the Task Force's recommendations about how the pathways are most workable in Oregon -- that is, based on the case type (small claims or residential landlord-tenant), or by a post-filing designation as a streamlined jury trial case or a complex case, or by post-filing operation of UTCR 7.020 that results in dismissal or default judgment.

**6.3.2** *Streamlined Pathway cases may be readily identified by case type or by party request for "streamlined" case processing under UTCR 5.150. See section 6.4.*

**6.3.3** *Complex Pathway cases may be readily identified at or near the outset by a party's request to designate the case as a "complex" case under UTCR 7.030. See section 6.5.*

**6.4 Call to Action Recommendation 4: Courts should implement a Streamlined Pathway for cases that present uncomplicated facts and legal issues, and require minimal judicial intervention but close court supervision.**

*Call to Action* explains that a "Streamlined Pathway" for uncomplicated cases -- with expedited deadlines and processing practices -- conserves court resources. Under Recommendation 4, courts should establish deadlines to complete key stages of the case, including setting a firm trial date, with a recommended time to disposition of six to eight months. This recommendation otherwise urges judges to manage trials in an efficient and time-sensitive manner, so that trial becomes an affordable option for litigants. *Call to Action* 21.<sup>11</sup>

The Task Force agrees that Oregon should adopt the concept of a Streamlined Pathway; indeed, as discussed below, many cases already are processed in a streamlined manner as envisioned in *Call to Action*, based on timelines that are shorter than those for ordinary civil cases by statute or rule, and also based on a 75-day processing goal for certain cases under OJD's Timely Standards for Disposition (see [Appendix D](#).) Oregon also already has a means of requesting streamlined treatment of a civil case, including expeditiously setting a jury trial, under current UTCR 5.150 (also discussed below). And, any case that otherwise begins on an ordinary path can be resolved in a "streamlined" manner, post-filing, by operation of UTCR 7.020(2) and (3) (also discussed below). Together, those collective processing tools compose Oregon's "Streamlined Pathway." In light of those existing tools for streamlining cases, the Task Force does not recommend standard criteria or case types for identifying cases as

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<sup>11</sup> Recommendation 4 also suggests that courts should require mandatory disclosures in streamlined pathway cases. As noted earlier, the Task Force does not make any recommendation about mandatory disclosures as a general matter, in light of earlier discussion among interested groups in Oregon debating the benefits and detriments of that sort of approach. In section 6.4.2 and a companion proposal set out in [Appendix K](#), this Report explains that UTCR 5.150 (expedited/streamlined civil jury trials), in its current and proposed amended form, incorporates some mandatory disclosure requirements. Also, at 6.1.4.3, this Report does recommend that OJD work with appropriate Oregon State Bar practice sections to ascertain which information might be appropriate for mutually agreed-upon, voluntary disclosure in certain types of cases, as a best practice for efficient case management.

"Streamlined Pathway" cases at the outset, except as those criteria already exist for certain cases or may arise in new case types that the legislature identifies.

#### **6.4.1 Streamlined Cases Upon Filing, Based on Case Type: Residential Forcible Entry and Detainer (FED) (landlord-tenant) and Small Claims**

Oregon currently has two types of cases that, due to statutory or statewide rule requirements, are processed in a "streamlined" manner: Residential FED (landlord-tenant) cases and small claims cases.

The expedited timelines for residential FED proceedings are established by statute, ORS 105.135 - 105.140. Those timelines include a first appearance date scheduled seven to 14 days after the next judicial day following the plaintiff's payment of filing fees. ORS 105.135(2). If the plaintiff appears but the defendant does not, the court must enter a default judgment in the plaintiff's favor, awarding possession of the premises. ORS 105.137(1). Conversely, if the defendant appears but the plaintiff does not, the court must enter a judgment in the defendant's favor, dismissing the complaint. ORS 105.137(2). The plaintiff may obtain a continuance of the action only as necessary to obtain legal representation. ORS 105.137(5). If both parties appear, the court must set the trial date for "as soon as practicable," but no later than 15 days after the joint appearance. ORS 105.137(6). Either party also may move the court to submit the matter to arbitration, if an enforceable arbitration agreement exists. ORS 105.138(1). Continuances are limited to two days, with only narrow exceptions. ORS 105.140. Under the residential FED statutory scheme, forms for the parties' use are prescribed by statute, and the summons must inform the defendant of the procedures, rights, and responsibilities of each party. ORS 105.135(6). Statewide forms that comply with the statutory requirements are available on OJD's website, including an interactive option.

As to small claims cases, the types of claims that qualify are established by statute, ORS 46.405:

- Action for the recovery of money, damages, specific personal property, or any penalty or forfeiture (excluding class actions and inmate v. inmate actions, ORS 46.405(2)-(4)), as follows:
  - If the amount sought does not exceed \$750, the action *must* be filed in small claims court, ORS 46.405(2);
  - If the amount sought is more than \$750 but does not exceed \$10,000, the action *may* be filed in small claims court, ORS 46.405(3).
- Action for statutory attorney fees (excluding if based on contract, authorized under ORS 20.082), in which the amount or value claimed does not exceed \$750, *may* be filed in small claims court, ORS 46.405(5).

The expedited timelines for small claims cases are established by statewide rule, UTCR 15.020. See [Appendix G](#) (setting out statewide rules for small claims cases). UTCR 15.020(2) permits the court to dismiss a small claims action after 63 days if the plaintiff does not file a proof of service of the complaint. (By contrast, under UTCR 7.020(2), after the 63rd day in an ordinary civil case, the court notifies the plaintiff that it will dismiss 28 days after that, if the plaintiff has not filed a proof of service.) Under UTCR 15.020(3), the defendant is required to appear within 35 days; if the defendant does not appear, the plaintiff must apply for a default judgment; if not, the court may dismiss the complaint. (By contrast, under UTCR 7.020(3), the defendant has 91 days to appear, and the plaintiff is notified on the 91st day that he or she has 28 days to apply for an order of default.) UTCR 15.010 establishes forms that must be used in small claims cases; statewide forms setting out the required content are available on OJD's website, including interactive options.

The Task Force agrees that, pursuant to the statutory and rule-based requirements set out above, residential FED cases and small claims cases should be considered part of Oregon's "Streamlined Pathway." The Task Force does not, however, recommend developing automatic expedited timelines for other cases upon filing, based on their case type or other characteristics (such as amount sought). Many other cases that logically could be treated in a streamlined manner -- for example, simple collections actions -- often are filed as small claims cases anyway; or they will resolve early on in the process under UTCR 7.020(2) or (3) (or by settlement) (discussed further below); or they are filed as a case type that does not categorically fit as a streamlined pathway case (for example, a simple breach-of-contract action or a property dispute).

**➔ Task Force Recommendations:**

**6.4.1.1** *Oregon's Streamlined Pathway should continue to include residential FED cases and small claims cases, which are subject to statewide expedited timelines and streamlined case processing requirements by statute (FEDs) and rule (small claims).*

**6.4.1.2** *If the legislature in the future identifies another type of civil case that is subject to expedited timelines, then such cases also should be considered part of Oregon's Streamlined Pathway.*

**6.4.2 "Streamlined" Civil Jury Cases, UTCR 5.150**

As explained, Recommendation 4 is aimed at adjusting court rules and processes for cases that, based on their characteristics, should be handled in a streamlined manner. In that regard, *Call to Action* identifies the following case characteristics as appropriate for the streamlined pathway: limited number of parties;

routine issues concerning liability and damages; few anticipated pretrial motions; limited discovery needs; few witnesses; minimal documentary evidence; and anticipated trial length of one or two days. *Call to Action 21*.

In Oregon, most civil cases involving \$50,000 or less must be referred to mandatory arbitration before proceeding to trial. ORS 36.400, ORS 36.405(1).<sup>12</sup> See [Appendix H](#) (setting out those statutes). Since 2010, however, Oregon has had an optional "expedited civil jury cases" statewide rule, UTCR 5.150, that was intended to move less complex cases, such as those bearing the characteristics identified above, to trial more quickly, without first proceeding to arbitration if otherwise required. UTCR 5.150 was intended to encourage the use of jury trials for a number of reasons -- to involve citizens in the judicial system, to give lawyers and judges more opportunities to develop civil trial skills -- and also to help litigants resolve cases more quickly and with less expense. Under the rule, parties may seek designation of a civil case that is eligible for a jury trial as an "expedited" case, subject to expedited timelines, mandatory disclosures, limits on discovery, and other requirements. In exchange for agreeing to proceed under those elements of the rule, the parties are ensured a trial within four months of the designation. The statewide rule takes an optional, "opt-in" approach.

In addition to the statewide rule, "pilot" courts in two counties -- Jackson and Lane -- have adopted Supplementary Local Rules (SLR), SLR 5.151, designed to increase the number of "expedited" civil jury trials in those counties. See [Appendix I](#) (Jackson County SLR 5.151) and [Appendix J](#) (Lane County SLR 5.151). Per those SLRs, case qualifications include a complaint seeking recovery of money damages not exceeding \$100,000, counsel on both sides, and the exclusion of certain case types (in both courts, family law and probate; in Lane, also consumer collections, FEDs, and small claims; in Jackson, also juvenile and post-conviction). Each county employs an "opt-out" model, meaning that qualifying cases begin as "expedited jury trial" cases, and a party must affirmatively seek removal of that designation.

To date, UTCR 5.150 has been underutilized -- largely, as the Task Force understands it, due to litigant concerns about its discovery limitations and concerns about mandated timelines (including four months to trial). The SLRs in the two "pilot" counties also have been underutilized.<sup>13</sup> In Jackson County, it appears that parties may plead around the rule, based on the amount of damages sought. In Lane County, for parties who agree that a speedier trial schedule is needed, civil cases ordinarily can be set for trial within two to three months after becoming at issue, and so the rule can be viewed as unnecessary. In both counties, a high number of cases settle and so do not reach trial anyway.

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<sup>12</sup> Under ORS 36.405(3), if a court has established a mediation program for an action that otherwise would be subject to mandatory arbitration, and the parties agree to mediation, then the case is submitted for mediation instead of arbitration.

<sup>13</sup> Indeed, both pilot programs initially were structured as "opt-in," optional programs, but they transitioned to "opt-out" to attempt to increase participation.

The Task Force also acknowledged that UTCR 5.150 often is not well-suited to certain types of cases -- for example, insurance defense cases in which parties must rely on third parties for discovery. It is well-suited, however, to two-party, noninsurance cases with more easily identifiable and obtainable discovery needs and legal issues -- such as business disputes between buyers and sellers of goods, or debt disputes between businesses.

The Task Force agreed that UTCR 5.150 could be a useful tool for right-sized case management, if lawyers were not so reluctant to use it. After identifying the aspects of the rule that appear most problematic, and also considering the overarching goals of right-sized case management and flexible case processing, the Task Force recommends renaming UTCR 5.150 as a "streamlined" civil jury trial rule; amending various provisions with a goal of flexibility while retaining the general structural framework and mandatory disclosure requirements; extending the trial time from four months to 180 days; and amending the accompanying motion and order forms. See [Appendix K](#) (setting out proposed amendments). The proposed amendments -- which the Task Force hopes will make the rule a more attractive option as opposed to ordinary civil case processing when appropriate -- are summarized in the recommendations set out below.

Also concerning UTCR 5.150, the Task Force spent considerable time debating the "opt-in" and "opt-out" approaches (as explained, the current statewide rule contemplates opt-in, while the two pilot courts take an "opt-out" approach). Discussion in the Task Force revealed conflicting views about whether Oregon's mandatory arbitration statutes, ORS 36.400 and ORS 36.405, permit adoption of a statewide "opt-out" rule. In particular, ORS 36.405 provides, in part:

"(1) Except as provided in ORS 30.136 [(concerning the federal Servicemembers Civil Relief Act)], in a civil action in a circuit court where all parties have appeared, the court *shall* refer the action to arbitration under ORS 36.400 to 36.425 if either of the following applies:

"(a) The only relief claimed is recovery of money or damages, and no party asserts a claim for money or general and special damages in an amount exceeding \$50,000, exclusive of attorney fees, costs and disbursements and interest on judgment.

"(b) The action is a domestic relations suit, as defined in ORS 107.510 [(including dissolution, annulment, or separation)], in which the only contested issue is the division or other disposition of property between the parties.

"(2) *The presiding judge for a judicial district may do either of the following:*

*"(a) Exempt from arbitration under ORS 36.400 to 36.425 a civil action that otherwise would be referred to arbitration under this section.*

*"(b) Remove from further arbitration proceedings a civil action that has been referred to arbitration under this section, when, in the opinion of the judge, good cause exists for that exemption or removal."*

(Emphasis added.)

Several members of the Task Force think that the emphasized statutory text precludes adoption of a statewide streamlined civil jury trial rule that requires parties to opt-out of the streamlined trial process and proceed to mandatory arbitration -- rather, the presiding judge may approve exemption from mandatory arbitration on only a case-by-case basis, for any case not yet referred. In the view of those members, the Task Force's recommended amendments to UTCR 5.150 should not conflict with that clear legislative policy choice. Other members, however, think that ORS 36.425(2) permits an opt-out approach similar to those set out in both Jackson and Lane County SLR 5.151, and that the Task Force's recommendations should not be constrained by conflicting, conceptual statutory interpretations, regarding presiding judge authority to remove a case from mandatory arbitration. In the view of those members, "opt-out" would ensure greater use of the rule, as well as counterbalance the decrease in civil jury trials, and the Task Force should recommend that favorable policy choice. Largely due to those differing viewpoints, the Task Force as a whole does not recommend amending UTCR 5.150 to become a statewide "opt-out" rule. The Task Force does, however, recommend that OJD consider gathering data to evaluate the effectiveness of mandatory arbitration in moving civil cases to resolution in an efficient and just manner.<sup>14</sup>

The Task Force identified additional "best practice" recommendations intended to alert or remind parties about the availability of UTCR 5.150, set out below. In doing so, the Task Force also declined to propose amending the statewide rule to require the "streamlined" designation to occur at a particular point in time, so as to ensure greater flexibility.

**➔ Task Force Recommendation:**

**6.4.2.1**      *Oregon's Streamlined Pathway should include cases designated as "streamlined" civil jury cases under UTCR 5.150.*

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<sup>14</sup> Along those lines, the Task Force discussed that arbitration may not be as cost-effective in small courts because those courts can find it difficult to attract qualified arbitrators, particularly when a party obtains a fee waiver. And, the quality of arbitrators can vary. But, the Task Force also agreed that arbitration can work well, depending on the nature of the dispute.

**➔ Task Force Recommendations, Amendment to UTCR 5.150:**

- 6.4.2.2** *A proposed amendment to UTCR 5.150, and accompanying forms, should be submitted to the OJD UTCR Committee, applying to streamlined civil jury trials. (See following recommendations for specific proposed amendments and [Appendix K.](#))*
- 6.4.2.3** *UTCR 5.150 should be renamed as a "streamlined" civil jury trial rule (from "expedited").*
- 6.4.2.4** *The trial timeline in UTCR 5.150 should be changed from four months to 180 days from the date of the streamlined case designation.*
- 6.4.2.5** *The current requirement in UTCR 5.150 for a pretrial conference at a designated time should be eliminated.*
- 6.4.2.6** *The current requirement in UTCR 5.150 for a written agreement about the scope, nature, and timing of discovery, and the date by which discovery must be completed, should be eliminated. However, the rule should clarify that such agreements are permitted and encouraged.*
- 6.4.2.7** *The express limitations on discovery in UTCR 5.150 (e.g., number of depositions and requests for production; deadline for service of discovery requests) should be eliminated.*
- 6.4.2.8** *The timeline in UTCR 5.150 for completing discovery should be changed from 21 days to 14 days before trial.*
- 6.4.2.9** *UTCR 5.150 should be amended to permit streamlined procedures for resolving discovery disputes.*
- 6.4.2.10** *UTCR 5.150 should be amended to require the parties to file, no later than three days before trial, stipulations regarding the admission of exhibits, the manner for submitting expert testimony, the use of deposition excerpts (if any), and the conduct of trial.*
- 6.4.2.11** *The motion and order forms currently set out as UTCR Form 5.150.1a and 5.150.1b, should be amended so that they conform with amended UTCR 5.150, and those forms should*

be moved out of the UTCR Appendix of Forms and to OJD's website.<sup>15</sup>

➔ **Task Force Recommendations, to OJD:**

- 6.4.2.12** OJD should convey to the Presiding Judges that a streamlined trial process under UTCR 5.150 is an available option for all courts to use, even for counties that have not adopted a companion SLR.
- 6.4.2.13** OJD should consider gathering data to evaluate the effectiveness of mandatory arbitration statewide, in moving civil cases to resolution in an efficient and just manner.
- 6.4.2.14** After evaluating the effectiveness of mandatory arbitration statewide, OJD should coordinate with the Oregon State Bar, to identify and seek Bar drafting of possible legislative amendments to the mandatory arbitration statutes, ORS 36.400 - 36.405, with the goal of improving effective and timely civil case processing.

➔ **Task Force Recommendations, Best Practices:**

- 6.4.2.15** All court arbitration notices should include the following statement: "In lieu of arbitration, a party may seek court approval to designate the case as a streamlined civil jury case under Uniform Trial Court Rule 5.150. For more information, see <https://www.courts.oregon.gov/programs/utcr/Pages/currentrules.aspx>"
- 6.4.2.16** Court should send arbitration notices, in appropriate cases, to parties 30 days after the answer is filed in the case.

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<sup>15</sup> Since the statewide Oregon eCourt system rollout, discussed later in this Report, OJD has been working to move many forms currently contained in the UTCR Appendix of Forms to OJD's online Forms Center on its website, instead. Removing the forms from the UTCR Appendix of Forms gives OJD more flexibility to update them due to legislative and other changes. An opportunity for public comment on all statewide forms is available in the online Forms Center, and OJD has an established, multi-step process for reviewing and approving changes to statewide forms.

### **6.4.3 Streamlined Cases After Filing: Dismissal or Default Order and Judgment Under UTCR 7.020**

*Call to Action* describes the pathway approach as identifying which cases, upon filing and based on various characteristics, are appropriate for various right-sized case management pathways. As explained earlier, however, UTCR 7.020 creates a series of dispositional opportunities at several early stages of any civil case, which in essence can result in streamlined case processing. Stated another way, many cases that are ostensibly filed within a "general" case pathway quickly move to streamlined processing by operation of UTCR 7.020(2) and (3) post-filing. Most notably:

- *Dismissal, want of prosecution, no proof of service:* If the plaintiff does not file return or acceptance of service of complaint, by 63rd day after filing, the court notifies the plaintiff that the case will be dismissed for want of prosecution 28 days from date of mailing, unless proof of service is filed within that time period (or unless a good cause exception applies or the defendant appears), UTCR 7.020(2).
- *Dismissal, want of prosecution, no motion for order of default:* If proof of service is filed and the defendant has not appeared by 91st day from the filing of the complaint, the court deems case "not at issue" and issues written notice to the plaintiff that it will dismiss the case against each nonappearing defendant for want of prosecution, 28 days from date of notice, unless plaintiff files for order of default and entry of judgment (or unless good cause exception applies or the defendant appears), UTCR 7.020(3).
- *Judgment Following Order of Default:* If the plaintiff timely files for order of default and entry of judgment, and the defendant does not appear, the court issues judgment on a showing of a prima facie case.

In the Task Force's view, cases that are resolved post-filing by operation of UTCR 7.020(2) and (3) are logically part of Oregon's Streamlined Pathway.

In discussing case dispositions under UTCR 7.020(2) and (3), the Task Force also agreed that, if a party seeks to "undo" a judgment entered pursuant to one of those provisions, the party must move pursuant to ORCP 71 for relief from judgment -- as opposed to an inaccurate, and procedurally inadequate, request to "reinstate" the case.

#### **➔ Task Force Recommendation:**

- 6.4.3.1** *Oregon's Streamlined Pathway should include cases that, after filing, proceed to disposition by dismissal or judgment following order of default, by operation of UTCR 7.020(2) or (3).*

➔ **Task Force Recommendations, Best Practices:**

**6.4.3.2** *If the court has entered judgment under UTCR 7.020(2) due to service or nonappearance issues, and a party seeks to undo the judgment due to mistake, etc., then the party must seek relief from the judgment, not a "reinstatement" of the case.*

**6.5** **Call to Action Recommendation 5: Courts should implement a Complex Pathway for cases that present multiple legal and factual issues, involve many parties, or otherwise are likely to require close court supervision.**

As part of right-sized case processing, *Call to Action's* Recommendation 5 explains that more complex civil cases require more substantial court involvement, such as the assignment of a single judge for the life of the case; an early case management conference followed by periodic conferences or other informal monitoring; establishing key deadlines early on, for each stage of the case; early development of a detailed discovery plan; informal communications between the court and the parties as appropriate, to encourage a narrowing of the issues; and judicial management of trials in an efficient and time-sensitive manner. *Call to Action* 23. A case may be complex for a variety of reasons -- including legal complexity, evidentiary complexity, and logistic complexity, or a combination of any of those characteristics.

**6.5.1** ***Designation as a "Complex Case" Under UTCR 7.030***

In considering Recommendation 5, the Task Force first evaluated Oregon's current statewide rule relating to "complex" cases, UTCR 7.030. That rule permits any party to apply to the presiding judge to have a case designated as "complex," based on the following nonexclusive criteria: the number of parties involved; the complexity of the legal issues; the expected extent and difficulty of discovery; and the anticipated length of trial. Once a case is designated as "complex," it is assigned to a specific judge who thereafter has full or partial responsibility for the case. Trial must be scheduled within two years from the date of filing, unless extended for good cause. See [Appendix L](#) (setting out UTCR 7.030).<sup>16</sup>

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<sup>16</sup> UTCR 7.030 provides:

"7.030 COMPLEX CASES

"(1) Any party in a case may apply to the presiding judge to have the matter designated as a 'complex case.'

"(2) The criteria used for designation as a 'complex case' may include, but shall not be limited to, the following: the number of parties involved, the

The Task Force agreed that current UTCR 7.030 works well in the courts. Parties have a good sense of when they should seek a "complex case" designation, and the presiding judge has discretion to deny the motion if he or she disagrees with the proposed designation. The Task Force does not think that any particular type of case should be presumptively designated as a "complex case." It also does not propose any amendment to UTCR 7.030, although it does make the recommendations set out below regarding the operation of UTCR 7.030 in practice.

➔ **Task Force Recommendations, Best Practices:**

- 6.5.1.1** *If a judge thinks that a civil case is appropriate for designation as a complex case under UTCR 7.030, then the judge should encourage the parties to file a motion for complex case designation with the presiding judge.*
- 6.5.1.2** *After designation of a "complex case" under UTCR 7.030, a court that uses centralized docketing should expeditiously assign the case to a judge, for the life of the case.*
- 6.5.1.3** *After a complex case designation under UTCR 7.030 and assignment to a judge, the assigned judge should schedule an early case management conference, within 30 days. The judge should have discretion about when to set the case for trial and, otherwise, in establishing a case management order.*
- 6.5.1.4** *If a case management conference already has been held in a complex case under UTCR 7.030 and a party later wishes to have another case management conference, then that party first should meet and confer with the other party, before requesting that the court hold a conference. The court thereafter should hold the conference.*

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complexity of the legal issues, the expected extent and difficulty of discovery, and the anticipated length of trial.

- "(3) A presiding judge shall assign any matter designated as a 'complex case' to a specific judge who shall thereafter have full or partial responsibility for the case as determined by the presiding judge.
- "(4) A 'complex case' shall not be subject to the time limitation or trial setting procedures set forth in UTCR 7.020(5), (6) and (7); however, any such case will be set for trial as soon as practical, but in any event, within two years from the date of filing unless, for good cause shown, the trial date is extended by the assigned judge."

- 6.5.1.5** *Courts should adopt procedures for, and encourage litigants to, resolve discovery disputes informally, to reduce the cost of litigation in complex cases.*

### **6.5.2 Oregon Complex Litigation Court, UTCR Chapter 23**

The Task Force also discussed UTCR Chapter 23, adopted statewide in 2010, which establishes an Oregon Complex Litigation Court (OCLC). See [Appendix M](#) (setting out UTCR Chapter 23). The OCLC involves assigning experienced judges, identified as "OCLC judges," to be assigned to complex cases, even if the judge is from a different county. UTCR 23.010. The OCLC is managed by a "managing panel" consisting of three circuit court judges (appointed by the Chief Justice) -- among other things, the managing panel confers with the parties and the presiding judge, and, if appropriate based on established criteria, accepts the case into the OCLC; and then assigns the case to a single OCLC judge. UTCR 23.010, UTCR 23.020. The assigned judge manages the case for all purposes, including potential assignment to a settlement judge. A case management conference is required, and the parties are required to take several steps before that conference, including exploring early resolution of the case, preparing a discovery plan, attempting to reach agreement on as many issues as possible, and conferring as needed. UTCR 23.040. The case management conference is governed by rule; several topics may be covered or resolved at the conference, but discussion or resolution is not required, so the rule retains flexibility depending on the case. A case management order must issue following the conference, encompassing the matters addressed and any others that the judge thinks appropriate. UTCR 23.050. Within 10 days of trial, several exhibit-related requirements must be satisfied. UTCR 23.040.

The Task Force agreed that UTCR Chapter 23 -- which addresses many of the concerns expressed in *Call to Action*, regarding effective and successful case management of complex cases -- is a useful tool for managing appropriate complex cases in Oregon. However, the chapter is not currently widely used, and the Task Force noted a few reasons: (1) local judges often prefer to handle complex cases filed locally; (2) local voters often expect their local courts and locally elected judges to handle such cases; and (3) logistically, some courthouses are not able to effectively host an additional judge trying a complex case for an extensive period of time, due to lack of space and technological capacity. One alternative solution to the OCLC, courtroom space permitting, is for a visiting judge (who could be a current circuit court judge or a retired "senior judge") to handle overflow work for a smaller county, when one of that county's judges is trying a complex case.

#### **➔ Task Force Recommendation:**

- 6.5.2.1** *OJD should make Oregon civil practitioners aware of UTCR Chapter 23 -- the Oregon Complex Litigation Court -- as a useful tool for managing complex cases from early in the*

*case through trial. OJD should work with the Oregon State Bar to provide such educational opportunities.*

**6.5.2.2** *When the Oregon Complex Litigation Court rules are utilized, UTCR Chapter 23, and the visiting trial court judge is assigned, the hosting county's court and the visiting judge, together with his or her immediate staff and technology staff, should develop a communication and technology plan to ensure effective and efficient management of the case.*

**6.5.2.3** *As an alternative to the Oregon Complex Litigation Court, UTCR Chapter 23, a visiting judge could be used to handle overflow, routine cases in another county while a local judge handles a locally filed complex case.*

**6.6 Call to Action Recommendation 6: Courts should implement a General Pathway for cases whose characteristics do not justify assignment to either the Streamlined or Complex Pathway.**

For civil cases that do not fit either the Streamlined or Complex Pathways, *Call to Action* recommends establishing a General Pathway with a number of accompanying practices to assist with effective case management. Those include establishing deadlines for key stages, including a firm trial date; holding an early case management conference on party request; requiring mandatory disclosures and tailored additional discovery; utilizing expedited approaches to resolving discovery disputes; engaging in informal communications with the parties regarding dispositive motions and possible settlement; and managing trials in an efficient and time-sensitive manner. *Call to Action* 26.

**6.6.1 Managing General Pathway Cases Under UTCR 7.020**

In sections 6.4 and 6.5, this Report describes the Task Force's recommended approach to identifying "Streamlined" and "Complex" case pathways in Oregon. Consistently with those descriptions, the Task Force defines a "General Pathway" case as a case that is neither (1) "complex" under UTCR 7.030; (2) "streamlined" at or near the outset of the case based on case type or designation (small claims, residential FED, or cases designated as streamlined under UTCR 5.150); nor (3) "streamlined" because, post-filing, the case was dismissed or an order of default and judgment issued under UTCR 7.020(2) or (3). Also as described earlier, provisions of current UTCR 7.020 already establish, as a matter of statewide case management protocols, various requirements and associated deadlines for moving a civil case through each stage, including setting a firm trial date. See UTCR 7.020(4) (if all defendants have appeared, case is deemed "at issue" 91 days after the earlier of the filing of the complaint or when the pleadings are complete); 7.020(5) (trial date must be no later than one year from filing, unless a third-party complaint filed); 7.020(6) (parties may agree on a trial date

within that timeframe or seek a conference to set a date). See generally [Appendix C](#) (setting out UTCR 7.020).

The Task Force sets out the following "best practice" recommendations, to ensure consistent statewide application of UTCR 7.020, as well as to encourage effective case management practices that apply to the General Pathway.<sup>17</sup>

➔ **Task Force Recommendations, Best Practices:**

- 6.6.1.1** *Courts should consistently rely on UTCR 7.020(4), (5), (6), and (7) to move General Pathway cases toward resolution in a timely manner, including setting firm trial dates.*
- 6.6.1.2** *Courts should encourage parties to confer and agree on a trial date within the parameters established in UTCR 7.020(5).*
- 6.6.2** ***Tracking General Pathway Cases, Informally Resolving Discovery Disputes, and Holding Case Management Conferences***

In addition to recommending consistent statewide application of UTCR 7.020, the Task Force discussed other strategies for ensuring that General Pathway cases move toward trial without unnecessary delay or the filing of unnecessary motions, set out below.

➔ **Task Force Recommendations, Best Practices:**

- 6.6.2.1** *Courts should have a process for establishing trial readiness in General Pathway cases and, once established, to track the case and enforce the trial date or schedule a conference to select a trial date.*
- 6.6.2.2** *Each court should have a system for quickly resolving minor discovery disputes in General Pathway cases that do not require a party to file a motion. For example, questions about the scope of discovery, or issues that might otherwise require a party to move to compel production, often can be resolved via a short phone call with the judge. If, in addressing the issue informally, the judge determines that a*

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<sup>17</sup> The Task Force does not make any recommendation about mandatory disclosures in the General Pathway, other than proposing that OJD coordinate with the Oregon State Bar to encourage subject-matter sections to develop best practices about mandatory disclosures, as appropriate. See recommendation 6.1.4.3.

*hearing is needed, then the judge should schedule a hearing.*

**6.6.2.3** *A party seeking a case management conference in a General Pathway case should meet and confer with the other party before requesting a conference. The court then should hold the conference. The assigned judge also may convene a case management conference, if it would be useful to move the case to resolution. Case management conferences can be informal, depending on the case.*

**6.7 Call to Action Recommendation 7: Courts should develop civil case management teams consisting of a responsible judge supported by appropriately trained staff.**

*Call to Action* describes a "civil case management team" as utilizing court staff, in addition to the judge, in actively managing civil cases -- specifically, case management should be a "team effort aided by technology and appropriately trained and supervised staff," in light of the skill sets of different staff members. *Call to Action* 27-28. To facilitate that approach, Recommendation 7 recommends that courts conduct a thorough examination of their civil case processing practices to determine the degree of discretion required for each task; then, each task should be performed by staff whose experience and skills correspond with the staff requirements. Also, courts should delegate administrative authority to specially trained staff to make routine case management decisions. *Id.* at 27.

**6.7.1 Civil Case Management Structure and Responsibilities in the Oregon Circuit Courts**

In discussing *Call to Action's* Recommendation 7, the Task Force agreed that it is not workable for the Oregon circuit courts to adopt a one-size-fits-all approach to civil case management. Each court is different -- varying in size, management structure, and effective methods for case processing. Additionally, some jurisdictions implementing the "civil case management team" approach are increasing the job requirements for court staff positions -- including creating new Civil Case Manager positions -- which include changes in minimum qualifications that include higher levels of education in relevant fields. OJD does not have the resources to staff its courts with Civil Case Managers or to fund a reclassification effort to create those types of positions.

No matter the court size or management structure, however, each circuit court must ensure that designated staff is sufficiently trained to ensure compliance with established deadlines -- such as those set out in UTCR Chapter 7 -- are met and who otherwise ensure that civil cases are progressing toward resolution, without judicial involvement until necessary. Court staff who assist the judges in tracking cases vary in

the courts, but can include teams or designated individuals in the court's records office, the judge's clerk, and the judge's judicial assistant. The key is for the court to ensure compliance with UTCR 7.020 and 7.030 -- which provide the ultimate guidelines for case aging, trial deadlines, and trial readiness -- and otherwise effectively track cases to ensure forward movement.

➔ **Task Force Recommendations, Best Practices:**

- 6.7.1.1 *Courts should make certain that designated staff ensures compliance with deadlines that are established by statute, rules of procedure, court rules (such as UTCR 7.020, 7.030, and 5.150, or applicable Supplementary Local Rules), or court orders.*
- 6.7.1.2 *Designated staff should have authority to monitor civil cases, run various system reports, and ensure that cases are progressing toward resolution, without judicial involvement until necessary.*
- 6.7.1.3 *Designated staff who can assist with active civil case management should include central court staff, the judge's clerk, the judge's judicial assistant, or any a combination, as appropriate in each court.*

**6.8 Call to Action Recommendation 8: For right-size case management to become the norm, not the exception, courts must provide judges and court staff with training that specifically supports and empowers right-sized case management. Courts should partner with bar leaders to create programs that educate lawyers about the requirements of newly instituted case management practices.**

To facilitate adopted improvements to civil case processing, *Call to Action* recommends three general training components. First, courts should develop a comprehensive judicial training program, including web-based training modules, regular training of new judges and sitting judges, and a system for identifying judges who could benefit from additional training. Second, court staff must be trained on the skills necessary for effective case management, technology improvements, and consumer expectations (for example, working with self-represented litigants). Third, judges and court administrators should partner with the bar to create CLE programs and bench/bar conferences that help practitioners understand whatever civil improvement efforts are being undertaken and what will be expected of lawyers as a result. *Call to Action* 29.

**6.8.1 Judicial and Staff Training**

Oregon's circuit court judges have several regular statewide training opportunities. OJD presents an annual, comprehensive new-judge training and also

holds a multi-day annual conference for all the judges in the state, as well as a bi-annual conference for all the circuit court judges in the state.

Educational opportunities also are provided to OJD staff, but training is not as comprehensive as in past years. OJD's budget has been significantly reduced over the last nine years, leaving insufficient resources for such training. When budget cuts are directed, staff training is one of the first items to be cut, to preserve staff positions.<sup>18</sup> As a result of reductions to its budget, OJD has been forced to eliminate, or significantly reduce the frequency of, statewide staff trainings that it regularly had offered in the past. For example, OJD used to present an annual, comprehensive, one-week "Clerk College" to train court staff on statewide business processes and data entry, including managing civil cases, as well as an annual multi-day "Supervisor Camp" training for supervisors and lead workers. Budget cuts required OJD to suspend both programs for several years. Both programs have been revived, but scaled back. For example, the Clerk College program is held a fewer number of days and has largely been replaced with monthly business process webinars to provide some minimal training. Individual courts also provide training as needed on court business processes, data entry, and customer service skills.

The Task Force agrees that better-trained staff results in better case processing. OJD would like to provide meaningful, comprehensive statewide training, and staff wants to be trained, but, as just described, budget difficulties have hampered OJD's ability to thoroughly train court staff. In light of those difficulties, the Task Force recommends some low-cost strategies and best practices for development of staff skills in relation to effective and efficient case management, summarized below.

**➔ Task Force Recommendations, Best Practices:**

- 6.8.1.1** *The Presiding Judge and the Trial Court Administrator of each court should develop a plan for developing right-sized case management and UTCR Chapter 7 staff training, within their available resources.*
  
- 6.8.1.2** *Courts should continue to organize internal trainings to ensure that designated staff understand their responsibilities under UTCR Chapter 7 and otherwise to keep civil cases moving forward toward resolution -- such as the ability to run tickler and other reports, evaluating cases for items needing action, developing action plans with the judge as needed, and ensuring that outstanding fee issues are appropriately resolved by the end of a case.*

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<sup>18</sup> The vast majority of OJD's budget pays for salaries of judges, court staff, and other OJD staff. However, under the Oregon Constitution, judicial compensation cannot be reduced, so, when budget cuts are required, they have a disproportionate impact on court staffing. OJD has not yet recovered to staffing levels in place before the 2008 recession (OJD's budget during the 2009 legislative session was reduced by 15%).

**6.8.1.3** *Courts should share information on successful strategies and staff resources with each other -- for example, trial court administrators sharing information at regular meetings, and staff from one court receiving training from more experienced staff in another court. This could become a regular agenda item for Trial Court Administrator Peer Review meetings.*

**6.8.1.4** *In addition to system and business process training, resources permitting, staff should receive ad hoc training -- via judge or lawyer-presented information sessions -- about various substantive areas (for example, how a medical malpractice case works), to provide context for their daily work.*

## **6.8.2 State and Local Bar Association Outreach**

The Task Force agrees with Recommendation 8 that outreach to state and local bar associations is an important component to effective civil case management, and offers the recommendation set out below.

### **➔ Task Force Recommendation:**

**6.8.2.1** *At the completion of the work of the OJD CJI Task Force, OJD should engage in outreach to the Oregon State Bar and the legislature to share this Report and its recommendations, and to ensure that courts moving forward are communicating with their local bars about any resulting practice changes.*

## **6.9 Call to Action Recommendation 9: Courts should establish judicial assignment criteria that are objective, transparent, and mindful of a judge's experience in effective case management.**

*Call to Action* notes that, traditionally, the only criteria for judicial assignment has been a judge's request for a particular assignment and seniority; by contrast, important qualities such as judicial experience or training were not top priorities in making assignments. Recommendation 9 therefore recommends several factors to consider in developing appropriate judicial assignment criteria: demonstrated case management skills; civil case litigation experience; previous civil litigation training; specialized knowledge; interest in civil litigation; reputation with respect to neutrality; and professional standing with the trial bar. *Call to Action* 30.

### **6.9.1 Judicial Assignments, Generally**

In discussing Recommendation 9, the Task Force reached several points of agreement. First, in light of the Oregon courts' large criminal caseloads, judges often cannot be designated as only "civil judges," because they need to be available to handle both civil and criminal cases.<sup>19</sup> Additionally, the Oregon circuit courts assign judges differently, based in large part on the size of the court, the needs of the county, and court practices. For example, except in designated complex cases, Multnomah County assigns a "motions judge" soon after a case becomes "at issue," but does not assign a trial judge until much closer to the trial date. Deschutes County, in other than complex cases, uses a central docketing assignment system (based on availability at the time a judge is needed in a case); by contrast, Marion and Benton counties use individual docketing, assigning a judge once a case is at issue, and that judge then handles all motions and the trial. Jackson County assigns criminal cases based on central docketing, but civil cases based on individual docketing. Given the statewide disparity in court size, management structure, number of judges, and types of cases filed, the Task Force agreed that each court should continue to determine which assignment structure -- whether individual docketing, central docketing, or a mix of both -- is the most effective means of judicial assignment purposes in that court.<sup>20</sup>

As to judicial experience as a criterion for case assignments, the Task Force agreed in concept that, for courts that do not randomly assign judges to incoming cases, judicial experience in relation to the case type or complexity should be a factor for consideration in judicial assignments. However, another factor for consideration is that less-experienced judges need to gain experience, by being assigned to cases that allow them to grow in their judicial roles.

Finally, the Task Force discussed that, unlike in many other states, Oregon law permits a party to seek judicial reassignment if the party submits an affidavit stating that the party believes in good faith that the judge originally assigned will not be fair or impartial. See [Appendix N](#) (setting out ORS 14.260 and ORS 14.270). Those statutes help to frame the judicial assignment process in courts across the state.

In sum, the Task Force does not recommend any statewide changes to the judicial assignment process, although it does offer the recommendations set out below.

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<sup>19</sup> In 2015, in the Oregon circuit courts, 142,002 civil cases were filed statewide (including general civil, FED, and small claims; excluding family law and probate cases). By contrast, more than double that number of criminal cases were filed statewide -- 288,253 (felonies, misdemeanors, and violations). *2016 Annual Report: Focus on Technology*, Oregon Judicial Branch 75, available at <http://www.courts.oregon.gov/about/Documents/OJD2016AnnRptWEB-VERSION2.pdf>.

<sup>20</sup> There are benefits to the different approaches. Central docketing maintains much-needed flexibility in the court's management of its judicial resources. But, individual docketing ensures continuity and early, individual judicial engagement in the case.

➔ **Task Force Recommendation:**

- 6.9.1.1 *Courts should evaluate their judicial assignment processes (be they central docketing, individual docketing, or a mix of both), to ensure that current processes provide the most efficient means of civil case management, in light of the court's size, management structure, and case load.*
- 6.9.1.2 *Judicial experience should be a criterion for judicial assignment in civil cases; however, an additional consideration is that new, challenging case assignments will help judges develop their skills and grow in the role of judge.*

**6.9.2 Judicial Experience and Assignments, Transparency**

The Task Force thinks it important that courts be transparent about each judge's judicial experience and the court's judicial assignment process. Among other things, transparency helps to provide information to self-represented litigants and also to lawyers who are litigating in unfamiliar courts. Of course, because judges are elected in Oregon, their experience is ultimately transparent to the voters through the election process, as well as through a vetting process by the Oregon State Bar.<sup>21</sup> But, the Task Force agreed that courts could take additional steps to support a transparent approach regarding judicial experience and the judicial assignment process.

➔ **Task Force Recommendations:**

- 6.9.2.1 *For judicial experience transparency purposes, as part of information about "Going to Court," each court's website should include a summary of each judge's experience.*
- 6.9.2.2 *For judicial assignment transparency purposes, as part of information about "Going to Court," each court's website should include a general statement of when and how judges are assigned to cases.*
- 6.9.2.3 *Court staff should be trained on the judicial assignment process, so that they can answer questions from litigants and the public on that topic.*
- 6.9.2.4 *Ideally, each courthouse should have an easily accessible means for self-represented litigants to learn which judge is*

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<sup>21</sup> See Or Const, Art VII (Amended), § 1 (all state court judges in Oregon shall be elected by the legal voters of state or, as appropriate, by the legal voters of each district, for six-year terms).

*handling their hearing or trial, and where the judge's courtroom is located (for example, a conspicuous display screen or a marked terminal with calendar search available).*

**6.9.2.5** *OJD's statewide form instructions for civil case filings should state that, depending on the court, (1) different judges may preside at different stages of the case; and (2) the court's process for assigning judges should be available on the court's website.*

**6.10 Call to Action Recommendation 10: Courts must take full advantage of technology to implement right-size case management and achieve useful litigant-court interaction.**

To facilitate many of its other recommendations, *Call to Action* urges courts to use technology wisely, including to support a courtwide, team approach to case management; to establish business processes that would ensure forward momentum of civil cases; to regularly collect and use standardized, real-time information about civil case management; and to inventory and analyze existing civil dockets. *Call to Action* 31. A key function of case management automation is to generate deadlines for case action based on court rules; to alert judges and court staff to missed deadlines; to provide digital data and searchable options for scheduled events; and to trigger appropriate compliance orders. *Id.* at 32. Courts also are encouraged to publish measurement data as a means of increasing transparency and accountability. *Id.* at 31.

**6.10.1 *Oregon eCourt and Automation***

OJD is unique in a technological sense, because all the circuit courts have been using the same statewide Oregon eCourt system since at least 2016 -- including a case management system with electronic documents and workflows, as well as integrated financial management, ePayment, and eFiling systems. The Oregon eCourt system has moved the courts from a paper-based environment to an electronic, paper-on-demand environment that allows multiple judges and staff to simultaneously access a single electronic case file, and that facilitates a judge's ability to remotely access case information and documents. It also permits the courts to share data and information within a single database.

The circuit courts' case management system includes automated ticklers, tickler reporting, and court-generated notices that are tied to deadline and notification requirements established by various statutes, rules of procedure, UTCR Chapter 7, and other court rules. For example, based on event entries made in a case register of actions, the court can run reports for cases that require court action under UTCR 7.020(2) and (3) (expired timelines for plaintiffs to file proof of service or move for order of default) -- such as a Time Standards Tickler Report and an Overdue Time Standards Event Listing Report. The system also provides real-time information on cases and

custom reports that include measuring data, and it permits a wide variety of ad hoc reporting.<sup>22</sup>

In light of OJD's significant recent efforts to configure, implement, maintain, and improve the Oregon eCourt system, the Task Force does not make any specific recommendations about the functionality of that system in relation to Recommendation 10. The Task Force does recommend, however, that courts continue to leverage that system to ensure efficient and effective case management, as noted below.

➔ **Task Force Recommendation, Best Practices:**

**6.10.1.1** *Courts should ensure that they are regularly running and evaluating reports based on UTCR 7.020 and other deadlines, including the Oregon eCourt system's Time Standard Tickler Reports and Overdue Time Standards Event Listing Reports.*

**6.10.1.2** *Trial Court Administrators and the Office of the State Court Administrator should regularly share information with each other about how they are using the Oregon eCourt system to collect and analyze data, and to ensure efficient case management.*

**6.11 Call to Action Recommendation 11: Courts must devote special attention to high-volume dockets that are typically composed of cases involving consumer debt, landlord-tenant, and other contract claims.**

*Call to Action* identifies several characteristics of high-volume cases that, although not posing complex issues, can require special court attention: (1) factual and legal issues tend to be relatively uniform from case to case; (2) plaintiffs often are corporate entities and, in any event, are likely to be represented by a lawyer or a representative who often handles that type of case; (3) plaintiffs are likely to have significantly greater knowledge of formal and informal court practices, greater resources, and greater access to case information than defendants; (4) defendants are likely to be self-represented individuals, often of low or modest income, and are likely to be ill-equipped to handle formal court proceedings; and (5) defendants often face additional barriers that impede effective navigation of the civil justice system, such as limited literacy, limited English proficiency, cognitive impairments, and distrust of the courts based on prior experience or upbringing in a different culture. *Call to Action*, Appendix I, 4.

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<sup>22</sup> Other aspects of the Oregon eCourt system -- including statewide forms in both printable and interactive format, public access, and OJD's website -- are discussed in sections 16.11 and 16.13 of this Report.

In Recommendation 11, *Call to Action* emphasizes several actions that courts can take to ensure that litigants in high-volume cases -- particularly those who are self-represented -- are treated fairly and not placed, from the court's perspective, at an unfair disadvantage due to their lack of representation. *Call to Action* 33. Those actions include (1) implementing systems to ensure that entry of judgments complies with basic procedural requirements (notice, standing, timeliness, sufficiency of documentation); (2) ensuring that litigants have access to accurate and understandable information about court processes and appropriate tools such as standardized court forms and checklists for pleadings and discovery requests; (3) ensuring that the courtroom environment in high-volume cases minimizes the risk that litigants will be confused or distracted by overcrowding, excessive noise, or inadequate case calls; and (4) preventing opportunities for self-represented persons to become confused about the roles of the court and opposing counsel. *Id.*

### **6.11.1            *Procedural Fairness and Access to Justice***

The Task Force discussed concepts of procedural fairness involving self-represented litigants in the courts -- such as ensuring that litigants understand the court process, their rights, the decisions that are made; and the next steps in the case; and that courts communicate with them in an understandable and respectful manner. Procedural fairness is becoming a more urgent need across the state, and the Task Force thinks it important that judges are trained statewide on that topic and remain mindful of it when they conduct court sessions.

#### **➔ *Task Force Recommendations:***

- 6.11.1.1**        *Judges should focus on procedural fairness at open calls and in hearings and trials -- such as providing self-represented litigants with understandable information about courtroom procedure and next steps in the case, while remaining neutral in the case.*
  
- 6.11.1.2**        *As part of new judge training and, as appropriate, as agenda items for Presiding Judge meetings, the annual Judicial Conference, and the bi-annual circuit court judge conference, OJD should provide judges with specific strategies for ensuring procedural fairness, particularly to ensure that self-represented litigants in high-volume cases understand what is happening in court.*
  
- 6.11.1.3**        *Resources permitting, OJD and the courts should train staff on procedural fairness issues, such as avoiding the perception that lawyers or frequently appearing litigants have an advantage based on their familiarity with court staff.*

As part of discussing procedural fairness, the Task Force also discussed an issue that can arise for litigants who request that an associated fee be waived or deferred: If the court does not rule on the request at the outset of the case for some reason, the court sometimes does not revisit the issue at case closing, which results in the fee obligation being imposed and, typically, additional administrative fees added, in connection with a payment plan. Although the Task Force did not view OJD's statewide process for waiving or deferring fees to be part of the scope of its work, it does recommend that courts implement a case-closing review process, such that any outstanding fee question is affirmatively resolved by the end of the case.<sup>23</sup>

**➔ Task Force Recommendation, Best Practices:**

**6.11.1.2** *As part of managing a civil case, designated court staff must ensure that any application for a fee waiver or deferral is resolved by case closing.*

Of course, ensuring procedural fairness in court proceedings addresses just a small part of the myriad access-to-justice issues facing self-represented litigants. In general, the Task Force considered in-depth discussion and recommendations about access to justice to be beyond the scope of its work. The Task Force did agree, however, that courts should continue to work collaboratively to share access-to-justice strategies and solutions. For example, the Deschutes County Bar Association has an Access to Justice Committee that recently implemented a "Lawyers in the Library" program, in conjunction with the county library. Through the program, one branch of the Deschutes Public Library offers self-represented litigants a 30-minute free consultation with a lawyer, one evening per week, concerning general legal information or referrals to public agencies, legal service providers, or the Oregon State Bar's Attorney Referral Service.<sup>24</sup>

**➔ Task Force Recommendation:**

**6.11.1.3** *Courts should engage in regular and deliberate information sharing about access to justice strategies and solutions that are working in their counties.*

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<sup>23</sup> On May 1, 2018, the Chief Justice issued a new Chief Justice Order (CJO) amending OJD's standards and practices for deferral and waiver of fees in civil actions and proceedings. CJO 18-024. Among other things, that order approved new "case closing" forms that may be used to assist the courts in evaluating an applicant's qualification for fee waiver or deferral at the conclusion of the case.

<sup>24</sup> See <https://www.deschuteslibrary.org/files/LawyerintheLibraryhandout1-18.pdf>.

### **6.11.2 Online Resources -- General Information, Forms, and Case Information**

As part of Oregon eCourt, OJD has implemented several statewide tools intended to assist self-represented litigants -- including those in the types of cases mentioned in *Call to Action's* Recommendation 11. For example, OJD's website, which is user-friendly and generally adheres to an eighth- or ninth-grade reading level standard, includes easy-to-find links for litigants seeking certain information. The website includes a prominently placed Self-Help Center and also a Forms-Rules-Fees link, with links to a Rules Center (containing all applicable court rules), a Forms Center, and a page containing information about filing and other fees. The website also includes a prominently placed "find a court" link that lets users access the local court's webpage for more particular information about that court and its processes. The website can be accessed by -- and is easily adaptable to -- a computer, tablet, or smartphone.

OJD's online Self-Help Center provides links to resources for self-represented litigants and other members of the public. OJD also has partnered with the Oregon State Bar (OSB) and the Oregon legal aid organizations -- which regularly provide information to self-represented litigants about different types of cases and court processes -- to form a "Self-Navigator's Work Group." The Work Group coordinates information that is available online about high-volume cases that typically involve at least one self-represented party -- including small claims, residential FED, and consumer collections cases (as well as family law cases). While OJD provides statewide forms online, as well as other court-related information, the other entities provide additional information about how different types of cases work, including online video content being offered and continually developed by OSB (available on OSB's website and YouTube.com<sup>25</sup>), and online information about different types of legal proceedings maintained by the OSB and by Legal Aid Services of Oregon at <https://oregonlawhelp.org/>. OSB also offers a Lawyer Referral Service and a Modest Means Program (which assists lower-income litigants in certain types of cases who do not qualify for legal aid services), with information about both available online.<sup>26</sup> The three entities are working to effectively cross-link to each other's sites -- for example, so that a user who accesses OSB's or the Oregon legal aid organizations' website for certain content information can then easily link to OJD's online Forms Center to access the necessary forms.<sup>27</sup>

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<sup>25</sup> For example, the Oregon State Bar has a video about appearing at small claims court, available at [http://www.osbar.org/public/legalinfo/1061\\_SmallClaims.htm](http://www.osbar.org/public/legalinfo/1061_SmallClaims.htm). Newer video content is shorter and includes frequently asked questions. (Sample family law videos are available at <http://www.osbar.org/public/legalinfo/family.html>.)

<sup>26</sup> Information about the Oregon State Bar's Lawyer Referral Service and its Modest Means Program is available at [https://www.osbar.org/public/legalinfo/1171\\_LRS.htm](https://www.osbar.org/public/legalinfo/1171_LRS.htm).

<sup>27</sup> The coordinating Work Group was formed as a result of recommendations issued in 2017 by the Oregon State Bar's Futures Task Force. As part of its Regulatory Committee, the

OJD's online Forms Center contains two types of statewide forms: (1) printable PDF forms that a litigant can print, complete, and file conventionally with the appropriate court; and (2) for many of the same forms, an interactive option that -- through an online interview process -- generates completed forms that the litigant may either print and conventionally file or, in most cases, electronically submit to the court, instead. The available forms, with instructions, currently include those for small claims and residential FED cases, satisfaction of a money award, applications for fee waiver or deferral, and limited scope representation for lawyers who offer that service,<sup>28</sup> as well as many family law and other forms. New form packets continue to be developed based on statewide priority assessment, with a focus on forms needed for high-volume filings with greater percentages of self-represented litigants. (In section 6.11.5 of this Report, the Task Force recommends development of new forms for consumer debt collection cases.)

As to case information and documents, OJD offers free access to case registers in most nonconfidential cases over the Internet; the registers display basic information about the case and events that have occurred to date, based on a case number or party name search. OJD also offers a subscription service that can include remote access to case documents, but only lawyers and certain authorized users -- not including general public users -- can access documents through the subscription service at this time.<sup>29</sup> OJD has worked for many years on issues concerning remote electronic access to case documents, addressing competing tensions between providing access for parties, which is a favored goal, versus indiscriminately disseminating nonconfidential case information and documents online, which can subject case parties and participants (witnesses, children, vulnerable persons, etc.) to various risks of harm. The current limitations in the Oregon eCourt system are largely based on system feasibility -- many access points are "all or nothing," without any option for a more nuanced approach, such as access for a party to his or her own case. The Task Force discussed the imbalance between remote electronic access to case documents for lawyers but not for self-represented litigants, generally favoring an approach that expands remote access for the latter group.

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Task Force had an original "Self-Navigators Workgroup," which issued extensive recommendations intended to assist self-represented litigants in the courts. See <https://www.osbar.org/search.html?addsearch=futures+task+force> (link to Executive Summary; Self-Navigators Work Group high-level recommendations set out on p 11); see *also id.* (link to full Futures Task Force report; Self-Navigator's Work Group report and recommendations begins on p 47).

<sup>28</sup> Under UTCR 5.170, a lawyer who offers "limited scope representation" in a civil case must file a notice describing the scope of the services being provided to the client. Once the services have been completed, the lawyer must file a termination notice.

<sup>29</sup> OJD provides nonconfidential document remote access, in nonconfidential cases, to users who are active Oregon State Bar members or are employees of governmental entities that regularly conduct business with the courts. Other users may apply for nonconfidential document remote access in most of the same types of cases, but the application must be based on the user's business need.

➔ **Task Force Recommendation:**

- 6.11.2.1** *OJD should continue to work to expand remote electronic access to nonconfidential case documents to self-represented litigants, at least in their own cases.*

**6.11.3** **Mediation**

The Task Force is generally in favor of local court mediation programs as an available alternative to trial that can keep costs down and move cases toward resolution. The availability of mediation services depends on the court and, of course, necessary resources -- for example, some courts have mandatory mediation for certain case types; many other courts have mediation available as an option, including in contested small claims and residential FED cases. Where mediation is available, parties should be advised about that option early in the case, and courts otherwise should work to expand and maintain current services as feasible.<sup>30</sup>

➔ **Task Force Recommendations:**

- 6.11.3.1** *Courts should consider the use of mediation programs to resolve disputes in high-volume cases, to save court time and move the case toward resolution.*
- 6.11.3.2** *Courts should train staff about when mediation is required or is an option in their counties, so that staff can provide accurate and timely information to parties about mediation.*

➔ **Task Force Recommendations, Best Practices:**

- 6.11.3.3** *In counties where mediation is available, the form of summons for a high-volume case should state that, if the defendant wants to resolve the case, mediation is available as a more simple form of resolution.*

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<sup>30</sup> As an example of a successful mediation program, Jackson County has employed a private contractor to mediate residential landlord-tenant Forcible Entry and Detainer (FED) actions and small claims actions. Participant survey statistics provided over the last six months of 2017 show a high percentage of agreements reached in FED cases in the program -- 85% of survey participants -- with a 50% rate in small claims cases. All survey participants reported a high degree of satisfaction (92% in FED cases and 84% in small claims cases; 90% of participants in both types of cases would use the program again).

#### **6.11.4 Residential Forcible Entry and Detainer (FED) Cases**

As noted in *Call to Action*, defendants in residential FED (landlord-tenant) cases are often self-represented and of modest means, whereas plaintiffs tend to be experienced litigants who are represented either by counsel or by property managers. In Oregon, the timelines, process, and court forms for these cases are governed by statute. See section 6.4.1 (discussing FED statutes).

Many difficulties for defendants in residential FED cases occur before the eviction action is filed -- for example, the defendant may not have understood an initial communication, notice of payment, or other required action sent earlier by a bank or a trustee, and then does not understand the implications of not responding. Recognizing that the courts are not involved until an action is filed, the Task Force recommends that defendants be provided with information about how residential FED cases work at the earliest point in the process, namely, at the time when the summons is served.

Additionally, once a judgment in favor of a landlord is entered, courts do not always appear to follow the statutory timelines and process for providing a four-day notice period for the tenant, before issuing a writ for purposes of executing the judgment. See ORS 105.151 (if the court enters judgment, the landlord can enforce judgment only if (1) the court issues a notice of restitution, served on the tenant, giving the tenant four days to move out and remove all personal property; and (2) after the four-day period expires, the court issues a writ of execution of judgment of restitution that is served on the tenant). The Task Force agreed that better and more consistent statewide training about that statutory process would benefit the parties and courts alike.

The Task Force discussed an additional statutory requirement that can arise in residential FED cases: payment of rent into court. In certain circumstances, a court must or may order the defendant to pay rent into court, in the form of an escrow-like account, until an underlying dispute is resolved. See ORS 90.370 (court may order payment of rent accrued and thereafter accruing into court, on party's request, if tenant has counterclaimed against a landlord action either for possession based on nonpayment of rent, or for rent when tenant in possession).<sup>31</sup> Particularly in rural counties, payment of rent into court does not occur very often, and so the courts do not have any established or consistent process to handle and maintain the payments, or to disburse the payments when appropriate.

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<sup>31</sup> See also ORS 105.137(6) (court must order payment of rent into court when matter not tried within 15-day period and delay not attributable to landlord); ORS 105.138(2) (court may so order pending arbitration, if court finds order necessary to protect parties' rights); ORS 105.140 (if court has ordered defendant to pay rent into court as becomes due from filing until entry of judgment, and defendant fails to do so, action shall be tried forthwith).

➔ **Task Force Recommendations:**

- 6.11.4.1** *OJD should update its statewide FED summons form, generated out of the case management system, to include an informational statement to the following general effect: "For more information on the court process for Forcible Entry and Detention (eviction) cases, see the "Self-Help Center" on the Oregon Judicial Department website, <http://www.courts.oregon.gov/help/Pages/default.aspx>."<sup>32</sup>*
- 6.11.4.2** ***OJD should provide court staff with specific training on the statutory timing requirements in a residential FED case, for issuance of a notice and service of the notice (and proof of service), followed by a writ of execution, under ORS 105.151, ORS 105.158, and ORS 105.159.***
- 6.11.4.3** *OJD should develop a standard court process for paying rent into court under ORS 90.370, ORS 105.137(6), and ORS 105.138(2), and provide consistent statewide training on that process, particularly to provide structure as needed to rural courts, in which the process is not regularly used.*

**6.11.5 Consumer Debt Collection Cases**

The Task Force next focused on debt collection cases filed against individuals, seeking to collect consumer debt. Such cases do not have their own "case type" in the Oregon eCourt system (relating to either "collections" or "consumer collections") -- they typically are in the nature of "contract" disputes, but they also frequently qualify as "small claims" cases. As discussed further below, the Task Force conceptually grouped consumer debt collection cases into two categories: (1) those filed by regular purchasers of charged-off debt for the purpose of collecting that debt ("debt buyers"), including actions filed by collectors on behalf of those purchasers; and (2) other debt collection cases in which the plaintiff is a debt collector and the debtor is a consumer.

The Task Force agreed that, as described in *Call to Action*, defendants in both types of consumer debt collection cases are often self-represented and can be disadvantaged from a procedural standpoint for reasons described earlier. Additionally, such actions sometimes can be filed improperly due to reasons relating to the

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<sup>32</sup> OJD's online Self-Help Center links to OJD's statewide forms and each of the circuit court's webpages. It also sets out basic Frequently Asked Question type of information, as well as links to Oregon State Bar resources and to OregonLawHelp.org, which is the website maintained by Legal Aid Services of Oregon that provides information about different types of legal cases to low-income citizens. As noted earlier, OJD is working to provide links at logical points in its website to the Oregon State Bar's online resources and to OregonLawHelp.org, and those entities are providing similar cross- links.

circumstances of the debt or the parties (e.g., the plaintiff may not own the debt, the defendant may not be the actual debtor, the statute of limitations may have run, etc.). And, they often languish at the point of service. The Task Force agreed that a rigorous, judicial-type of evaluation is needed to ensure that default judgments in such cases are properly entered.

As part of evaluating civil justice improvements in consumer debt collection cases, the Task Force reviewed recent legislation enacted by the Oregon Legislative Assembly, House Bill 2356 (2017), Or Laws 2017, ch 625, which addressed a variety of issues relating to the first category of cases identified above -- that is, those filed by debt buyers or collectors on behalf of debt buyers. That legislation established a series of licensing and related requirements for debt buyers, and also established requirements that apply to legal actions filed by debt buyers, or by debt collectors on behalf of debt buyers, to collect or attempt to collect on purchased debt. The key requirements that apply to legal actions -- now codified at ORS 646A.670 and effective January 1, 2018 -- provide as follows:

- In its complaint, the plaintiff must include
  - Specific information about both the debt buyer and the original creditor (e.g., names, contact information, whether plaintiff is a debt buyer); and
  - Specific information about the debt (e.g., account number; detailed and itemized statement showing balance, payment, interest, and fee information; and date of purchase);
- The court may not enter judgment if the plaintiff does not comply with the pleading requirements; if the court does so, the debtor can petition for relief (or the court may grant on its own motion); and
- The plaintiff must provide to the debtor a specified list of documents, if the debtor requests them, within 30 days after the request.<sup>33</sup>

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<sup>33</sup> ORS 646A.670 provides, in part:

"(1) A debt buyer that brings legal action to collect or brings legal action to attempt to collect purchased debt, or a debt collector that brings legal action on the debt buyer's behalf, shall include in an initial pleading that begins the legal action:

"(a) The original creditor's name, written as the original creditor used the name in dealings with the debtor;

"(b) The name, address and telephone number of the person that owns the debt and a statement as to whether the person is a debt buyer;

"(c) The last four digits of the original creditor's account number for the debt, if the original creditor's account number for the debt had four or more digits;

See [Appendix O](#) (setting out ORS 646A.670).

In light of the recent enactment of ORS 646A.670, the Task Force recommends adoption of a new "consumer debt collection" statewide rule that both facilitates and supplements operation of that statute. (The proposed rule, new UTCR 5.180, is discussed in greater detail below.) In conjunction with the new rule, the Task Force recommends that OJD adopt a statewide form for plaintiffs to provide the information that is statutorily required.

The Task Force deliberated whether to expand the new proposed statewide rule to the second category of consumer debt collection cases -- that is, non-debt-buyer legal actions filed by debt collectors to collect consumer debt. The Task Force members agree that the parties and the courts alike would benefit from an expanded rule. For example, the rule would require the plaintiff to provide important debt information in a consistent format and would preclude the court from entering judgment if the plaintiff did not comply with that requirement. Such an approach benefits the parties and the court alike: (1) the plaintiff is assured that, by providing the necessary information in an understandable format, it will unquestionably be able to obtain a default order and judgment if the plaintiff does not appear, and, otherwise, the plaintiff

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"(d) A detailed and itemized statement that shows:

"(A) The amount the debtor last paid on the debt, if the debtor made a payment, and the date of the payment;

"(B) The amount and date of the debtor's last payment on the debt before the debtor defaulted or before the debt became charged-off debt, if the debtor made a payment;

"(C) The balance due on the debt on the date on which the debt became charged-off debt;

"(D) The amount and rate of interest, any fees and any charges that the original creditor imposed, if the debt buyer or debt collector knows the amount, rate, fee or charge;

"(E) The amount and rate of interest, any fees and any charges that the debt buyer or any previous owner of the debt imposed, if the debt buyer or debt collector knows the amount, rate, fee or charge;

"(F) The attorney fees the debt buyer or debt collector seeks, if the debt buyer or debt collector expects to recover attorney fees; and

"(G) Any other fee, cost or charge the debt buyer seeks to recover; and

"(e) The date on which the debt buyer purchased the debt.

"(2)(a) A court may not enter a judgment for a debt buyer or debt collector that has not complied with the requirements set forth in this section."

will have cleanly presented its case for collection; (2) the debtor is provided the necessary information to confirm whether he or she actually owes the debt, so that he or she can respond appropriately; and (3) the court will have a consistent means of ensuring that the plaintiff set out all the necessary information, which was communicated to the debtor, before entering judgment. That approach also would address some of the access-to-justice issues that arise in high-volume civil cases discussed earlier -- for example, ensuring that the debtor receives accurate and understandable information about the debt at issue, and ensuring procedural fairness in relation to the entry of default judgments. Although the Task Force as a whole recommends adoption of the rule for both categories of consumer debt collection cases, some members were more reluctant to expand a statewide court rule to non-debt-buyer legal actions, when the legislature did not include those types of actions within the scope of ORS 646A.670, and when the rule proposal -- unlike other court rules -- in effect would require the showing of a prima facie case.<sup>34</sup> The Task Force agrees that submitting the rule through OJD's UTCR Committee process -- which includes a public comment period -- will facilitate additional discussion, by a larger group of stakeholders, about the proposed expansion of the proposed rule.

The new draft rule, proposed new UTCR 5.180, is set out in [Appendix P](#). The first two sections set out definitions and applicability provisions. Then, section (3) sets out provisions that apply to legal actions under ORS 646A.670, and section (4) sets out provisions that would apply to other consumer debt collection actions filed by debt collectors. In conjunction with the rule, the Task Force recommends adoption of a companion "Consumer Debt Collection Disclosure Statement" form, which would be available on OJD's website (also set out in [Appendix P](#)). In the Task Force's view, the proposed new rule will provide a helpful tool for the parties and the courts -- to ensure the communication of complete and accurate communication to the debtor and to the court; to ensure that the debtor also is told how to obtain additional information; to keep the case moving forward as appropriate; and to ensure that a default judgment is entered only if warranted.

**➔ Task Force Recommendation, New UTCR 5.180**

**6.11.5.1** *A proposed new UTCR 5.180 ("Consumer Debt Collection") should be submitted to the OJD UTCR Committee, applying to the following actions: (1) Consumer debt collection actions filed under ORS 646A.670 (plaintiff is a debt buyer or*

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<sup>34</sup> The Task Force considered some of the legislative history of HB 2356 (2017) -- most notably, that it always had been drafted as a "debt buyer" bill (not a general collections bill later narrowed to cover only debt buyers) and that the legislature's goal had been to address several issues arising in debt buyer collections. In the Task Force's view, the legislature's understandable focus on debt buyers did not mean that the legislature would disapprove of the concept of requiring non-debt-buyer plaintiffs to set out certain debt and related information in an understandable way in the complaint or that the court should not issue judgment until confirming that such a plaintiff had done so. The Task Force also learned that an additional goal of the legislation was for OJD to develop statewide forms for use in consumer debt collection cases, to ensure that accuracy and consistency of information submitted to the court.

a collector for a debt buyer); and (2) other consumer debt collection actions, when the plaintiff is a debt collector. (See following recommendations for specific proposed amendments and [Appendix P](#).)

- 6.11.5.2** *Under the new rule, the initiating pleading must:*
- *Include a special designation in the title, so that OJD can "count" the case as a debt buyer collection case;*
  - *State that the debtor can obtain more information about debt collection cases on OJD's website;*
  - *Attach and incorporate by reference a completed Consumer Debt Collection Disclosure Statement in substantially the form set out on OJD's website; and*
  - *If a debt buyer action, include a statement that the plaintiff has complied with ORS 646A.670.*
- 6.11.5.3** *Under the new rule, if the initiating pleading does not comply with the pleading requirements just identified, the court must issue a 30-day dismissal notice to the plaintiff, with 30 days to comply.*
- 6.11.5.4** *Under the new rule, if the plaintiff moves for entry of a judgment of default, the motion must include a declaration, under penalty of perjury, that the initial pleading complied with either ORS 646A.670 or the pleading requirements set out above.*
- 6.11.5.5** *Under the new rule, if the case is not subject to ORS 646A.670, the court may not enter judgment for a plaintiff who has not complied with the pleading requirements set out above.*
- 6.11.5.6** *In conjunction with new UTCR 5.180, OJD should adopt a new Consumer Debt Collection Disclosure Statement form (see [Appendix P](#)).*

As part of discussing proposed new UTCR 5.180, the Task Force also identified some recommended Oregon eCourt system updates, as well as court business processes, best practices, and other recommendations concerning consumer debt collections cases, set out below:

**➔ Task Force Recommendation, Updated Case Management System Configurations and Court Business Processes**

- 6.11.5.7** OJD should add two new flags to the case management system, so that consumer debt collection cases can be searched, counted, and otherwise tracked, as follows:
- Debt buyer consumer collection cases subject to ORS 646A.670 and proposed new UTCR 5.180(3); and
  - Non-debt-buyer consumer collection cases subject to proposed new UTCR 5.180(4).
- 6.11.5.8** When creating a new consumer debt collection case, court staff should designate the appropriate new flag, depending on the designation set out in the caption of the initiating pleading, as required by proposed new rule UTCR 5.180.
- 6.11.5.9** OJD should add to the case management system the ability to generate a 30-day dismissal notice for failure of an initiating pleading to comply with either ORS 646A.670(1) or new UTCR 5.180(4), with an accompanying tickler report.
- 6.11.5.10** Pursuant to ORS 646A.670(2), courts may not enter judgment for qualifying plaintiffs who have not complied with the requirements of ORS 646A.670(1).

**➔ Task Force Recommendation, Best Practices**

- 6.11.5.11** Before preparing an order of default and judgment in a consumer debt collection case, courts should use the following checklist to screen the motion for default:
- Whether the motion includes a notice of default, with service completed;
  - If the defendant is an active duty servicemember, whether the plaintiff complied with the federal Servicemembers Civil Relief Act, 50 USC §§ 3901-4043;
  - Whether all fees paid or previously waived or payment obligation deferred;
  - If a debt buyer case subject to ORS 646A.670, whether the motion includes a declaration that the initiating pleading complied with ORS 646A.670(1).

- *If a non-debt-buyer case, whether the motion includes a declaration that the initiating pleading complied with new UTCR 5.180(4).*

**6.11.5.12** *Courts should ensure that staff assigned the responsibility of reviewing motions for default in consumer debt collection cases are appropriately trained, using an approved checklist as a guide. If staff sees anything unusual, questions should be directed to the appropriate judge.*

**6.11.5.13** *At the prelitigation stage of collections, debt collectors should provide to debtors information about their rights and the debt collection case process -- for example, by referring to online content offered by the Oregon State Bar (OSB) or Oregon's legal aid organizations <https://oregonlawhelp.org/>. OJD and OSB should work with the OSB Debtor-Creditor section to facilitate this recommendation.*

**➔ Other Task Force Recommendations:**

**6.11.5.14** OJD should develop online forms for collection cases, which should be available in Spanish. A sample Summons form should include a cross-reference to OJD's online Self-Help Center, which in turn links to forms and other available online help content.

**6.11.5.15** OJD should work with the Oregon State Bar to coordinate development of online video help content for debtors in consumer collection cases, which in can be referred to in initiating pleadings and prelitigation collection notices.

**6.12 Call to Action Recommendation 12: Courts must manage uncontested cases to assure steady, timely progress toward resolution.**

Recommendation 12, regarding effective management of uncontested cases, has two components. First, to prevent uncontested cases from languishing on the court's docket, courts should monitor case activity and identify uncontested cases in a timely manner; once uncontested status is confirmed, courts should prompt plaintiffs to move for dismissal or final judgment. Second, final judgments must meet the same standards for due process and proof as contested cases. *Call to Action 35.*

In discussing this recommendation, the Task Force again recognized that reductions to OJD's budget over the last nine years have prompted the courts to hold multiple vacant positions open, rather than fill them, to try to conserve resources without losing additional positions. The number of vacant positions impacts the public, because OJD is not able to fully provide the public with services on which it depends. Even with

staff vacancies, however, the Task Force agrees that UTCR 7.020 should guide the courts' management of uncontested cases, as noted below.

### **6.12.1 Statewide Enforcement of UTCR 7.020**

As discussed earlier in this Report, UTCR 7.020 provides the key tool for managing civil cases from filing to resolution, including if a case is uncontested. See section 6.1.1 and [Appendix C](#) (discussing and setting out UTCR 7.020). By using that rule -- most notably, the provisions requiring court action to determine whether a case should be dismissed for failure to file proof of service or motion for default order, UTCR 7.020(2)-(3) -- courts can keep cases moving forward and prevent them from languishing, and lawyers, upon receiving notices under that rule, are prompted to confer and work toward case resolution.

#### **➔ Task Force Recommendations, Best Practices:**

- 6.12.1.1** *OJD should demonstrate an institutional commitment to using UTCR 7.020 (subsections (2) and (3)) as the primary tool for managing uncontested cases.*
- 6.12.1.2** *Designated court staff should regularly run case management system reports that track cases that have missed UTCR 7.020(2) or (3) deadlines, or are otherwise stale -- for example, the Time Standards Tickler Report and the Overdue Time Standards Event Listing Report. Staff should be consistently trained on which reports to run at particular time intervals, how to review the reports, and how to identify next steps to ensure timely management of cases.*

### **6.13 Call to Action Recommendation 13: Courts must take all necessary steps to increase convenience to litigants by simplifying the court-litigant interface and creating on-demand court assistance services.**

*Call to Action's* Recommendation 13 encourages judges to promote the use of remote audio and video services for case hearings and case management meetings. It also builds on some of the earlier recommendations and encourages courts to simplify court-litigant interfaces and screen out unnecessary technical complexities as possible; to establish Internet portals and stand-alone kiosks to facilitate litigant access to court services; and to provide real-time assistance for navigating the litigation process. *Call to Action* 37.

### **6.13.1      *Judicial and Court Staff Interaction with Lawyers and Litigants***

As discussed earlier in relation to procedural fairness, the Task Force agrees that, in the courtroom setting, self-represented litigants often are placed at a disadvantage because they do not understand the court process. See section 6.11.1 (setting out recommendations to ensure procedural fairness). The Task Force further agrees that, at times, judges, court staff, and lawyers can interact in an overly familiar manner, prompting self-represented litigants to feel like outsiders to the court system, sometimes even misunderstanding that a lawyer might work for the court, instead of for other litigants in the case.

The optics of a court proceeding, relating to fairness and an opportunity to be heard, are critically important. All regular participants in the court process -- judges, court staff, lawyers, and other regular participants -- must be mindful of procedural fairness issues and the need for all litigants, whether represented or not, to be assured fair, respectful, and impartial treatment. Judges and court staff alike should be trained accordingly, and lawyers so educated.

In addition to the procedural fairness discussion set out earlier in this Report, the Task Force offers the following recommendations.

#### **➔ *Task Force Recommendations, Best Practices:***

- 6.13.1.1**      *All judges should focus on procedural fairness at open calls and in hearings and trials -- such providing self-represented litigants with understandable information about courtroom procedure while remaining neutral in the case.*
- 6.13.1.2**      *OJD should work with the Oregon State Bar's Bench-Bar Professionalism Commission about opportunities to train lawyers about procedural fairness -- for example, so that lawyers avoid interactions with judges or court staff that can prompt self-represented litigants to think that the lawyers have a special advantage based on familiarity with court staff or court procedures.*
- 6.13.1.3**      *Resources permitting, local courts should present staff trainings that provide staff with information about different areas of law and diverse communities, to provide additional staff education and improve customer service -- such as "Lunch and Learn" sessions with outside volunteer speakers on various topics.*

### **6.13.2 Telephone and Video Appearances**

The Task Force discussed current UTCR 5.050(2), which permits parties to request telephonic hearings on nonevidentiary motions in civil cases.<sup>35</sup> See [Appendix Q](#) (setting out UTCR 5.050(2)). The Task Force thinks that telephonic conferences can be an efficient case management tool, but noted that a lawyer appearing by phone or other remote appearance can at times feel disadvantaged if the other party appears in person -- a lawyer in that position therefore may opt for an in-person appearance instead, which can increase litigation costs.<sup>36</sup> The Task Force therefore agreed on several recommendations that are intended to ensure that the judge provides sufficient direction about telephonic or other remote appearances, while being mindful of perceived disadvantages.

#### **➔ Task Force Recommendations, Best Practices:**

**6.13.2.1** *Judges should clarify for the parties, at the outset of the case, the judge's preference for handling disputes about discovery and procedural issues -- for example, when briefing would be required or when resolution by phone conference would be preferred, as opposed to a hearing.*

**6.13.2.2** *Courts should encourage the use of UTCR 5.050(2) (providing for telecommunication hearings on nonevidentiary motions), when in-person argument is unnecessary, to save time and cost for lawyers and litigants.*

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<sup>35</sup> UTCR 5.050(2) provides:

"A party may request that a nonevidentiary hearing or a motion not requiring testimony be heard by telecommunication.

"(a) A request for a nonevidentiary hearing or oral argument by telecommunication must be in the caption of the pleading, motion, response, or other initiating document.

"(b) If appearance or argument by telecommunication is requested, the first paragraph of the pleading, motion, response, or other initiating document must include the names and telephone numbers of all parties served with the request. The request must be granted.

"(c) The first party requesting telecommunication must initiate the conference call at its expense unless the court directs otherwise."

<sup>36</sup> For example, to protect against a sense of being disadvantaged, a lawyer may drive more than an hour for a 15-minute hearing, which the Task Force thinks is unnecessary if the issue can be resolved via a telephonic hearing.

- 6.13.2.3** *If one party requests a phone appearance and the court approves the request, the judge should direct the other party to also appear by phone, so as to avoid misperceptions about any advantage for a party appearing in person.*
- 6.13.2.4** *Courts should be open to having witnesses appear by live video, particularly when requiring travel would result in unnecessary costs to the litigants. In considering objections to video testimony, courts should consider whether the objection may be an effort to increase costs for the other side or otherwise has merit based on the importance of the witness and the nature of the testimony. Courts also must ensure that one party's access to technology solutions does not result in procedural unfairness against the opposing party.*
- 6.13.2.5** *As appropriate, judges should be available to resolve simple discovery disputes by phone. The judge must consider, as part of resolving such a dispute, whether any ruling must be docketed on the register of actions for the case.*

### **6.13.3 Resources for Litigants**

In section 6.11.2, this Report describes several components of the Oregon eCourt system that are designed to assist litigants in their interactions with the courts and to gain familiarity with the court process -- including OJD's user-friendly website with an online Forms Center (including interactive forms), an online Self-Help Center, and public access to certain case information.<sup>37</sup>

Of course, effective human interaction is also essential. In addition to service by court staff at the courthouse counter, almost all the Oregon circuit courts have courthouse family law facilitation programs, which provide in-person assistance to litigants -- for example, reviewing forms, providing information about court processes, providing post-hearing support, and providing community-resource information. They do not, however, provide legal advice. See ORS 3.428 (authorizing family law facilitation programs).<sup>38</sup> Under new legislation enacted in 2018 and effective in 2019, the courts will be able to expand those services beyond the family law arena. See Or Laws 2018, ch 29, § 2 (HB 4097 (2018)). Regarding expansion of those programs, the

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<sup>37</sup> OJD's website is available at <http://www.courts.oregon.gov/Pages/default.aspx>.

<sup>38</sup> Facilitation programs differ from court to court due to funding difficulties and the needs of each judicial district. Unfortunately, many facilitation programs lost funding during the recession years, so, for several years, they assisted increasing numbers of self-represented litigants using fewer resources.

Oregon State Bar's Futures Task Force report sets out an extensive recommendation, from the Self-Navigators Work Group of the Regulatory Committee, that proposed several guidelines that should be considered -- such as the types of cases that should be in-scope for the programs, eligibility for assistance, staffing, supervision, resources, and coordination with others.<sup>39</sup> Also as part of the 2018 legislation, Oregon's largest circuit court -- Multnomah County -- will be transitioning its current law library to a Legal Resource Center, in conjunction with opening a new courthouse. The new Legal Resource Center is anticipated to include expanded access to case information, as well as statutes and other legal materials.<sup>40</sup>

Otherwise, as explained earlier, budget cuts have significantly affected OJD's ability to dedicate court resources to services other than direct staff services. The Task Force agreed, however, that, resources permitting, there are steps that OJD can take to make improvements under Recommendation 13, set out below.

**➔ Task Force Recommendations:**

- 6.13.3.1** *Consistently with Or Laws 2018, ch 29, § 2 (HB 4097 (2018)), and resources permitting, courts should evaluate whether to expand current court facilitator services as permitted in that legislation. In doing so, courts should consider Recommendation 3.2 from the Self-Navigators Workgroup of the Oregon State Bar's Futures Task Force's Regulatory Committee, concerning expansion of Oregon courthouse facilitation services.*
- 6.13.3.2** *Resources permitting, OJD should develop simple, statewide "what to expect when you go to court" materials and short-hand reference guides that are easily accessible online and at the courthouse for to self-represented litigants. Alternatively, court websites and court staff should direct self-represented litigants toward those resources as*

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<sup>39</sup> See <https://www.osbar.org/search.html?addsearch=futures+task+force> (link to full Futures Task Force report; Self-Navigators Work Group Recommendation 3.2, concerning court facilitator programs, begins on p 50). Among other things, that recommendation proposed that key areas for providing services should include family law, landlord-tenant, consumer issues (specifically, debt collection), and small claims, with possible future expansion into other areas, such as guardianships, conservatorships, and probate.

<sup>40</sup> Another resource for self-represented litigants on the horizon in Oregon is the development of a paraprofessional licensing program, in which licensed paraprofessionals may assist litigants in certain types of cases in a more extensive way than court facilitation programs. See OSB Board of Governors, Minutes, February 23, 2018, 2 (areas of focus for 2018 include consideration of recommendations from OSB's Paraprofessionals Implementation Committee), available at [https://www.osbar.org/\\_docs/leadership/bog/minutes/20180223BOGminutesDRAFT.pdf](https://www.osbar.org/_docs/leadership/bog/minutes/20180223BOGminutesDRAFT.pdf).

*available from other sources (for example, if maintained by the Oregon State Bar or Oregon's legal aid organizations).*

- 6.13.3.3** *Resources permitting, OJD should install court kiosks that provide the public with information about court processes. Courthouses also should provide easily understandable information about where to go in the courthouse upon arrival.*
- 6.13.3.4** *OJD's statewide summons forms for high-volume cases that typically involve self-represented litigants should include a simple statement to the effect of, "if you need help, go to..." and list website information for OJD's Self-Help Center, which in turn links to online information offered by Oregon State Bar and Oregon's legal aid organizations (<https://oregonlawhelp.org/>).*
- 6.13.3.5** *OJD should work with the Oregon State Bar to encourage local bar associations to work on innovative access to justice solutions, as well as procedural fairness issues, at a local level. This should include providing general information to underserved populations about common legal issues and proceedings, as well as developing other innovative volunteer opportunities.<sup>41</sup>*

## **7.0 Conclusion**

In some key respects, Oregon's circuit courts are already equipped with tools for effective, right-sized civil case management. Most notably, within the context of Oregon's unified court system, statewide rules are designed to prevent cases from languishing at early stages and to move them to some form of resolution; to provide for setting firm trial dates; and to permit the designation of both streamlined and complex cases. Statutory and other requirements provide additional tools in certain streamlined cases, such as residential FEDs, small claims, and debt buyer consumer collections. And, the Oregon eCourt system provides statewide tools for efficiently tracking cases at different procedural stages, statewide forms for litigants, and extensive online information about the courts, including an online Self-Help Center.

Of course, as in any organizational setting, improvements can be made and gaps addressed. Among many other recommendations in this Report, the OJD CJI Task Force recommends consistent statewide application of all parts of UTCR 7.020; institutional commitment to setting firm trial dates; adoption of a "pathway" approach to civil case management as explained in this Report; effective staff training; and

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<sup>41</sup> Examples of innovative local improvements include the Deschutes County Bar Association's Lawyers in the Library Program, see section 6.11.1; Multnomah County's planned Legal Resource Center, see section 6.13.3; and anticipated expansion of courthouse facilitation services, see section 6.13.3.

encouragement of efficient solutions to case management and to resolving discovery disputes. The Task Force further recommends the submission of two comprehensive statewide rule proposals -- a proposed revision of UTCR 5.150 and its companion forms (streamlined civil jury trials), and adoption of a new UTCR 5.180 with a companion form (consumer debt collection cases).

The Task Force recognizes that Oregon's Judicial Branch has not yet recovered from budget cuts that followed the 2008 recession, which affect OJD's ability to expend additional resources on effective civil case management. This Report is intended to recommend court-focused civil justice improvements, within the confines of existing resources. In the view of the Task Force, in moving forward with effective right-sized case management, the recommendations set out in this Report will benefit the courts statewide. They also should help to reduce cost and delay that can occur in civil cases, improve access to justice for civil litigants, and improve procedural fairness in the courts.

## ***APPENDICES***

**APPENDIX A**

In the Matter of the Establishment of ) CHIEF JUSTICE ORDER  
the Oregon Judicial Department Civil ) No. 17-046  
Justice Improvements Task Force and )  
Appointment of Task Force Members ) ORDER ESTABLISHING THE OREGON  
) JUDICIAL DEPARTMENT CIVIL JUSTICE  
) IMPROVEMENTS TASK FORCE AND  
) APPOINTING TASK FORCE MEMBERS

I HEREBY ORDER, pursuant to ORS 1.002, the establishment of the Oregon Judicial Department Civil Justice Improvements Task Force (Task Force). The Task Force is established to:

- 1) Review the Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee (July 2016);
- 2) Review civil justice reforms implemented or under consideration in other state courts;
- 3) Consider other related concepts for civil justice reform in Oregon; and
- 4) Make recommendations to the Oregon Judicial Department to the extent feasible, necessary, and appropriate to implement improvements to Oregon’s civil justice system.

The Task Force should formulate and develop, without limitation, recommendations for:

- 1) Concrete actions that can be taken to increase and improve access to civil justice, improve procedural fairness in civil cases, and reduce cost and delay in civil cases;
- 2) Consistent statewide standards to ensure appropriate case management and timely disposition of civil cases, including, without limitation:
  - a) enforcing UTCR 7.020 requirements;
  - b) setting firm trial dates; and
  - c) determining appropriate pathways for managing different types of cases, including high-volume cases that often involve self-represented parties;
- 3) Proposed rules, procedures, or best practices for civil case management within each case pathway; and
- 4) Leveraging available technology to facilitate civil case processing improvements.

The Task Force’s recommendations should be based on existing Oregon statutes and the Oregon Rules of Civil Procedure, although the Task Force may identify recommended statutory or rule changes where appropriate. Recommendations may form the basis for new or revised Uniform Trial Court Rules (UTCRCs); Chief Justice Orders (CJOs); Supplementary Local Rules (SLRs); or Statements of Best Practices directed toward increasing and improving access to

Oregon's courts, and ensuring the fair, timely, and cost-effective disposition of cases. In developing recommendations for case management practices, the Task Force may consider the need for local court flexibility as appropriate. In assessing feasibility, the Task Force should assume that judicial, staff, and other resources available within the Oregon Judicial Department will remain at current levels.

I FURTHER ORDER that the following persons are appointed to the Task Force:

Name
Hon. Judge Stephen K. Bushong (Multhomah County), Co-Chair
Dana L. Sullivan, Buchanan Angeli Altschul & Sullivan LLP (Portland), Co-Chair
Hon. Judge Scott A. Shorr (Court of Appeals)
Hon. Judge Benjamin M. Bloom (Jackson County)
Jeff Hall, Deschutes County Trial Court Administrator
Linda Hukari, Benton County Trial Court Administrator
Helen M. Hirschbiel, Chief Executive Officer, Oregon State Bar
Melissa Bobadilla, Bobadilla Law PC (Beaverton)
Emily Teplin Fox, Oregon Law Center (Portland)
Dominic M. Campanella, Brophy Schmor LLP (Medford)
Michelle Freed, Eblen Freed LLP (Portland)
Megan I. Livermore, Hutchinson Cox Coons Orr & Sherlock PC (Eugene)
J. Christian Malone, Schmid Malone Buchanan LLC (Bend)
Brett A. Pruess, Oregon Law Center (Coos Bay)
Daniel H. Skerritt, Tonkon Torp LLP (Portland)
Julie R. Vacura, Larkins Vacura Kayser LLP (Portland)

The Task Force shall complete its work no later than August 31, 2018, unless another Chief Justice Order grants an extension.

This order takes effect immediately.

Dated this 22<sup>nd</sup> day of August, 2017

  
Thomas A. Balmer  
Chief Justice

## APPENDIX B

### OREGON LANDSCAPE STATISTICS, YEAR-END 2016 CIVIL, LANDLORD-TENANT, AND SMALL CLAIMS CASES

**Figure 1: Cases Filed**

Case Type	# Filed in 2016	% of all Filings within Case Type Category	% of all Civil, Landlord-Tenant, and Small Claims Filings
<b>Civil</b>			
Contract	26,446	70.3%	23.8%
Injunctive Relief	217	0.6%	0.2%
Property - General	979	2.6%	0.9%
Property - Foreclosure	2,984	7.9%	2.7%
Property - Water Rights	5	0.0%	0.0%
Tort - General	6,644	17.7%	6.0%
Tort - Malpractice Legal	42	0.1%	0.0%
Tort - Malpractice Medical	184	0.5%	0.2%
Tort - Products Liability	40	0.1%	0.0%
Tort - Wrongful Death	65	0.2%	0.1%
<b>Civil Totals</b>	<b>37,606</b>	<b>(100%)</b>	<b>33.8%</b>
<b>Landlord-Tenant</b>			
Landlord-Tenant - General	1,123	5.8%	1.0%
Landlord-Tenant - Residential	18,072	94.1%	16.2%
Landlord-Tenant - Appeal	5	0.0%	0.0%
<b>Landlord-Tenant Totals</b>	<b>19,200</b>	<b>(100%)</b>	<b>17.3%</b>
<b>Small Claims</b>			
Small Claims - General	54,465	100.0%	48.9%
Small Claims - Appeal	2	0.0%	0/0%
<b>Small Claims Totals</b>	<b>54,467</b>	<b>(100%)</b>	<b>48.9%</b>

**Figure 2: Amount in Controversy**

Case Type	# Less than \$10,000	% Less than \$10,000	# \$10,001 - \$50,000	% \$10,001 - \$50,000	# \$50,001 - \$1 Million	% \$50,001 - \$1 Million
<b>Civil</b>						
Contract	8,997	86%	1,285	12%	217	2%
Injunctive Relief	1	33%	2	67%	0	0%
Property - General	39	27%	21	14%	83	56%
Property - Foreclosure	48	5%	39	4%	785	89%
Tort - General	24	38%	19	30%	20	32%
Tort - Malp. Legal	0	0%	0	0%	2	100%
Tort- Malp. Medical	5	29%	1	6%	4	24%
Tort - Products Liability	3	75%	1	25%	0	0%
Tort - Wrongful Death	1	25%	0	0%	2	50%
<b>Statewide Totals</b>	<b>9,118</b>	<b>78%</b>	<b>1,368</b>	<b>12%</b>	<b>1,113</b>	<b>10%</b>

Case Type	# \$1 Million - \$10 Million	% \$1 Million - \$10 Million	# \$10 Million and Higher	% \$10 Million and Higher	Statewide Totals
<b>Civil</b>					
Contract	7	0%	0	0%	10,506
Injunctive Relief	0	0%	0	0%	3
Property - General	4	3%	0	0%	147
Property - Foreclosure	7	1%	0	0%	879
Tort - General	0	0%	0	0%	63
Tort - Malp. Legal	0	0%	0	0%	2
Tort - Malp. Medical	6	35%	1	6%	17
Tort - Products Liability	0	0%	0	0%	4
Tort - Wrongful Death	1	25%	0	0%	4
<b>Statewide Totals</b>	<b>25</b>	<b>0%</b>	<b>1</b>	<b>0%</b>	<b>11,625</b>

Case Type	# Under \$2,500	% Under \$2,500	# Over \$2,500	% Over \$2,500	Statewide Totals
<b>Landlord-Tenant , Small Claims</b>					
Landlord-Tenant Residential	8	100%	0	0%	8
Small Claims-General	25,885	79%	6,776	21%	32,661
Small Claims-Appeal	0	0%	2	100%	2
<b>Statewide Totals</b>	<b>25,893</b>	<b>79%</b>	<b>6,778</b>	<b>21%</b>	<b>32,671</b>

**Figure 3: Parties with and without Representation  
(Figures based on parties, not cases)**

Case Type	# With Rep'n	% With Rep'n	# Without Rep'n*	# Identified as Pro Se**	% Without Rep'n & Pro Se	Total # of Parties
<b>Civil</b>						
Appeal - Lower Court	4	44%	5	0	56%	9
Contract	38,692	58%	27,855	612	42%	67,159
Injunctive Relief	804	74%	251	26	26%	1,081
Property - General	1,848	55%	1,444	94	45%	3,386
Property - Foreclosure	6,016	32%	12,394	113	68%	18,523
Tort - General	288	83%	56	1	17%	345
Tort - Malp. Legal	147	89%	16	3	11%	166
Tort - Malp. Medical	842	86%	128	8	14%	978
Tort - Products Liability	262	77%	78	1	23%	341
Tort - Wrongful Death	361	89%	41	3	11%	405
<b>Landlord-Tenant</b>						
LL-Tenant - General	436	37%	744	13	63%	1,193
LL-Tenant - Residential	7,842	15%	45,300	456	85%	53,598
LL-Tenant - Appeal	6	55%	4	1	45%	11
<b>Small Claims</b>						
Small Claims - General	768	1%	119,575	3,509	99%	123,852
Small Claims - Appeal	2	17%	9	1	83%	12
<b>Statewide Totals</b>	<b>58,318</b>	<b>22%</b>	<b>207,900</b>	<b>4,841</b>	<b>78%</b>	<b>271,059</b>

\* Counts parties with no representation entered in the case, who do not otherwise identify as "pro se."

\*\* Counts parties who identify as "pro se" in case-imitating filing.

**Figure 4: Form of Disposition (cont. on next page)**

Case Type	# Converted Judgment	% Converted Judgment	# General Dismissal	% General Dismissal	# General Dismissal w/ Lien	% General Dismissal w/ Lien
<b>Civil</b>						
Appeal - Lower Court	1	8%	6	50%	0	0%
Contract	2	0%	13,077	44%	10	0%
Injunctive Relief	0	0%	115	65%	1	1%
Property - General	0	0%	334	38%	0	0%
Property - Foreclosure	0	0%	2,279	43%	1	0%
Property - Wtr Rights	0	0%	1	100%	0	0%
Tort - General	0	0%	5,278	86%	11	0%
Tort - Malp. Legal	0	0%	38	88%	0	0%
Tort - Malp. Medical	0	0%	142	92%	0	0%
Tort - Products Liability	0	0%	28	90%	0	0%
Tort - Wrongful Death	0	0%	52	84%	0	0%
<b>Statewide Totals</b>	<b>3</b>	<b>0%</b>	<b>21,350</b>	<b>50%</b>	<b>23</b>	<b>0%</b>
<b>Landlord-Tenant</b>						
LL-Tenant - General			230	48%	3	1%
LL-Tenant - Residential			10,726	54%	49	0%
LL-Tenant - Appeal			1	50%	0	0%
<b>Statewide Totals</b>			<b>10,957</b>	<b>54%</b>	<b>52</b>	<b>0%</b>
<b>Small Claims</b>						
Small Claims - General	2	0%	19,421	30%	18	0%
Small Claims - Appeal	0	0%	1	50%	0	0%
<b>Statewide Totals</b>	<b>2</b>	<b>0%</b>	<b>19,422</b>	<b>30%</b>	<b>18</b>	<b>0%</b>
<b>Combined Statewide Totals</b>	<b>5</b>	<b>0%</b>	<b>51,729</b>	<b>40%</b>	<b>93</b>	<b>0%</b>

**Figure 4: Form of Disposition (cont. from prev. page)**

Case Type	# General Judgment	% General Judgment	# General Judgment w/ Lien	% General Judgment w/ Lien	Statewide
<b>Civil</b>					
Appeal - Lower Court	2	17%	3	25%	12
Contract	452	2%	16,375	55%	29,916
Injunctive Relief	28	16%	32	18%	176
Property - General	423	48%	129	15%	886
Property - Foreclosure	2,698	51%	363	7%	5,341
Property - Wtr Rights	0	0%	0	0%	1
Tort - General	85	1%	754	12%	6,128
Tort - Malp. Legal	0	0%	5	12%	43
Tort - Malp. Medical	3	2%	9	6%	154
Tort - Products Liability	0	0%	3	10%	31
Tort - Wrongful Death	3	5%	7	11%	62
<b>Statewide Totals</b>	<b>3,694</b>	<b>9%</b>	<b>17,680</b>	<b>41%</b>	<b>42,750</b>
<b>Landlord-Tenant</b>					
LL-Tenant - General	144	30%	104	22%	481
LL-Tenant - Residential	4,382	22%	4,597	23%	19,754
LL-Tenant - Appeal	1	50%	0	0%	2
<b>Statewide Totals</b>	<b>4,527</b>	<b>22%</b>	<b>4,701</b>	<b>23%</b>	<b>20,237</b>
<b>Small Claims</b>					
Small Claims - General	34,610	53%	9,584	15%	65,527
Small Claims - Appeal	1	50%	0	0%	2
<b>Statewide Totals</b>	<b>34,611</b>	<b>53%</b>	<b>9,584</b>	<b>15%</b>	<b>65,529</b>
<b>Combined Statewide Totals</b>	<b>42,832</b>	<b>33%</b>	<b>31,965</b>	<b>25%</b>	<b>128,516</b>

**Figure 5: Cases with Orders of Default**

<b>Case Type</b>	<b>Statewide Count</b>
<b>Civil</b>	
Contract	6,003
Injunctive Relief	3
Property - General	49
Property - Foreclosure	490
Tort - General	152
Tort - Products Liability	1
<b>Civil Totals</b>	<b>6,698</b>
<b>Landlord-Tenant</b>	
Landlord-Tenant - General	2
Landlord-Tenant - Residential	7
<b>Landlord-Tenant Totals</b>	<b>9</b>
<b>Small Claims</b>	
Small Claims - General	5
<b>Small Claims Totals</b>	<b>5</b>
<b>Statewide Totals</b>	<b>6,712</b>

**Figure 6: Trials Held**

Case Type	# Trials	# Court Trials	# 6-Person Jury Trials	# 12-Person Jury Trials	# Total Trials	% of Civil Cases Tried
<b>Civil</b>						
Appeal - Lower Court	0	6	0	0	6	1%
Contract	6	55	3	47	111	24%
Injunctive Relief	0	8	0	2	10	2%
Property - General	2	32	2	5	41	9%
Property - Foreclosure	4	24	0	3	31	7%
Tort - General	17	16	12	190	235	52%
Tort - Malp. Legal	1	0	0	0	1	0%
Tort - Malp. Medical	1	0	0	8	9	2%
Tort - Products Liability	1	0	0	3	4	1%
Tort - Wrongful Death	0	1	0	6	7	2%
<b>Statewide Totals</b>	<b>32</b>	<b>142</b>	<b>17</b>	<b>264</b>	<b>455</b>	<b>(100%)</b>

Case Type	# Trials	# Court Trials	# 6-Person Jury Trials	# 12-Person Jury Trials	# Stipulated Trials	# Total Trials	% of Civil Cases Tried
<b>Landlord-Tenant-Small Claims</b>							
LL-Tenant - General	7	56	1	0	0	64	2%
LL-Tenant - Residential	192	1,168	6	1	6	1,373	46%
LL-Tenant - Appeal	0	1	0	0	0	1	0%
Small Claims - General	57	1,459	0	1	0	1,517	51%
Small Claims - Appeal	0	2	0	0	0	2	0%
<b>Statewide Totals</b>	<b>256</b>	<b>2,686</b>	<b>7</b>	<b>2</b>	<b>6</b>	<b>2,957</b>	<b>(100%)</b>

**Figure 7: Time to Disposition**

(Note: The figures in this chart are based on OJD's Timely Standards for Disposition (See Appendix D))

Case Type	# Decided in Under 12 Months	% Reaching Goal of 90% within 12 Months	# Decided in 13-18 Months	% Reaching Goal of 98% within 13-18 Months
<b>Civil</b>				
Contract	24,970	93%	1,006	97%
Injunctive Relief	138	78%	22	91%
Property - General	761	87%	66	95%
Property - Foreclosure	3,355	77%	644	92%
Property - Wtr Rights	1	100%	0	100%
Tort - General	4,548	74%	1,158	93%
Tort - Malp. Legal	20	49%	11	76%
Tort - Malp. Medical	62	43%	38	69%
Tort - Products Liability	24	67%	7	86%
Tort - Wrongful Death	31	51%	20	84%
<b>Statewide Totals</b>	<b>33,910</b>	<b>88%</b>	<b>2,972</b>	<b>95%</b>

Case Type	# Decided in 19-24 Months	% Reaching Goal of 100% within 19-24 Months	# Beyond 24 Months	% Beyond Goal of 100% within 24 Months	Total Cases
<b>Civil</b>					
Contract	398	98%	493	2%	26,867
Injunctive Relief	5	94%	11	6%	176
Property - General	21	97%	22	3%	870
Property - Foreclosure	157	95%	212	5%	4,368
Property - Wtr Rights	0	100%	0	0%	1
Tort - General	251	97%	156	3%	6,113
Tort - Malp. Legal	3	83%	7	17%	41
Tort - Malp. Medical	30	90%	15	10%	145
Tort - Products Liability	3	94%	2	6%	36
Tort - Wrongful Death	5	92%	5	8%	61
<b>Statewide Totals</b>	<b>873</b>	<b>98%</b>	<b>923</b>	<b>2%</b>	<b>38,678</b>

Case Type	# Under 75 Days	% Reaching Goal of 100% within 75 Days	# Beyond 75 Months	% Beyond Goal of 100% within 75 Days	Total Cases
LL-Tenant - General	387	89%	47	11%	434
LL-Tenant - Residential	16,584	91%	1,668	9%	18,252
LL-Tenant - Appeal	2	25%	6	75%	8
Small Claims - General	33,913	62%	20,523	38%	54,436
Small Claims - Appeal	3	75%	1	25%	4
<b>Statewide Totals</b>	<b>50,889</b>	<b>70%</b>	<b>22,245</b>	<b>30%</b>	<b>73,134</b>

## APPENDIX C

### CURRENT UTCR 7.020 -- CIVIL CASE MANAGEMENT

#### 7.020 SETTING TRIAL DATE IN CIVIL CASES

- (1) After service is made, the serving party must forthwith file the return or acceptance of service with the trial court administrator.
- (2) If no return or acceptance of service has been filed by the 63rd day after the filing of the complaint, written notice shall be given to the plaintiff that the case will be dismissed for want of prosecution 28 days from the date of mailing of the notice unless proof of service is filed within the time period, good cause to continue the case is shown to the court on motion supported by affidavit and accompanied by a proposed order, or the defendant has appeared.
- (3) If proof of service has been filed and any defendant has not appeared by the 91st day from the filing of the complaint, the case shall be deemed not at issue and written notice shall be given to the plaintiff that the case will be dismissed against each nonappearing defendant for want of prosecution 28 days from the date of mailing of the notice unless one of the following occurs:
  - (a) An order of default has been filed and entry of judgment has been applied for.
  - (b) Good cause to continue the case is shown to the court on motion supported by affidavit and accompanied by a proposed order.
  - (c) The defendant has appeared.
- (4) If all defendants have made an appearance, the case will be deemed at issue 91 days after the filing of the complaint or when the pleadings are complete, whichever is earlier.
- (5) The trial date must be no later than one year from date of filing for civil cases or six months from the date of the filing of a third-party complaint under ORCP 22 C, whichever is later, unless good cause is shown to the presiding judge or designee.
- (6) Parties have 14 days after the case is at issue or deemed at issue to:
  - (a) Agree among themselves and with the presiding judge or designee on a trial date within the time limit set forth above.
  - (b) Have a conference with the presiding judge or designee and set a trial date.
- (7) If the parties do neither (a) nor (b) of (6) above, the calendar clerk will set the case for trial on a date that is convenient to the court.

## APPENDIX D

### OREGON JUDICIAL CONFERENCE STANDARDS FOR TIMELY DISPOSITION

The circuit court manages pre-judgment actions to meet the Standards for Timely Disposition adopted by the Oregon Judicial Conference. The Oregon Judicial Conference is a plenary body of all state judges. The standards adopted by the Judicial Conference apply to all circuit courts, and have been in effect since 1990. When requesting a postponement of any proceeding, bear in mind that the court's obligation is to meet these standards. To do so, it monitors constantly the age of pending cases, and parties should be able to rely on these time lines for the disposition of filed actions.

General Civil--90 percent of all civil cases should be settled, tried or otherwise concluded within 12 months of the date of case filing; 98 percent within 18 months of such filing, and the remainder within 24 months of such filing, except for individual cases in which the court determines exceptional circumstances exist and for which a continuing review should occur.

Domestic Relations--90 percent of all domestic relations matters should be settled, tried or otherwise concluded within 9 months of the date of case filing, and 100 percent within one year, except for exceptional cases in which continuing review should occur.

Summary Civil--Proceedings using summary hearing procedures, as in small claims, landlord-tenant and replevin actions, should be concluded within 75 days after filing.

Criminal: Felony--90 percent of all felony cases should be adjudicated or otherwise concluded within 120 days from the date of arraignment, 98 percent within 180 days, and 100 percent within one year, except for exceptional cases in which continuing review should occur.

Criminal: Misdemeanor--90 percent of all misdemeanors, infractions and other non-felony cases should be adjudicated or otherwise concluded within 90 days from the date of arraignment, 98 percent within 180 days, and 100 percent within one year, except for exceptional cases in which continuing review should occur.

Persons in Pretrial Custody--Persons detained should have a determination of custodial status or bail set within 36 hours of arrest. Persons incarcerated before trial should be afforded priority for trial.

## APPENDIX E

### CIVIL MOTION PANEL STATEMENT OF CONSENSUS (Multnomah County)

Current as of February 1, 2013

The Civil Motions Panel of the Circuit Court is a voluntary group of judges who agree to take on the work of hearing and deciding pretrial motions in civil actions that are not assigned specially to a judge. Periodically, the motion panel judges discuss their prior rulings and the differences and similarities in their decisions. When it appears panel members have ruled similarly over time on any particular question, it is announced to the bar as a "consensus" of the members.

The current consensus of the Panel's members are set out below. The statements do not have the force of law or court rule; the statements are not binding on any judge. A consensus statement is not a pre-determination of any question presented on the merits to a judge in an action. In every proceeding before a judge of this court, the judge will exercise independent judicial discretion in deciding the questions presented by the parties.

#### 1. ARBITRATION

**A. Motions** - Once a case has been transferred to arbitration, all matters are to be heard by the arbitrator. UTCR 13.040(3). A party may show cause why a motion should not be decided by the arbitrator.

**B. Punitive Damages** - Where the actual damages alleged are less than \$50,000, the pleading of a punitive damages claim which may be in excess of the arbitration amount does not exempt a case from mandatory arbitration.

#### 2. DISCOVERY

##### A. Medical Examinations (ORCP 44)

1. Vocational Rehabilitation Exams - Vocational rehabilitation exams have been authorized when the exam is performed as part of an ORCP 44 examination by a physician or a psychologist.

2. Recording Exams and Presence of Third Persons - Audio recordings have been allowed absent a particularized showing that such recording will interfere with the exam. Videotaping or the presence of a third person has been denied absent a showing of special need (e.g., an especially young plaintiff).

3. We have ordered the pretrial disclosure of the percentage of an examiner's income received from forensic work and amount of the examiner's charges. We have ordered that the information be provided for the most recent three years. We have permitted the information to be provided by an affidavit from the examiner, instead of the underlying documentation. We have not conditioned the examination itself on the disclosure of the information.

**Motion Panel Statement of Consensus  
As Of February 1, 2013**

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**B. Depositions**

1. Attendance of Experts - Attendance of an expert at a deposition has generally been allowed, but has been reviewed on a case-by-case basis upon motion of a party.
2. Attendance of Others - Persons other than the parties and their lawyers have been allowed to attend a deposition, but a party may apply to the court for the exclusion of witnesses.
3. Out-of-State Parties - A non-resident plaintiff is normally required to appear at plaintiff's expense in Oregon for deposition. Upon a showing of undue burden or expense, the court has ordered, among other things, that plaintiff's deposition occur by telephone with a follow-up personal appearance deposition in Oregon before trial. Non-resident defendants normally have not been required to appear in Oregon for deposition at their own expense. The deposition of non-resident corporate defendants, through their agents or officers, normally occurs in the forum of the corporation's principal place of business. However, the court has ordered that a defendant travel to Oregon at either party's expense, to avoid undue burden and expense and depending upon such circumstances as whether the alleged conduct of the defendant occurred in Oregon, whether defendant was an Oregon resident at the time the claim arose, and whether defendant voluntarily left Oregon after the claim arose.
4. Videotaping - Videotaping of discovery depositions has been allowed with the requisite notice. The notice must designate the form of the official record. There is no prohibition against the use of BOTH a stenographer and a video, so long as the above requirements are met.
5. Speaking Objections - Attorneys should not state anything more than the legal grounds for the objections to preserve the record, and objection should be made without comment.

**C. Experts**

Discovery under ORCP 36B(1) generally has not been extended to the identity of nonmedical experts.

**D. Insurance Claims Files**

An insurance claim file "prepared in anticipation of litigation" has been held to be protected by the work product doctrine regardless of whether a party has retained counsel. Upon a showing of hardship and need pursuant to ORCP 36B(3) by a moving party, the court has ordered inspection of the file in camera and allowed discovery only to the extent necessary to offset the hardship (i.e., not for production of entire file).

**Motion Panel Statement of Consensus  
As Of February 1, 2013**

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**E. Medical Chart Notes**

1. Current Injury - Medical records, including chart notes and reports, have been generally discoverable in personal injury actions. These are in addition to reports from a treating physician under ORCP 44. The party who requests an ORCP 44 report has been required to pay the reasonable charges of the practitioner for preparing the report.

2. Other/Prior Injuries - ORCP 44C authorizes discovery of prior medical records "of any examinations relating to injuries for which recovery is sought." Generally, records relating to the "same body part or area" have been discoverable, when the court was satisfied that the records sought actually relate to the presently claimed injuries.

**F. Photographs**

Photographs generally have been discoverable.

**G. Privileges**

Psychotherapist - Patient - ORCP 44C authorizes discovery of prior medical records of any examinations relating to injuries for which recovery is sought. Generally, records relating to the same or related body part or area have been discoverable. In claims for emotional distress, past treatment for mental conditions has been discoverable. See OEC 504(4)(b)(A).

**H. Tax Returns**

In a case involving a wage loss claim, discovery of those portions of tax returns showing an earning history, i.e., W-2 forms, has been held appropriate, but not those parts of the return showing investment data or non-wage information.

**I. Witnesses**

1. Identity - the court has required production of documents, including those prepared in anticipation of litigation, reflecting the names, addresses and phone numbers of occurrence witnesses. To avoid having to produce documents which might otherwise be protected, attorneys have been allowed to provide a "list" of occurrence witnesses, including their addresses and phone numbers.

2. Statements - Witness statements, if taken by a claims adjuster or otherwise in anticipation of litigation, have been held to be subject to the work-product doctrine. Generally, witness statements taken within 24 hours of an accident, if there is an inability to obtain a substantially similar statement, have been discoverable. ORCP 36B(3) specifies that any person, whether a party or not, may obtain his or her previous statement, concerning the action or its subject matter.

## **J. Surveillance Tapes**

Surveillance tapes of a plaintiff taken by defendant generally have been protected by the work-product privilege, and not subject to production under a hardship or need argument.

## **3. VENUE**

**A. Change of Venue (*forum non conveniens*)** - Generally, the court has not allowed a motion to change venue within the tri-county area (from Multnomah to Clackamas or Washington counties) on the grounds of *forum non conveniens*.

**B. Change of Venue - FELA** - The circuit court generally has followed the federal guidelines regarding choice of venue for FELA cases.

## **4. MOTION PRACTICE**

**A. Conferring and Good Faith Efforts to Confer (UTCR 5.010) -**

1. **"Conferring."** We have held that "to confer" means to talk in person or on the phone.

2. **Good Faith Efforts to Confer.** Because "confer" means to talk in person or on the phone, a "good faith effort to confer" is action designed to result in such a conversation. In various cases, motion judges have held that a letter to opposing counsel, even one that includes an invitation to call for a discussion, does not constitute a good faith effort to confer unless the moving attorney also makes a follow-up phone call to discuss the matter. We have held that a phone call leaving a message must be specific as to the subject matter before it constitutes a good faith effort to confer. Likewise, a message that says simply: "This is Jane. Please call me about Smith v. Jones," is not enough. Last minute phone messages or FAX transmissions immediately before the filing of a motion have been held not to satisfy the requirements of a good faith effort to confer.

3. **Complying with the Certification Requirement.** UTCR 5.010(3) specifies that the certificate of compliance is sufficient if it states either that the parties conferred, or contains **facts** showing good cause for not conferring. The judges on the Motion Panel have held that the certificate is not sufficient if it simply says "I made a good faith effort to confer." It must either state that the lawyers actually talked or state the facts showing good cause why they did not.

**B. Copy of Complaint** - The failure to attach a marked copy of the complaint to a Rule 21 motion pursuant to UTCR 5.020(2) has resulted in denial of the motions. UTCR 1.090.

## **5. DAMAGES**

**Non-economic Cap** - The court has not struck the pleading of non-economic damages over \$500,000 on authority of ORS 31.710 (*former* ORS 18.560) (Note: the Oregon Supreme Court ruled that ORS 18.560(1) violates Article I section 17, Oregon Constitution, to the following extent: " ... The legislature may not interfere with the full effect of a jury's assessment of noneconomic damages, at least as to civil cases in which the right to jury trial was customary in 1857, or in cases of like nature." *Lankin v. Senco Products, Inc.*, 329 Or 62, 82 (1999)).

## **6. REQUESTING PUNITIVE DAMAGES**

**A.** All motions to amend to assert a claim for punitive damages are governed by ORS 31.725, ORCP 23A, UTCR Chapter 5 and Multnomah County SLR Chapter 5. Enlargements of time are governed by ORS 31.725(4), ORCP 15D and UTCR 1.100.

**B.** A party may not include a claim for punitive damages in its pleading without court approval. A party may include in its pleading a notice of intent to move to amend to claim punitive damages. While discovery of a party's ability to pay an award of punitive damages is not allowed until a motion to amend is granted per ORS 31.725(5), the court has allowed parties to conduct discovery on other factual issues relating to the claims for punitive damages once the opposing party has been put on written notice of an intent to move to amend to claim punitive damages.

**C.** All evidence submitted must be admissible per ORS 31.725(3); evidence to which an objection is not made is deemed received. Testimony generally is presented through deposition or affidavit; live testimony has not been permitted at the hearing absent extraordinary circumstances and prior court order.

**D.** If the motion is denied, the claimant has been permitted to file a subsequent motion based on a different factual record (i.e. additional or different facts) without the second motion being deemed one for reconsideration prohibited by Multnomah County SLR 5.045.

**E.** For cases in mandatory arbitration, the arbitrator has the authority to decide any motion to amend to claim punitive damages. The arbitrator's decision may be reconsidered by a judge as part of de novo review under UTCR 13.040(3) and 13.100(1).

## APPENDIX F

### CIVIL MOTION CONSENSUS STATEMENT (Jackson County)

Periodically, the Circuit Court Judges assigned to civil cases in Jackson County will confer regarding their prior rulings on motions in civil cases. These judges have developed a consensus statement on particular issues that regularly come up in motions made in civil cases.

This consensus statement does not have the force of statute or court rule, and the statements are not binding on any judge, but are a good indication of how Judges handling civil cases will rule on similar issues. The following is not a predetermination of any question presented on the merits to a judge in a particular action. The statement may be of assistance in guiding practitioners as to anticipated rulings on a specific question and may eliminate the time and expense of presenting the issues to the court.

#### 1. Arbitration

**A. Motions** - Once a case has been transferred to arbitration, all matters are to be heard by the arbitrator. UTCR 13.040(3). A party may show cause (by application to the judge assigned to the case) why a motion should not be decided by the arbitrator.

**B. Punitive Damages** - Where the damages alleged are less than \$50,000, the subsequent pleading of a punitive damages claim, which results in the prayer exceeding \$50,000, will not exempt a case from mandatory arbitration.

#### 2. Motion Practice

##### A. Conferring and Good Faith Efforts to Confer (UTCR 5.010)

1. **"Conferring."** We have held that "to confer" means to talk in person or on the phone.
2. **Good Faith Efforts to Confer.** Because "confer" means to talk in person or on the phone, a "good faith effort to confer" is action designed to result in such a conversation. In various cases, judges have held that a letter to opposing counsel, even one that includes an invitation to call for a discussion, does not constitute a good faith effort to confer unless the moving attorney also makes a follow-up phone call to discuss the matter. We have held that a phone call leaving a message must be specific as to the subject matter before it constitutes a good faith effort to confer. Likewise, a message that says simply: "This is Jane. Please call me about Smith v. Jones," is not enough. Last minute phone messages or FAX transmissions immediately before the filing of a motion have been held not to satisfy the requirements of a good faith effort to confer. If, after hearing the motion, the court finds that efforts to confer have not been made in good faith, the court may decide the motion against the moving party.
3. **Complying with the Certification Requirement.** UTCR 5.010(3) specifies that the certificate of compliance is sufficient if it states either that the parties conferred, or contains facts showing good cause for not conferring. The judges have held that the certificate is not sufficient if it simply says "I made a good faith effort to confer." It must either state that the lawyers actually talked or state the facts showing good cause why they did not talk.

## **B. Copy of Complaint**

The failure to attach a marked copy of the complaint to a Rule 21 motion pursuant to UTCR 5.020(2) may result in denial of the motions. UTCR 1.090.

## **C. Motions for Reconsideration**

Motions for Reconsideration on any pre-trial, trial, or post-trial civil or criminal matter generally will not be considered except as set forth below.

This statement will not apply to any statutory motion to modify, set aside, vacate, suppress, or rescind; nor will it obstruct the authority of the assigned trial judge to review any previously-filed motions.

## **3. Discovery**

### **A. Motions to Compel**

A motion to compel discovery will set out at the beginning of the motion the specific items the moving party seeks to compel a party to produce (ORCP 46A(2)). Simply asserting that the party has not complied with the attached request for production will not satisfy this requirement.

### **B. Medical Examinations (ORCP 44)**

1. The court generally authorizes (1) the recording of an examination by audio tape at the examined party's expense, and (2) the presence of a family member or friend of the examined party at the examination.
2. An examiner's qualifications (*curriculum vitae*) will be promptly provided to the examined party, upon request.
3. As soon as is reasonably possible before the examination, defendant will provide the examined party with copies of all forms the examiner will require the examined party to complete as part of the examination.
4. No later than fourteen days after the examination, defendant will provide the examined party a copy of any report prepared by the examiner.
5. If requested, prior to the testimony of the examiner on cross examination, the party calling the examiner as a witness will provide the opposing party with copies of the examiner's 1099 and W-2 forms showing the examiner's income for the past two years from performing ORCP 44 examinations or medical record reviews. All such documents provided by the examiner will be retained by the examiner after review by the opposing party.
6. When entitled, a party generally may have an ORCP 44 examination performed by a doctor selected by the requesting party. For an examination taking place in Jackson County, the requesting party may schedule the examination at a reasonable time and place without any payment to the other party.

If the examination is to be scheduled outside Jackson County, the requesting party shall pay travel costs at the rate allowed for mileage by the IRS or shall pay air fare. If the entire travel and examination time will take 4 hours or more, the reasonable costs of meals shall be paid. If the entire travel and examination time will take 8 hours or more, the reasonable costs of meals and lodging will be paid.

Reasonable accommodations as to the type of travel and the scheduling needed by the person to be examined shall be made.

### **C. Depositions**

1. Attendance of Experts - Attendance of an expert at a deposition has generally been allowed, but has been reviewed on a case-by-case basis upon the motion of a party.

2. Attendance of Others - Persons other than the parties and their lawyers are generally not allowed to attend a deposition. Upon a showing of need, exceptions have been granted.

3. Out-of-State Parties -A non-resident plaintiff is normally required to appear at plaintiff's expense in Oregon for depositions. Upon a showing of undue burden or expense, the court has ordered, among other things, that plaintiff's deposition occur by telephone with a follow-up personal appearance in Oregon before trial. Non-resident defendants normally have not been required to appear in Oregon for deposition at their own expense. The deposition of non-resident corporate defendants, through their agents or officers, normally occurs in the forum of the corporation's principal place of business. However, the court has ordered that a defendant must travel to Oregon at either party's expense, to avoid an undue burden and expense and depending upon such circumstances as (a) whether the alleged conduct of the defendant occurred in Oregon, (b) whether defendant was an Oregon resident at the time the claim arose, and (c) whether defendant voluntarily left Oregon after the claim arose.

4. Videotaping - Videotaping of discovery depositions has been allowed with the requisite notice. The notice must designate the form of the official record. There is no prohibition against the use of both a stenographer and a video, so long as the notice requirements are met.

### **D. Experts**

Discovery under ORCP 36B(l) has not been extended to the identity of expert witnesses.

### **E. Witnesses**

Identity - the court has required production of documents, including those prepared in anticipation of litigation, reflecting the names, addresses and phone numbers of occurrence witnesses. To avoid having to produce documents which might otherwise be protected, attorneys have been allowed to provide a "list" of occurrence witnesses, including their addresses and phone numbers.

## APPENDIX G

### CURRENT UTCR CHAPTER 15 -- SMALL CLAIMS

#### 15.010 SMALL CLAIMS FORMS

- (1) The following small claims documents shall be accepted, when the proper fee is tendered, by all judicial districts that accept small claims filings:
  - (a) Small Claim and Notice of Small Claim substantially in the form of the corresponding document made available to the public on <http://www.courts.oregon.gov/forms/Pages/default.aspx>, to commence a small claims action pursuant to ORS 46.425 and 46.445 or 30.642 – 30.650. In an action by an inmate, the inmate must include the inmate's identification number in the caption.
  - (b) Motion for Default Judgment and Defendant Status Declaration substantially in the form of the corresponding document made available to the public on <http://www.courts.oregon.gov/forms/Pages/default.aspx>, to request a default judgment pursuant to ORS 46.475(2).
  - (c) Declaration of Noncompliance and Request for Judgment substantially in the form of the corresponding document made available to the public on <http://www.courts.oregon.gov/forms/Pages/default.aspx>, to request a judgment for failure to comply with a Small Claims Agreement.
  - (d) Small Claims Judgment and Money Award substantially in the form of the corresponding document made available to the public on <http://www.courts.oregon.gov/forms/Pages/default.aspx>, as a form for use to enter judgment in a small claims action under ORS 46.475(2), 46.485, and 46.488.
  - (e) Defendant's Response substantially in the form of the corresponding document made available to the public on <http://www.courts.oregon.gov/forms/Pages/default.aspx>, as a form for use to respond to a claim and notice of claim in a small claims action pursuant to ORS 46.455.
  - (f) Small Claims Agreement substantially in the form of the corresponding document made available to the public on <http://www.courts.oregon.gov/forms/Pages/default.aspx>, as a form for use when the parties agree to resolve a small claims action.
- (2) Forms in these formats may be made mandatory by SLR. SLR 15.011 is reserved for making such formats mandatory in the judicial district.

#### 15.020 DISMISSAL OF SMALL CLAIMS FOR WANT OF PROSECUTION

- (1) After service is made, the serving party must forthwith file the return or acceptance of service with the trial court administrator.
- (2) If no return or acceptance of service is filed by the 63rd day after the filing of the complaint, the court may dismiss the case for want of prosecution.
- (3) If proof of service is filed and any defendant does not appear by the 35th day after the proof of service is filed, the court may dismiss the complaint against each nonappearing defendant for want of prosecution unless the plaintiff has applied for a default judgment.

## APPENDIX H

### ORS 36.400 - 36.405 -- MANDATORY ARBITRATION

#### **ORS 36.400 Mandatory arbitration programs.**

(1) A mandatory arbitration program is established in each circuit court.

(2) Rules consistent with ORS 36.400 to 36.425 to govern the operation and procedure of an arbitration program established under this section may be made in the same manner as other rules applicable to the court and are subject to the approval of the Chief Justice of the Supreme Court.

(3) Each circuit court shall require arbitration under ORS 36.400 to 36.425 in matters involving \$50,000 or less.

(4) ORS 36.400 to 36.425 do not apply to appeals from a county, justice or municipal court or actions in the small claims department of a circuit court. Actions transferred from the small claims department of a circuit court by reason of a request for a jury trial under ORS 46.455, by reason of the filing of a counterclaim in excess of the jurisdiction of the small claims department under ORS 46.461, or for any other reason, shall be subject to ORS 36.400 to 36.425 to the same extent and subject to the same conditions as a case initially filed in circuit court. The arbitrator shall not allow any party to appear or participate in the arbitration proceeding after the transfer unless the party pays the arbitrator fee established by court rule or the party obtains a waiver or deferral of the fee from the court and provides a copy of the waiver or deferral to the arbitrator. The failure of a party to appear or participate in the arbitration proceeding by reason of failing to pay the arbitrator fee or obtain a waiver or deferral of the fee does not affect the ability of the party to appeal the arbitrator's decision and award in the manner provided by ORS 36.425.

#### **ORS 36.405 Referral to mandatory arbitration; exemptions.**

(1) Except as provided in ORS 30.136, in a civil action in a circuit court where all parties have appeared, the court shall refer the action to arbitration under ORS 36.400 to 36.425 if either of the following applies:

(a) The only relief claimed is recovery of money or damages, and no party asserts a claim for money or general and special damages in an amount exceeding \$50,000, exclusive of attorney fees, costs and disbursements and interest on judgment.

(b) The action is a domestic relations suit, as defined in ORS 107.510, in which the only contested issue is the division or other disposition of property between the parties.

(2) The presiding judge for a judicial district may do either of the following:

(a) Exempt from arbitration under ORS 36.400 to 36.425 a civil action that otherwise would be referred to arbitration under this section.

(b) Remove from further arbitration proceedings a civil action that has been referred to arbitration under this section, when, in the opinion of the judge, good cause exists for that exemption or removal.

(3) If a court has established a mediation program that is available for a civil action that would otherwise be subject to arbitration under ORS 36.400 to 36.425, the court shall not assign the proceeding to arbitration if the proceeding is assigned to mediation pursuant to the agreement of the parties. Notwithstanding any other provision of ORS 36.400 to 36.425, a party who completes a mediation program offered by a court shall not be required to participate in arbitration under ORS 36.400 to 36.425.

## APPENDIX I

### CURRENT JACKSON COUNTY SLR 5.151 -- STREAMLINED TRIAL PROJECT

(9/26/17)

#### SLR 5.151 Streamlined Trial Project

- (1) Except as provided in subsections 2 and 3 of this rule, civil cases in which the only relief sought is recovery of money damages not exceeding \$100,000, exclusive of attorney fees, costs, disbursements and interest, are assigned to the Streamlined Trial Project (STP). This rule does not apply to domestic relations, probate, juvenile, or post-conviction relief cases.
- (2) Any case in which one or more parties is not represented by counsel is excluded from the STP.
- (3) Any case in which one of the parties serves and files a timely notice to remove the case from the STP is excluded from the STP.
  - (a) A plaintiff must file the notice within thirty (30) days of the filing of the action or, if a counterclaim is asserted, within fourteen (14) days of the filing of the counterclaim.
  - (b) A defendant or third party defendant must file the notice with that party's first appearance.
  - (c) A party must state the reason for removal in the notice. Removal is automatic and the statement for removal is for planning purposes only.
  - (d) After the time for filing the notice has expired and no later than the trial date, a party may by motion request that the case be removed from the STP for good cause shown related to a new development that could not have been previously identified.
- (4) For each case assigned to the STP, the presiding judge shall exempt the case from mandatory arbitration, pursuant to ORS 36.405(2)(a), and from all court rules requiring mediation, arbitration, and other forms of alternative dispute resolution.
- (5) For each case assigned to the STP, the court shall set a trial date as provided by UTCR 7.020 with a pretrial conference no later than 14 days before trial. The trial date shall be set within ten months of the date the case is fully at issue, subject to the requirements of the court's calendar and the availability of judges.

- (6) Pretrial Procedures - Unless otherwise agreed to by the parties or upon order of the court for good cause shown:
- (a) Each party must provide to all other parties within four weeks of the date the court issues the Ready for Trial Notice:
    - (i) The names and, if known, addresses and telephone numbers of all persons, other than expert witnesses, likely to have knowledge that the party may use to support its claims or defenses, unless the use would be solely for impeachment.
    - (ii) A copy of all unprivileged ORCP 43 A(1) documents and tangible things that the party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.
    - (iii) A copy of all insurance agreements and policies discoverable pursuant to ORCP 36 8(2).
  - (b) No party shall:
    - (i) Take more than four hours of deposition.
    - (ii) Serve more than one set of requests for production.
    - (iii) Serve more than one set of requests for admission.
    - (iv) File a pretrial motion, including a motion for summary judgment, absent prior leave of the court.
  - (c) All discovery requests must be served no later than 60 days before the trial date.
  - (d) All discovery must be completed no later than 21 days before the trial date.
  - (e) Before filing a motion to compel, motion for a protective order, or any other discovery motion, the parties must contact the motions judge by telephone and request assistance in resolving the dispute. The motions judge may resolve the dispute informally, without requiring the parties to file a written motion or scheduling a hearing.
  - (f) A party's failure to request or respond to discovery is not a basis for that party to seek postponement of the trial date.

(7) Trial Procedures.

- (a) The Oregon Rules of Civil Procedure (ORCP), Oregon Evidence Code (OEC), and Uniform Trial Court Rules (UTCRC) apply to cases under the STP. However, the parties shall consider modification of these rules to expedite the trial and reduce the costs of litigation, including;
  - (i) Stipulation to a six or eight person jury.
  - (ii) Stipulation to the admissibility of documents such as those described in UTCRC 13.190.
- (b) The court will discuss trial procedure and modification of trial procedure and rules of evidence at the pre-trial conference set pursuant to subsection 5 of this rule.

## APPENDIX J

### CURRENT LANE COUNTY SLR 5.151 -- STREAMLINED TRIAL PROJECT

(2/18/18)

#### 5.151 STREAMLINED JURY TRIAL PROJECT

- (1) ELIGIBILITY: Except as provided in subsections (a) and (b) of this section, civil cases in which the only relief sought is recovery of money damages not exceeding \$100,000, exclusive of attorney fees, costs, disbursements and interest, are included in the Streamlined Jury Trial Project (SJTP). This rule does not apply to consumer collections, foreclosure, domestic relations, probate, or cases filed in the Small Claims Department.
  - (a) All parties must be represented by counsel or the case will be excluded from the SJTP.
  - (b) A party may serve and file a timely notice to remove the case from the SJTP. Removal is automatic subject to the following:
    - (i) A plaintiff must file the notice within thirty (30) days of the filing of the action or, if a counterclaim is asserted, within fourteen (14) days of the filing of the counterclaim.
    - (ii) A defendant or third party defendant must file the notice with that party's first appearance.
    - (iii) A party must state the reason for removal in the notice.
    - (iv) After the time for filing the notice has expired and no later than the trial date, a party may by motion request that the case be removed from the SJTP for good cause shown related to a new development that could not have been previously identified.
- (2) For all cases subject to the SJTP, the filing party must place in the title of a pleading (including a claim, counterclaim, cross claim, and third-party claim): "SUBJECT TO STREAMLINED JURY TRIAL PROJECT".
- (3) Each case assigned to the SJTP shall be exempt from mandatory arbitration, pursuant to ORS 36.405(2)(a), and from all court rules requiring mediation, arbitration, and other forms of alternative dispute resolution.
- (4) For each case assigned to the SJTP, the court shall set a trial date as provided by UTCR 7.020 with a case status conference within 45 days of the date the court issues the Ready for Trial Notice. The trial date shall be set within eleven months of the case initiation date.

- (5) PRETRIAL PROCEDURE: Unless otherwise agreed to by the parties or upon order of the court for good cause shown:
- (a) Each party must provide to all other parties within 30 days of the date the court issues the Ready for Trial Notice:
    - (i) The names and, if known, addresses and telephone numbers of all persons, other than expert witnesses, likely to have knowledge that the party may use to support its claims or defenses, unless the use would be solely for impeachment.
    - (ii) A copy of all unprivileged ORCP 43 A(1) documents and tangible things that the party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.
    - (iii) A copy of all insurance agreements and policies discoverable pursuant to ORCP 36 B(2).
  - (b) Except for good cause shown and approval by the court, no party shall:
    - (i) Take more than four hours of depositions.
    - (ii) Serve more than one set of requests for production.
    - (iii) Serve more than one set of requests for admission.
    - (iv) File a pretrial motion, including a motion for summary judgment, absent prior leave of the court.
  - (c) All discovery requests must be served no later than 60 days before the trial date.
  - (d) All discovery must be completed no later than 21 days before the trial date.
  - (e) Before filing a motion to compel, motion for a protective order, or any other discovery motion, the parties must contact the motions judge by telephone and request assistance in resolving the dispute. The motions judge may resolve the dispute informally, without requiring the parties to file a written motion or scheduling a hearing.
  - (f) A party's failure to request or respond to discovery is not a basis for that party to seek postponement of the trial date.
- (6) TRIAL PROCEDURE: The Oregon Rules of Civil Procedure (ORCP), Oregon Evidence Code (OEC) and Uniform Trial Court Rules (UTCRC) apply to cases under the SJTP. However, the parties shall consider modification of these rules to expedite the trial and reduce the costs of litigation, including;

- (a) Stipulation to a six or eight person jury.
  - (b) Stipulation to the admissibility of documents such as those described in UTCR 13.190.
- (7) The court will discuss trial procedure and modification of trial procedure and rules of evidence at the case status conference set pursuant to subsection (4) of this rule.

## APPENDIX K

### PROPOSED AMENDED UTCR 5.150 (Clean)

#### 5.150 STREAMLINED CIVIL JURY CASES

- (1) A civil case eligible for jury trial may be designated as a streamlined case. The availability of the designation may vary by judicial district and is dependent on the availability of staff, judges, and courtrooms. A party seeking the designation must confer with the court to determine whether the designation is available. If it is available, a party seeking the designation must do all of the following:
  - (a) Obtain the agreement of all other parties to designate the case as a streamlined civil jury case.
  - (b) Submit a joint motion and an order to the presiding judge in substantially the form as set out on the Oregon Judicial Department website (<http://www.courts.oregon.gov/Pages/default.aspx>).
- (2) The decision to accept or reject a case for designation as a streamlined case is within the sole discretion of the presiding judge or designee. The judge will consider the request on an expedited basis, when possible, and enter an order granting or denying the motion. If the judge grants the motion and designates the case as a streamlined case, the judge will:
  - (a) Exempt or remove the case from mandatory arbitration, pursuant to ORS 36.405(2)(a) and (b), and from all court rules requiring mediation, arbitration, and other forms of alternative dispute resolution.
  - (b) Set a trial date certain no later than 180 days from the date of the order.
- (3)
  - (a) Within 30 days of the designation, each party must provide to all other parties:
    - (i) The names and, if known, addresses and telephone numbers of all persons, other than expert witnesses, likely to have knowledge that the party may use to support its claims or defenses, unless the use would be solely for impeachment;
    - (ii) A copy of all unprivileged ORCP 43 A(1) documents and tangible things that the party has in its possession, custody or control and may use to support its claims or defenses, unless the use would be solely for impeachment; and
    - (iii) A copy of all insurance agreements and policies discoverable pursuant to ORCP 36 B(2).
  - (b) The parties may, and are encouraged to, file stipulations regarding the scope, nature, and timing of discovery.

- (c) The parties must complete discovery no later than 14 days before trial.
- (d) The parties may request, and the court may utilize, streamlined procedures for resolving any discovery disputes.
- (4) No later than 3 days before trial, the parties must file stipulations regarding the admission of exhibits, the manner for submitting expert testimony, the use of deposition excerpts (if any), and the conduct of the trial.
- (5) After an order designating the case as a streamlined case, a party shall not file a pretrial motion without prior leave of the court.
- (6) A party's failure to request or respond to discovery is not a basis for that party to seek postponement of the streamlined case trial date.



- d. Exchange names, and if known, the addresses and phone numbers, of witnesses  
Describe categories of witnesses \_\_\_\_\_ (e.g., those described in UTCR 5.150(3)(a)(i), percipient, lay, expert, all)  
Exchange by \_\_\_\_\_ (date)
- e. Exchange existing witness statements  
Describe categories of witnesses \_\_\_\_\_ (e.g., those described in UTCR 5.150(3)(a)(i), percipient, lay, expert, all)  
Exchange by \_\_\_\_\_ (date)
- f. Insurance agreements and policies discoverable pursuant to ORCP 36 B(2)  
Produce by \_\_\_\_\_ (date)
- g. Other, if any:  
\_\_\_\_\_  
Produce by \_\_\_\_\_ (date) (describe)

4. To expedite the trial, the parties further agree as follows (describe stipulations such as those concerning marking and admissibility of exhibits, damages, and other evidentiary issues):

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Attorney for \_\_\_\_\_

\_\_\_\_\_  
Attorney for \_\_\_\_\_

\_\_\_\_\_  
Attorney for \_\_\_\_\_



## PROPOSED AMENDED UTCR 5.150 (Redline)

### 5.150 ~~EXPEDITED~~STREAMLINED CIVIL JURY CASES

- (1) A civil case eligible for jury trial may be designated as ~~an expedited~~ streamlined case. The availability of the designation may vary by judicial district and is dependent on the availability of staff, judges, and courtrooms. A party seeking the designation must confer with the court to determine whether the designation is available. If it is available, a party seeking the designation must do all of the following:
  - (a) Obtain the agreement of all other parties to designate the case as ~~an expedited~~ streamlined civil jury case.
  - (b) Submit a joint motion and an order to the presiding judge in substantially the form ~~of UTCR Forms 5.150.1a and 5.150.1b as set out on the Oregon Judicial Department website (<http://www.courts.oregon.gov/Pages/default.aspx>).~~
- (2) The decision to accept or reject a case for designation as ~~an expedited~~ streamlined case is within the sole discretion of the presiding judge or designee. The judge will consider the request on an expedited basis, when possible, and enter an order granting or denying the motion. If the judge grants the motion and designates the case as ~~an expedited~~ streamlined case, the judge will:
  - (a) Exempt or remove the case from mandatory arbitration, pursuant to ORS 36.405(2)(a) and (b), and from all court rules requiring mediation, arbitration, and other forms of alternative dispute resolution.
  - (b) Set a trial date certain no later than ~~four months~~ 180 days from the date of the order ~~with a pretrial conference to be set no later than 14 days before trial.~~
- ~~(3) The parties in an expedited case may file (a written agreement with the court, in substantially the form of UTCR Form 5.150.1a, section 4, stating all of the following:~~
  - ~~(a) The scope, nature, and timing of discovery.~~
  - ~~(b) The date by which discovery will be complete, which must be not later than 21) Within 30 days before trial.~~
  - ~~(c) Stipulations regarding the conduct of the trial, which may include stipulations for the admission of exhibits and the manner of submission of expert testimony of the designation.~~
- ~~(4) If the parties in an expedited case do not file a discovery agreement pursuant to subsection (3) of this rule, then each party must do all of the following:~~
  - (a) ~~Provide~~ provide to all other parties ~~within four weeks of the expedited case designation;~~

- (i) The names and, if known, addresses and telephone numbers of all persons, other than expert witnesses, likely to have knowledge that the party may use to support its claims or defenses, unless the use would be solely for impeachment;
- (ii) A copy of all unprivileged ORCP 43 A(1) documents and tangible things that the party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment; and
- (iii) A copy of all insurance agreements and policies discoverable pursuant to ORCP 36 B(2).

~~(b) Take no more than two depositions after a party has requested an expedited case designation.~~

~~(c) Serve no more than one set of requests for production after a party has requested an expedited case designation.~~ The parties may, and are encouraged to, file stipulations regarding the scope, nature, and timing of requests for production after a party has requested an expedited case designation.

~~(d) Serve no more than one set of requests for admission after a party has requested an expedited case designation.~~

(e) ~~Serve all discovery requests no later than 60 days before the trial date.~~

~~(f) Complete all (c)~~ The parties must complete discovery no later than 14 days before trial.

~~(d) The parties may request, and the court may utilize, streamlined procedures for resolving any discovery disputes.~~

(4) ~~21~~ No later than 3 days before trial, the parties must file stipulations regarding the admission of exhibits, the manner for submitting expert testimony, the use of deposition excerpts (if any), and the conduct of the trial.

(5) After an order designating the case as ~~an expedited~~ a streamlined case, a party shall not file a pretrial motion without prior leave of the court.

(6) A party's failure to request or respond to discovery is not a basis for that party to seek postponement of the ~~expedited~~ streamlined case trial date.

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR \_\_\_\_\_ COUNTY

\_\_\_\_\_  
Plaintiff

v.

\_\_\_\_\_  
Defendant

)  
) Case No. \_\_\_\_\_  
)  
)

**MOTION FOR AN STREAMLINED EXPEDITED  
CIVIL JURY CASE DESIGNATION**

1. The parties move the court for an order designating this case as a streamlined ~~n-expedited~~ civil jury case and exempting or removing it from mandatory arbitration, pursuant to ORS 36.405(2)(a) and (b), and from all court rules requiring mediation, arbitration, and other forms of alternative dispute resolution.

2. Each party agrees:

~~a. To fully comply with section (3)(a) of UTCR 5.150, regarding mandatory disclosures to be made within 30 days of the date of this order. any agreements set forth in section 4 of this motion as to the scope, nature, and timing of discovery or, if there are no such agreements, to fully comply with the requirements of UTCR 5.150(4).~~

b. That all discovery will be completed by \_\_\_\_\_ (which must be no later than 1424 days before the trial date).

c. That the parties ~~y~~ have consulted with the office of the trial court administrator and have agreed on a trial date of \_\_\_\_\_. (The trial date must be no later than 180-120 days from the date of this request and is based on the understanding that streamlined ECJC-designation will occur expeditiously.)

d. To fully comply with section (4) of UTCR 5.150, regarding the filing of stipulations due no later than 3 days before trial.

~~3. The parties agree: (Check one)~~

~~To conduct discovery in accordance with section 4 of this motion. The terms of section 4 supersede UTCR 5.150(4).~~

~~To conduct discovery in accordance with the requirements of UTCR 5.150(4).~~

34. (If applicable): The parties agree to the following ~~If the parties agree to the scope, nature, and timing of discovery pursuant to UTCR 5.150(3), these additional discovery provisions are stated here and supersede UTCR 5.150(4):~~

a. Document discovery  
\_\_\_\_ Set(s) of Requests for Production per party  
Serve by \_\_\_\_\_ (date)  
Produce by \_\_\_\_\_ (date)

b. Depositions

\_\_\_\_ Depositions per party  
Complete by \_\_\_\_\_ (date)

~~Page 1 — Form 5.150.1a — MOTION FOR AN EXPEDITED CIVIL JURY CASE DESIGNATION — UTCR 5.150 (05-06-10)~~

- c. Requests for admissions  
\_\_\_\_ Sets of Requests for Admission per party  
Serve by \_\_\_\_\_ (date)  
Serve response by \_\_\_\_\_ (date)
- d. Exchange names, and if known, the addresses and phone numbers, of witnesses  
Describe categories of witnesses \_\_\_\_\_ (e.g., those described in UTCR 5.150(34)(a)(i), percipient, lay, expert, all)  
Exchange by \_\_\_\_\_ (date)
- e. Exchange existing witness statements  
Describe categories of witnesses \_\_\_\_\_ (e.g., those described in UTCR 5.150(34)(a)(i), percipient, lay, expert, all)  
Exchange by \_\_\_\_\_ (date)
- f. Insurance agreements and policies discoverable pursuant to ORCP 36 B(2)  
Produce by \_\_\_\_\_ (date)
- g. Other, if any: \_\_\_\_\_ (describe)  
Produce by \_\_\_\_\_ (date)

~~5. — The parties agree that expert testimony will be submitted at trial by (specify all that apply):~~

- ~~Report (specify date for exchange) \_\_\_\_\_~~
- ~~An alternative to in-person testimony \_\_\_\_\_ (describe)~~
- ~~In-person testimony~~

46. To expedite the trial, the parties further agree as follows (describe stipulations such as those concerning marking and admissibility of exhibits, damages, and other evidentiary issues):

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DATED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Attorney for \_\_\_\_\_

\_\_\_\_\_  
Attorney for \_\_\_\_\_

\_\_\_\_\_  
Attorney for \_\_\_\_\_

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR \_\_\_\_\_ COUNTY

\_\_\_\_\_  
Plaintiff

v.

\_\_\_\_\_  
Defendant

)  
) Case No. \_\_\_\_\_  
)  
)

) **ORDER DESIGNATING CASE AS AN**  
) **STREAMLINED EXPEDITED CIVIL JURY**  
) **CASE**

I HEREBY ORDER that:

1. This case is designated as a streamlined ~~n~~-expedited civil jury case.
2. Good cause having been shown, pursuant to ORS 36.405(2)(a) and (b), this case is  
 exempt  
 removed  
from mandatory arbitration and from all court rules requiring mediation, arbitration, and other forms of alternative dispute resolution.
2. Trial is set for \_\_\_\_\_ (date) at \_\_\_\_\_ (time).
3. [If applicable] This case is assigned to Judge \_\_\_\_\_, and the parties are directed to call the judge and arrange for a pretrial conference if feasible.
4. This order takes effect immediately.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Circuit Court Judge

## APPENDIX L

### CURRENT UTCR 7.030 -- COMPLEX CASES

#### 7.030 COMPLEX CASES

- (1) Any party in a case may apply to the presiding judge to have the matter designated as a “complex case.”
- (2) The criteria used for designation as a “complex case” may include, but shall not be limited to, the following: the number of parties involved, the complexity of the legal issues, the expected extent and difficulty of discovery, and the anticipated length of trial.
- (3) A presiding judge shall assign any matter designated as a “complex case” to a specific judge who shall thereafter have full or partial responsibility for the case as determined by the presiding judge.
- (4) A “complex case” shall not be subject to the time limitation or trial setting procedures set forth in UTCR 7.020(5), (6) and (7); however, any such case will be set for trial as soon as practical, but in any event, within two years from the date of filing unless, for good cause shown, the trial date is extended by the assigned judge.

## APPENDIX M

### CURRENT UTCR CHAPTER 23 -- OREGON COMPLEX LITIGATION COURT

#### 23.010 OREGON COMPLEX LITIGATION COURT

- (1) The criteria used for assignment of a case to the Oregon Complex Litigation Court (OCLC), pursuant to UTCR 23.020, may include, but are not limited to, the number of parties, the complexity of the legal issues, the complexity of the factual issues, the complexity of discovery, and the anticipated length of trial.
- (2) The UTCR apply to cases in the OCLC except where the rules in this chapter specifically provide otherwise.
- (3) Absent a motion and order for a change of venue pursuant to ORS 14.110, assignment of a case to the OCLC does not change the venue of a case.
- (4) The OCLC will be managed by a panel of three circuit court presiding judges appointed by the Chief Justice of the Oregon Supreme Court.

#### 23.020 ASSIGNMENT OF CASES TO THE OCLC

- (1) Assignment of a case to the OCLC requires agreement of the parties, the presiding judge or designee of the court with venue, and the managing panel of the OCLC.
- (2) The following must occur for a case to be considered for assignment to the OCLC:
  - (a) The parties and the presiding judge or designee of the court with venue must confer to determine whether there is agreement to assign the case to the OCLC and to determine the special needs, facts, and issues of the case.
  - (b) The presiding judge or designee of the court with venue and the managing panel of the OCLC must confer to discuss whether the case is appropriate for assignment to the OCLC and to discuss the special needs, facts, and issues of the case.
- (3) If the agreement required by UTCR 23.020(1) is reached and the managing panel accepts a case into the OCLC, the parties must submit a stipulated order for assignment of the case to the OCLC to the presiding judge or designee of the court with venue over the case and to the managing panel of the OCLC.
- (4) Once a case is accepted into the OCLC, the managing panel of the OCLC will assign the case to a single OCLC judge.

- (5) The parties must:
- (a) Share equally, unless otherwise agreed, the cost of copying and providing the entire court file to the OCLC judge assigned to the case.
  - (b) Make all necessary arrangements to have a copy of the entire court file delivered to the OCLC judge within 14 days of assignment of the case to the OCLC judge.
  - (c) Continue, after assignment of the case to the OCLC judge, to file all documents in the court with venue and provide copies of all filed documents to the OCLC judge.

#### 23.030 REMOVAL OF CASES FROM THE OCLC

- (1) When an OCLC judge finds good cause to remove a case from the OCLC, the judge must confer with the managing panel of the OCLC. If the managing panel agrees that the case should be removed, the managing panel will discuss the removal and return of the case with the presiding judge or designee of the court with venue before any action is taken.
- (2) If venue has not been changed, the case may then be returned to the originating circuit court.
- (3) If venue has been changed, the case may then be returned to the circuit court with current venue absent a motion and order for change of venue pursuant to ORS 14.11 O and 14.120.

#### 23.040 CASE MANAGEMENT

- (1) Cases assigned to the OCLC are under the direct supervision of a single OCLC judge for all purposes including referral to mediation, assignment to a settlement judge, and trial.
- (2) Before the date set by the court for a case management conference, all parties must do all of the following:
  - (a) Explore early resolution of the case and prepare a discovery plan.
  - (b) Confer concerning the matters to be raised at the conference.
  - (c) Attempt to reach agreement on as many of the issues as possible.
  - (d) Report the results of their conference to the court at the case management conference.
- (3) No later than 10 days prior to trial, unless the OCLC judge has ordered otherwise, the parties must do all of the following:

- (a) Confer and disclose to each other all exhibits, except impeachment exhibits.
  - (b) Number all exhibits.
  - (c) Reach, to the extent possible, agreement on the admissibility of exhibits.
  - (d) File with the court and provide to the OCLC judge a list of exhibits indicating the status of each exhibit.
  - (e) Reach, to the extent possible, agreement on foundation for other exhibits to which they might have substantive objections. Any agreement must be noted on the exhibit list filed with the court.
- (4) Upon compliance with UTCR 23.040(3)(a)-(e), the OCLC judge will confer with the parties to resolve any disputes on exhibits or other matters upon which a stipulation might be reached to make the trial more efficient.

23.050 CASE MANAGEMENT CONFERENCE; CASE MANAGEMENT ORDER

- (1) A case management conference will be held within 30 days of assignment of a case to an OCLC judge or at such other time as the court may order. The purpose of the case management conference is to identify the essential issues in the litigation and to avoid unnecessary, burdensome, or duplicative discovery and other pretrial procedures to ensure the prompt resolution of the dispute. The case management conference may include discussion of the following:
- (a) The trial date.
  - (b) The need for additional parties.
  - (c) Time limits for filing of third-party complaints or bringing in additional parties.
  - (d) Severance, consolidation, or coordination with other actions.
  - (e) A discovery plan, including a schedule for the exchange of documents, conducting discovery from third parties, use of common number systems for documents production and exhibits identification, a schedule for conducting depositions, the need for protective orders or other limitations allowed by ORCP 36 C, and a date for the close of discovery.
  - (f) A time schedule for motion practice and date for submission of dispositive motions.
  - (g) Mediation or settlement, and the identity of the assigned neutral facilitator. If the case has not settled within 45 days of the trial date, the case may be assigned for settlement conference to a judge other than the OCLC judge.
  - (h) Use of technology in discovery and at trial, such as electronic or physical document depositories, videotaping of depositions, videoconferencing, and teleconferencing.

- (i) A master list of contact information.
  - (j) The method of jury selection and resolution of disputes relating to forms for juror questionnaires, if any.
  - (k) Scheduling of a Rule 104 hearing on scientific issues, if necessary.
  - (l) Scheduling of further conferences.
  - (m) Other matters the court or the parties deem appropriate to manage or expedite the case such as whether the parties will mutually employ a court reporter to serve for the creation of the official record, use of a trial plan having timelines for the submission and resolution of pretrial motions, motions in limine, deposition designations, submission of trial memoranda and jury instructions, and timelines for the examination of witnesses and evidentiary presentations by the parties.
- (2) Following the case management conference, the OCLC judge will issue a case management order. The case management order will encompass the matters addressed at the case management conference and any other matters the judge considers appropriate for the order.
- (3) The case management order may be modified or revised, as the OCLC judge deems necessary, to meet the purpose of the OCLC rules. The parties must not deviate from deadlines and requirements established in the case management order unless authorized by the OCLC judge.

#### 23.060 SETTLEMENTS AND DISCONTINUANCES

If a case in the OCLC is settled or dismissed, the parties must immediately inform the OCLC judge assigned to the case by telephone or email.

## APPENDIX N

### ORS 14.260 AND 14.270 -- STATUTORY AFFIDAVIT AND MOTION FOR CHANGE OF JUDGE

#### **ORS 14.260 Affidavit and motion for change of judge; time for making; limit of two changes of judge.**

(1) Any party to or any attorney appearing in any cause, matter or proceeding in a circuit court may establish the belief described in ORS 14.250 by motion supported by affidavit that the party or attorney believes that the party or attorney cannot have a fair and impartial trial or hearing before the judge, and that it is made in good faith and not for the purpose of delay. No specific grounds for the belief need be alleged. The motion shall be allowed unless the judge moved against, or the presiding judge for the judicial district, challenges the good faith of the affiant and sets forth the basis of the challenge. In the event of a challenge, a hearing shall be held before a disinterested judge. The burden of proof is on the challenging judge to establish that the motion was made in bad faith or for the purposes of delay.

(2) The affidavit shall be filed with the motion at any time prior to final determination of the cause, matter or proceedings in uncontested cases, and in contested cases before or within five days after the cause, matter or proceeding is at issue upon a question of fact or within 10 days after the assignment, appointment and qualification or election and assumption of office of another judge to preside over the cause, matter or proceeding.

(3) A motion to disqualify a judge may not be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause, matter or proceeding. A motion to disqualify a judge or a judge pro tem, assigned by the Chief Justice of the Supreme Court to serve in a county other than the county in which the judge or judge pro tem resides may not be filed more than five days after the party or attorney appearing in the cause receives notice of the assignment.

(4) In judicial districts having a population of 200,000 or more, the affidavit and motion for change of judge shall be made at the time and in the manner prescribed in ORS 14.270.

(5) In judicial districts having a population of 100,000 or more, but less than 200,000, the affidavit and motion for change of judge shall be made at the time and in the manner prescribed in ORS 14.270 unless the circuit court makes local rules under ORS 3.220 adopting the procedure described in this section.

(6) A party or attorney may not make more than two applications in any cause, matter or proceeding under this section.

**ORS 14.270 Time of making motion for change of judge in certain circumstances; limit of two changes of judge.**

An affidavit and motion for change of judge to hear the motions and demurrers or to try the case shall be made at the time of the assignment of the case to a judge for trial or for hearing upon a motion or demurrer. Oral notice of the intention to file the motion and affidavit shall be sufficient compliance with this section providing that the motion and affidavit are filed not later than the close of the next judicial day. No motion to disqualify a judge to whom a case has been assigned for trial shall be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause, matter or proceeding; except that when a presiding judge assigns to the presiding judge any cause, matter or proceeding in which the presiding judge has previously ruled upon any such petition, motion or demurrer, any party or attorney appearing in the cause, matter or proceeding may move to disqualify the judge after assignment of the case and prior to any ruling on any such petition, motion or demurrer heard after such assignment. No party or attorney shall be permitted to make more than two applications in any action or proceeding under this section.

## APPENDIX O

### ORS 646A.670 -- DEBT BUYER COLLECTION ACTIONS

**ORS 646A.670      Legal action to collect debt; requirements for pleadings; judgments; attorney fees.**

(1) A debt buyer that brings legal action to collect or brings legal action to attempt to collect purchased debt, or a debt collector that brings legal action on the debt buyer's behalf, shall include in an initial pleading that begins the legal action:

(a) The original creditor's name, written as the original creditor used the name in dealings with the debtor;

(b) The name, address and telephone number of the person that owns the debt and a statement as to whether the person is a debt buyer;

(c) The last four digits of the original creditor's account number for the debt, if the original creditor's account number for the debt had four or more digits;

(d) A detailed and itemized statement that shows:

(A) The amount the debtor last paid on the debt, if the debtor made a payment, and the date of the payment;

(B) The amount and date of the debtor's last payment on the debt before the debtor defaulted or before the debt became charged-off debt, if the debtor made a payment;

(C) The balance due on the debt on the date on which the debt became charged-off debt;

(D) The amount and rate of interest, any fees and any charges that the original creditor imposed, if the debt buyer or debt collector knows the amount, rate, fee or charge;

(E) The amount and rate of interest, any fees and any charges that the debt buyer or any previous owner of the debt imposed, if the debt buyer or debt collector knows the amount, rate, fee or charge;

(F) The attorney fees the debt buyer or debt collector seeks, if the debt buyer or debt collector expects to recover attorney fees; and

(G) Any other fee, cost or charge the debt buyer seeks to recover; and

(e) The date on which the debt buyer purchased the debt.

(2)(a) A court may not enter a judgment for a debt buyer or debt collector that has not complied with the requirements set forth in this section.

(b) If a court grants a judgment for a debt buyer or debt collector that does not comply with the requirements set forth in this section, the debtor in a motion under ORCP 71 may petition the court for relief from the judgment or the court may grant relief on the court's own motion.

(3) A debt buyer or debt collector may obtain attorney fees in a legal action to collect or attempt to collect a debt only if:

(a) The debt buyer or debt collector prevails in the legal action; and

(b) The contract or writing described in ORS 646.639 (4)(b) provides that the creditor may obtain attorney fees from the debtor in a legal action to collect or attempt to collect the debt or another provision of law allows an award of attorney fees to the debt buyer or debt collector.

(4) A debt buyer or a debt collector that acts on the debt buyer's behalf shall provide to a debtor all of the documents described in ORS 646.639 (4)(b) within 30 days after receiving a request for information about the debt from the debtor.

## APPENDIX P

### PROPOSED NEW UTCR 5.180 AND COMPANION FORM

#### UTCR 5.180 CONSUMER DEBT COLLECTION

- (1) Definitions. As used in this rule, unless otherwise indicated:
  - (a) "Consumer" means a natural person who purchases or acquires property, services or credit for personal, family, or household purposes.
  - (b) "Debt" means an obligation or alleged obligation that arises out of a consumer transaction.
  - (c) "Debt collector" means any person whose principal business purpose is the collection or attempted collection of debts owed to another.
- (2) Applicability. This rule applies to an action for collection of a debt that:
  - (a) Is an action under ORS 646A.670, when the plaintiff is either a debt buyer as defined in ORS 646.639(1)(g) or is a debt collector as defined in ORS 646.639(1)(h), bringing the action on a debt buyer's behalf; or
  - (b) Involves a plaintiff who is a debt collector as defined in subsection (1)(c) of this rule, but the action otherwise does not satisfy the requirements of subsection (2)(a) of this rule.
- (3) The following requirements apply to an action under subsection (2)(a) of this rule:
  - (a) The initiating pleading must:
    - (i) In the title, contain the words, "SUBJECT TO ORS 646A.670(1) and UTCR 5.180(3)";
    - (ii) In the body, include a statement to the following effect: "See the Oregon Judicial Department's website for information about debt collection cases"; and
    - (iii) Attach and incorporate by reference a completed Consumer Debt Collection Disclosure Statement in substantially the form as set out on the Oregon Judicial Department website (<http://www.courts.oregon.gov/Pages/default.aspx>), including a statement that the plaintiff has complied with ORS 646A.670(1).
  - (b) If the initiating pleading does not comply with subsection (3)(a)(iii) of this rule, written notice shall be given to the plaintiff that the case will be dismissed 30 days from the date of mailing of the notice, unless the plaintiff complies with subsection (3)(a)(iii) by that time.

- (c) If the plaintiff moves for entry of a judgment of default, the motion must include a declaration, under penalty of perjury, that the initial pleading complied with ORS 646A.670(1).
- (4) The following requirements apply to an action under subsection (2)(b) of this rule:
  - (a) The initiating pleading must:
    - (i) In the title, contain the words, "SUBJECT TO UTCR 5.180(4)";
    - (ii) In the body, include a statement to the following effect: "See the Oregon Judicial Department's website for information about debt collection cases."
    - (iii) Attach and incorporate by reference a completed Consumer Debt Collection Disclosure Statement in substantially the form as set out on the Oregon Judicial Department website (<http://www.courts.oregon.gov/Pages/default.aspx>).
  - (b) If the initiating pleading does not comply with subsection (4)(a)(iii) of this rule, written notice shall be given to the plaintiff that the case will be dismissed 30 days from the date of mailing of the notice, unless the plaintiff complies with subsection (4)(a)(iii) by that time.
  - (c) If the plaintiff moves for entry of a judgment of default:
    - (i) The plaintiff's motion must include a declaration, under penalty of perjury, that the initial pleading complied with UTCR 5.180(4)(a)(iii).
    - (ii) The court may not enter judgment for a plaintiff who has not complied UTCR 5.180(4)(a)(iii).

**PROPOSED CONSUMER DEBT COLLECTION DISCLOSURE STATEMENT**

*[Check all that apply]*

- 1. I am the plaintiff, and
  - I am a debt buyer, and this is an action seeking collection on a debt under ORS 646A.670. (UTCR 5.180(3))
    - I have complied with ORS 646A.670(1).
  - I am a debt collector, and this is an action seeking collection on a debt, and on a debt buyer's behalf, under ORS 646A.670. (UTCR 5.180(3))
    - I have complied with ORS 646A.670(1).
  - I am a debt collector seeking collection on a debt, but this action is not subject to ORS 646A.670(1). (UTCR 5.180(4))

2. I provide the following information about the debt sought to be collected:

A. Original creditor's name, as used in dealings with debtor:

\_\_\_\_\_

B. Name, address, and telephone number of the person that owns the debt:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

C. Last four digits of the original creditor's account number for the debt, if the account had four or more digits: \_\_\_\_\_

D.  If this action is subject to ORS 646A.670 and UTCR 5.180(3), the date on which the debt buyer purchased the debt:

\_\_\_\_\_

(Continued on next page)

E.  If this action is subject to ORS 646A.670 and UTCR 5.180(3):

*Either:*

i. The following information applies:

*Payment Information:*

The debtor made at least one payment:

Amount debtor last paid: \_\_\_\_\_

Date of last payment: \_\_\_\_\_

Amount and date of debtor's last payment before debtor's default or before debt became charged-off debt:

\_\_\_\_\_

The debtor made no payment

*Balance Information:*

The balance due on the debt, on the date it became charged-off debt: \_\_\_\_\_

*Other Information (check all that apply):*

The amount and rate of interest, any fees, and any charges that the original creditor imposed, if known to plaintiff:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The amount and rate of interest, any fees, and any charges, that the debt buyer imposed, or any previous owner imposed, if known to plaintiff:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The attorney fees that plaintiff seeks, if expected to recover fees:

\_\_\_\_\_

Any other fee, cost, or charge that the debt buyer seeks to recover: \_\_\_\_\_

\_\_\_\_\_

(Continued on next page)

Or:

- ii. See the attached detailed and itemized statement that shows the information described in section 2.E.i.

- F.  If this action is subject to UTCR 5.180(4), the following information applies:

*Payment Information:*

The debtor made at least one payment:

Amount debtor last paid: \_\_\_\_\_

Date of last payment: \_\_\_\_\_

Amount and date of debtor's last payment before debt became delinquent:  
\_\_\_\_\_

- The debtor made no payment

*Balance Information:*

The balance due on the debt, on the date it became delinquent:  
\_\_\_\_\_

*Other Information (check all that apply):*

- The amount and rate of interest, any fees, and any charges that the original creditor imposed, if known to plaintiff:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The attorney fees that plaintiff seeks, if expected to recover fees:  
\_\_\_\_\_

**I HEREBY DECLARE THAT THE ABOVE STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF AND ARE SUBJECT TO PENALTY FOR PERJURY.**

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_.

My (printed) Name Is \_\_\_\_\_, Plaintiff.

\_\_\_\_\_  
SIGNATURE

## APPENDIX Q

### CURRENT UTCR 5.050 -- ARGUMENT ON MOTIONS AND APPEARANCE BY TELECOMMUNICATION

- 5.050 ORAL ARGUMENT ON MOTIONS IN CIVIL CASES; APPEARANCE AT NONEVIDENTIARY HEARINGS AND MOTIONS BY TELECOMMUNICATION
- (1) There must be oral argument if requested by the moving party in the caption of the motion or by a responding party in the caption of a response. The first paragraph of the motion or response must include an estimate of the time required for argument and a statement whether official court reporting services are requested.
  - (2) A party may request that a nonevidentiary hearing or a motion not requiring testimony be heard by telecommunication.
    - (a) A request for a nonevidentiary hearing or oral argument by telecommunication must be in the caption of the pleading, motion, response, or other initiating document.
    - (b) If appearance or argument by telecommunication is requested, the first paragraph of the pleading, motion, response, or other initiating document must include the names and telephone numbers of all parties served with the request. The request must be granted.
    - (c) The first party requesting telecommunication must initiate the conference call at its expense unless the court directs otherwise.
  - (3) "Telecommunication" must be by telephone or other electronic device that permits all participants to hear and speak with each other and permits official court reporting when requested. When recording is requested, telecommunications hearings must be recorded by the court if suitable equipment is available; otherwise, it will be provided at the expense of the party requesting recording.

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 21, 2018  
**Memo Date:** September 6, 2018  
**From:** Dawn M. Evans, Disciplinary Counsel  
**Re:** Disciplinary/Regulatory Counsel's Status Report

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### 1. Decisions Received.

#### a. Supreme Court

Since the Board of Governors met in June 2018, the Supreme Court took the following action in disciplinary matters:

- Issued an order denying the request to vacate disciplinary action of Salem lawyer *Lynn E. Ashcroft*.
- Issued an order transferring Portland lawyer *Duane K. Petrowsky* to inactive status pursuant to BR 3.2.
- Issued an order in *In re Jonathan Stuart*, accepting this Salem lawyer's stipulation to a 7-month suspension, all stayed, 3-year probation.
- Accepted the Form B resignation from Portland lawyer *Robert Scott Phillips*.
- Accepted the Form B resignation from Portland lawyer *Lori E. Deveny*.
- Accepted the Form B resignation from Portland lawyer *Roger Gray*.
- Accepted the Form B resignation from South Jordan, Utah lawyer *Ryan M. Springer*.
- Accepted the Form B resignation from Astoria lawyer *Temojai Inhofe*.
- Issued an order transferring Corvallis lawyer *Jeffrey D. Goodwin* to inactive status pursuant to BR 3.2.

# OREGON STATE BAR

## Diversity and Inclusion Agenda

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**Meeting Date:** September 21, 2018  
**Memo Date:** August 31, 2018  
**From:** Jon Puente, Director of Diversity and Inclusion  
**Re:** Diversity and Inclusion Department Updates

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### Action Recommended

Informational, no action recommended.

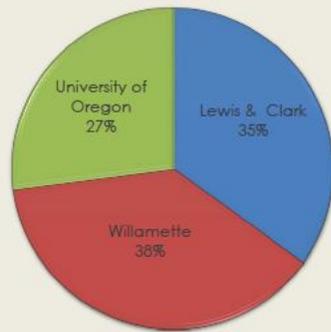
### Updates

Diversity and Inclusion Department updates since June BOG meeting.

- The Opportunities for Law in Oregon (OLIO) Orientation took place August 3-5th at the Mount Hood Oregon Resort in Welches Oregon. The weekend was very successful and we have been receiving positive feedback from students, attorney presenters and attendees, as well as other community partners.
- In addition to 49 students, we welcomed approximately 90 presenters and other professionals for varying portion of the weekend. (By comparison, approximately 60 presenters and other professionals attended last year.) Attorney attendees represented a broad spectrum of practice areas and employment types. Eleven judges attended (including from the US District Court, Oregon Court of Appeals, Oregon Supreme Court, Oregon Tax Court, and four county circuit courts.) Representatives from each of the specialty bars were present, as well as the ONLD, OAAP, 11 members of the ACDI, and three BOG members. (Please see attached graphs)
- On Monday, August 13, leadership from the OSB, including BOG members and staff, had the first meeting of a facilitated dialogue with representatives from Oregon affinity bars and other non-dominant culture attorneys to discuss experiences, perceptions, and structural barriers of the OSB as an institution.

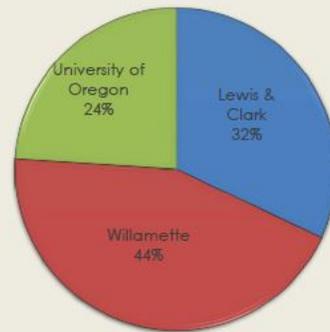
## OLIO 2018: 1Ls

1Ls Admitted by Law School



■ Lewis & Clark ■ Willamette ■ University of Oregon

1L Applicants by Law School



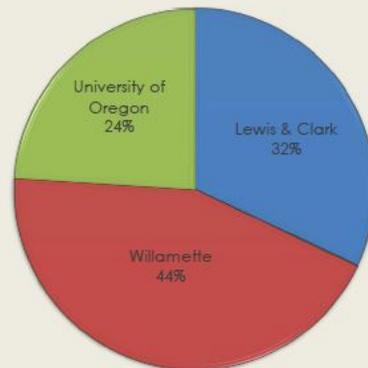
■ Lewis & Clark ■ Willamette ■ University of Oregon

## OLIO 2018: 1L Applications

- 50 1L applications received
- 26 1Ls admitted
  - 52% admission rate
- Of these applications:
  - 32% came from Lewis and Clark (16)
  - 44% came from Willamette (22)
  - 24% came from University of Oregon (12)
- Admitted students – percentage of total admitted
  - 35% were Lewis and Clark (9)
  - 38% were Willamette (10)
  - 27% were U of O (7)

*"Admitted" for the purposes of this report is defined as students who a) had their applications accepted (either at initial review or from the waitlist), and b) who attended OLIO.*

Number of 1L Applicants by Law School



■ Lewis & Clark ■ Willamette ■ University of Oregon

**OLIO Demographics: 2016-2018**

1Ls						
	2018	2017	2016	2018%	2017 %	2016 %
Native American / Alaska Native	1	0	0	4%	0%	0%
Asian / Pacific Islander	4	2	4	15%	8%	15%
Black / African American	1	1	0	4%	4%	0%
Hispanic / Latinx	5	7	6	19%	27%	22%
White / Caucasian	6	12	8	23%	46%	30%
Two or More	8	2	9	31%	8%	33%
Native American/Alaska Native + White	1	1	3	4%	4%	11%
Native American/Alaska Native + Asian/PI	1	0	0	4%	0%	0%
Native Am/Alaska Native + Black/Af Am + Hispanic/Ltnx	1	0	0	4%	0%	0%
Black/Af Am + Hispanic/Ltnx	0	0	0	0%	0%	0%
Black/Af Am + White	0	0	0	0%	0%	0%
Hispanic/Ltnx + White	0	0	4	0%	0%	15%
Asian/PI + White	4	1	2	15%	4%	7%
Asian/PI + Black/Af Am	1	0	0	4%	0%	0%
Native Am/Alaska Native + Asian/PI + White	0	0	0	0%	0%	0%
Other	0	0	0	0%	0%	0%
Self-Identification	1	2	0	4%	8%	0%
<b>TOTAL</b>	<b>26</b>	<b>26</b>	<b>27</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>
<b>LGBTQ</b>	<b>11</b>	<b>13</b>	<b>8</b>	<b>42%</b>	<b>50%</b>	<b>30%</b>
<b>Disability</b>	<b>3</b>	<b>2</b>	<b>4</b>	<b>12%</b>	<b>8%</b>	<b>15%</b>
<b>English Second Language</b>	<b>5</b>	<b>3</b>		<b>19%</b>	<b>12%</b>	
<b>Veteran of the Armed Forces</b>	<b>0</b>			<b>0%</b>		

**OLIO Demographics: 2016-2018**

THUDS						
	2018	2017	2016	2018%	2017 %	2016 %
Native American / Alaska Native	0	0	0	0%	0%	0%
Asian / Pacific Islander	6	6	6	26%	23%	27%
Black / African American	1	2	2	4%	8%	9%
Hispanic / Latinx	3	6	7	13%	23%	32%
White / Caucasian	5	5	2	22%	19%	9%
Two or More	8	6	5	35%	23%	23%
Native American/Alaska Native + White	2	2	2	9%	8%	9%
Native American/Alaska Native + Asian/PI	0	0	0	0%	0%	0%
Native Am/Alaska Native + Black/Af Am + Hispanic/Ltnx	0	0	0	0%	0%	0%
Black/Af Am + Hispanic/Ltnx	0	0	0	0%	0%	0%
Black/Af Am + White	0	1	0	0%	4%	0%
Hispanic/Ltnx + White	3	0	0	13%	0%	0%
Asian/PI + White	2	2	2	9%	8%	9%
Asian/PI + Black/Af Am	0			0%	0%	0%
Native Am/Alaska Native + Asian/PI + White	1	0	0	4%	0%	0%
Other	0	1	1	0%	4%	5%
Self-Identification	0	1	0	0%	4%	0%
Did Not Identify	0	0	0	0%	0%	0%
<b>TOTAL</b>	<b>23</b>	<b>26</b>	<b>22</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>
LGBTQ	6	6	5	26%	23%	23%
Disability	2	3	2	9%	12%	9%
English Second Language	9	7			27%	
Veteran of the Armed Forces	0			0%		

b. Disciplinary Board

One Disciplinary Board trial panel opinion has been issued since June 2018:

- A trial panel recently issued an opinion in *In re Eric J. Nisley* of The Dalles (1-month suspension).

No appeal was filed in the following case and the trial panel opinion is now final:

- *In re Brian A. Buchanan* of Salem (reprimand).

Since the Board of Governors met in June 2018, the Adjudicator took the following action in disciplinary matters:

- None.

In addition to these trial panel opinions, the Adjudicator approved stipulations for discipline in: *In re Thomas W. Crawford* of Roseburg (reprimand), *In re Eric M. Bosse* of Forest Grove (6-month suspension), *In re Suzanne Marie Bruce* of Eugene (reprimand), *In re Matthew Swihart* of Tampa, Florida (reprimand), *In re William Redden* of Hillsboro (30-day suspension), *In re Jane B. Stewart* of Eugene (30-day suspension), and *In re Jason A. Steen* of Portland (reprimand).

The Adjudicator approved BR 7.1 suspensions in: *In re Andrew Long* of Portland, *In re David Winston Giles* of Portland (2 matters), *In re James D. Huffman* of St. Helens, *In re Elizabeth D. Logsdon* of Astoria, and *In re Ronalee M. Fachner* of Salem.

**2. Decisions Pending.**

The following matters are pending before the Supreme Court:

- In re Gary B. Bertoni* – 1-year suspension; respondent appealed; oral argument January 22, 2018; under advisement
- In re Steven L. Maurer* – dismissed; OSB appealed; oral argument June 27, 2018; under advisement
- In re Eric J. Nisley* – 1-month suspension; respondent appealed; awaiting briefs

The following matters are under advisement before the Adjudicator of the Disciplinary Board:

- None.

The following matters are under advisement before a trial panel of the Disciplinary Board:

*In re Andrew Long* – August 21-22, 2018

**3. Trials.**

The following matters are on our trial docket in coming weeks/months:

*In re Lewis Irwin Landerholm* – October 1-3, 2018

*In re David H. Leonard* – November 6-8, 2018

*In re James D. Harris* – December 3, 2018

*In re Ioan Terri Myzak* – December 6-7, 2018

*In re Martin E. Thompson* – January 28, 2019

*In re Gary B. Bertoni* – February 5-7, 2019

*In re John G. Crawford* – February 19-21, 2019

**4. Diversions.**

The following diversion agreements have been entered into since June 2018:

*In re Michael John Turner* – April 1, 2018

*In re Anthonie H. Woller* – May 1, 2018

*In re Lisa M. LeSage* – August 1, 2018

*In re Elizabeth Tedesco Milesnick* – August 1, 2018

*In re Man M. Vu* – August 1, 2018

*In re Josh Lamborn* – September 1, 2018

*In re Margaret Parker Washburn* – October 1, 2018

**5. Admonitions.**

The SPRB issued 15 letters of admonitions in June and July 2018. The outcome in these matters is as follows:

- 14 lawyers have accepted their admonitions;
- 1 lawyer has rejected their admonition;
- 0 lawyers have asked for reconsiderations;
- 0 lawyers have time in which to accept or reject their admonition.

**6. New Matters.**

Below is a table of complaint numbers in 2018, compared to prior years, showing both complaints (first #) and the number of lawyers named in those complaints (second #):

<b>MONTH</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>
January	29/31	18/19	30/30	17/17	34/34
February	24/25	28/28	38/38	49/49	25/25
March	41/45	22/22	28/30	19/20	33/33
April	45/47	17/17	26/26	22/22	31/32
May	23/24	24/24	27/30	48/51	38/39
June	23/24	31/31	38/39	19/20	37/37
July	43/44	27/27	41/42	31/31	40/42
August	19/21	28/29	28/28	24/27	14/14
September	24/24	21/21	25/25	15/15	
October	25/25	38/39	39/39	37/37	
November	19/19	24/25	26/27	36/40	
December	21/23	20/20	25/28	27/28	
<b>TOTALS</b>	<b>336/352</b>	<b>298/302</b>	<b>371/382</b>	<b>344/357</b>	<b>252/256</b>

As of September 1, 2018, there were 233 new matters awaiting disposition by Disciplinary Counsel staff or the SPRB. Of these matters, 32% are less than three months old, 27% are three to six months old, and 42% are more than six months old. Approximately 25 of these matters will be on the September SPRB agenda.

DME/rh

**OREGON STATE BAR**

**Client Security - 113**

**For the Seven Months Ending Tuesday, July 31, 2018**

<b>Description</b>	<b>July 2018</b>	<b>YTD 2018</b>	<b>Budget 2018</b>	<b>% of Budget</b>	<b>July Prior Year</b>	<b>YTD Prior Year</b>	<b>Change v Pr Yr</b>
<b>REVENUE</b>							
Interest	\$2,294	\$14,190	\$19,600	72.4%	\$1,368	\$8,022	76.9%
Judgments	50	46,350	1,000	4635.0%	90	399	11510.4%
Membership Fees	330	146,750	153,400	95.7%	420	219,547	(33.2%)
<b>TOTAL REVENUE</b>	<b>2,674</b>	<b>207,290</b>	<b>174,000</b>	<b>119.1%</b>	<b>1,878</b>	<b>227,968</b>	<b>(9.1%)</b>
<b>EXPENSES</b>							
<b>SALARIES &amp; BENEFITS</b>							
Employee Salaries - Regular	2,056	19,442	28,900	67.3%	1,067	8,466	129.6%
Employee Taxes & Benefits - Reg	318	4,997	11,800	42.3%	784	3,728	34.1%
<b>TOTAL SALARIES &amp; BENEFITS</b>	<b>2,374</b>	<b>24,439</b>	<b>40,700</b>	<b>60.0%</b>	<b>1,851</b>	<b>12,194</b>	<b>100.4%</b>
<b>DIRECT PROGRAM</b>							
Claims	46,111	73,471	200,000	36.7%	4,004	16,429	347.2%
Collection Fees	0	89	1,000	8.9%	0	0	0.0%
Committees	0	57	150	38.0%	0	0	0.0%
Travel & Expense	0	2,052	1,800	114.0%	40	1,144	79.3%
<b>EXPENSE</b>	<b>46,111</b>	<b>75,669</b>	<b>202,950</b>	<b>37.3%</b>	<b>4,044</b>	<b>17,573</b>	<b>330.6%</b>
<b>GENERAL &amp; ADMINISTRATIVE</b>							
Office Supplies	0	0	150	0.0%	0	0	0.0%
Photocopying	0	0	50	0.0%	0	0	0.0%
Postage	0	53	150	35.3%	0	30	74.8%
Professional Dues	0	200	200	100.0%	0	0	0.0%
Telephone	0	47	200	23.4%	0	36	28.4%
Training & Education	0	815	600	135.8%	0	4,575	(82.2%)
Staff Travel & Expense	0	0	1,169	0.0%	556	1,169	(100.0%)
<b>TOTAL G &amp; A</b>	<b>0</b>	<b>1,115</b>	<b>2,519</b>	<b>44.3%</b>	<b>556</b>	<b>5,810</b>	<b>(80.8%)</b>
<b>TOTAL EXPENSE</b>	<b>48,485</b>	<b>101,223</b>	<b>246,169</b>	<b>41.1%</b>	<b>6,451</b>	<b>35,577</b>	<b>184.5%</b>
<b>NET REVENUE (EXPENSE)</b>	<b>(45,811)</b>	<b>106,067</b>	<b>(72,169)</b>	<b>####</b>	<b>(4,573)</b>	<b>192,391</b>	<b>(44.9%)</b>
Indirect Cost Allocation	2,853	19,972	34,237	58.3%	2,779	19,454	2.7%
<b>NET REV (EXP) AFTER ICA</b>	<b>(48,664)</b>	<b>86,095</b>	<b>(106,406)</b>	<b>(80.9%)</b>	<b>(7,352)</b>	<b>172,937</b>	<b>(50.2%)</b>

Fund Balance beginning of year  
Ending Fund Balance

1,258,377  
1,344,472

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 15, 2018  
**From:** Amber Hollister, General Counsel  
**Re:** CSF Claims

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### Action Requested

Consider Client Security Fund Committee's recommendations that the board grant claimants claims in amounts over \$5000 in the following matters:

- *2017-14 Jeff Milstein (James Cooper) \$7,500*
- *2015-39 Jonah Morningstar (Charles P. Boone) \$8,000*
- *2016-27 Jonah Morningstar (Joseph Roden) \$9,635.50*
- *2018-09 Matthew Wilson (Tom Lasota) \$30,608*

### Discussion

As described in the attached investigatory reports, the Client Security Fund Committee recommends that the board grant the following claims to the Fund.

#### *2017-14 Jeff Milstein (James Cooper) \$7,500*

Mr. Milstein was hired to represent Mr. Cooper in Lane County custody case. While Mr. Milstein did appear at court there is evidence that Mr. Milstein did not earn the \$7,500 that Mr. Cooper paid. Mr. Milstein has since resigned Form B.

#### *2015-39 Jonah Morningstar (Charles P. Boone) \$8,000*

Mr. Boone through Mr. Kirkland paid Mr. Morningstar to complete a habeas corpus application to the Supreme Court. Mr. Morningstar did not do any work for the \$8,000 he was paid. Mr. Boone and Mr. Kirkland tried numerous times to get the money back, but Mr. Morningstar did not return the funds. He has been suspended for failure to respond to disciplinary matters, and the Supreme Court has ordered he be placed in involuntary inactive status.

#### *2016-27 Jonah Morningstar (Joseph Roden through attorney-in-fact Melody Butler) \$9,635.50*

Ms. Butler hired Mr. Morningstar to represent Mr. Roden on his direct appeal and in a post-conviction relief case. Mr. Morningstar did provide minimal legal services, but no substantive legal services were provided for the funds expended.

*2018-09 Matthew Wilson (Tom Lasota) \$30,608*

Mr. Lasota loaned Mr. Wilson \$30,000 in return for the promise of free legal services. The loan was to be secured by real estate as collateral, but the collateral did not in fact exist. Ultimately, Mr. Wilson never provided Mr. Lasota any legal services, and he was disbarred as a result of his misconduct. Mr. Lasota obtained a civil judgment against Mr. Wilson for the \$30,000 and incurred \$608 in court fees.

## CLIENT SECURITY FUND

### INVESTIGATIVE REPORT

July 3, 2018

From: Rick Braun

Re: Claim No. 2017-14  
Claimant: James Adam Cooper  
Attorney: Jeffrey Milstein

#### Recommendation

This claim should be paid in the amount of \$7,500.

#### Statement of Claim

Claimant Cooper hired Milstein in July 2014 to deal with child custody issues. Cooper and Milstein executed two fee agreements, July 7, 2014 and September 3, 2014. The July agreement was for “custody and DHS investigation of children” and was for a flat fee of \$4,000 “for cases that proceed through trial”. The September agreement was for “custody and support and return of children from ex-wife / suit v. DHS”. That agreement was for a deposit of \$800 and hourly billing at \$80 per hour.

Mr. Cooper submitted receipts from Milstein totaling \$11,500. Mr. Cooper asserts that Milstein constantly demanded money and provided no services. Mr. Cooper requests that the CSF pay him the entire amount he paid Milstein.

#### Investigation Report.

The facts are considerably more complicated than Mr. Cooper makes out. In fact, Milstein appeared in the custody case, Lane County Case No. 15-14-21019, filed a response and counterclaim, and resolved the case in March 2015 with a stipulated general judgment awarding custody of one child to its grandmother. In August 2015 Mr. Cooper hired another firm to handle judicial review of a DHS order (“Founded Disposition”) challenging the factual basis for the order and requesting that the court reverse, modify, or vacate and remand the order. That challenge succeeded.

Mr. Cooper’s payments to Milstein occurred between June 12 and November 24, 2014, well before resolution of the Lane County case. It is impossible to know what Milstein did in that interval, but it is clear that he was attorney of record in the ongoing Lane County case into 2015. However, the terms of the fee agreements provide some basis for finding that Milstein did not earn \$7,500 of the money Cooper paid. The first fee agreement was a fixed fee, \$4,000, for a subject specific matter involving “custody” of children. The second fee agreement was for a time based fee for a “suit v. DHS”. Milstein performed the work in the fixed fee agreement, and arguably earned the \$4,000 fixed fee. Milstein did nothing further and does not appear to have earned the remaining \$7,500 Cooper paid him. The question is whether or not the loss was caused by dishonesty.

As with other claims against Mr. Milstein, there is evidence from which the committee can infer that during the time Milstein represented claimant, Milstein was an “out of control” licensee heavily involved in drug use, incompetent to practice law, and using his law practice solely to fleece naïve clients of their money. At the time Milstein resigned his license Form B, Milstein was the subject of five filed formal complaints, seven complaints authorized by the SPRB for filing, and eight pending disciplinary investigations. Suffice it to say, on this record Milstein has not earned “the benefit of the doubt” on the honesty front. It is no stretch to find that Milstein recklessly demanded money from claimant for work he had not yet performed, and knew or should have known he might not perform.

This claim should be paid in the amount of \$7,500.



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Richard H. Braun, OSB 850065  
Investigator

CLIENT SECURITY FUND  
INVESTIGATIVE REPORT

Re: Claim No. 2015-39  
Claimant: Charles P. Boone  
Attorney: Jonah Morningstar  
Investigator: Daniel Steinberg  
Date: July 5, 2018

**RECOMMENDATION**

I recommend approving \$8,000 being requested by claimant.

**CLAIM INVESTIGATION SUMMARY**

Attorney Jonah Morningstar was placed on inactive status pursuant to Bar Rule 3.2(c)(1)(ii) now renumbered to 3.2(c)(1)(B). The order transferring him to inactive status was dated July 27, 2016. The underlying facts of this case constitute a part of the basis for several disciplinary complaints against Mr. Morningstar. These facts are undisputed.

Claimant Boone sought legal services from Morningstar in February of 2014. Mr. Boone was incarcerated in Umatilla, Oregon, and paid \$8,000 as a flat fee for Mr. Morningstar to complete a habeas corpus application to the Oregon Supreme Court.<sup>1</sup>

Mr. Boone obtained the \$8,000 by obtaining a loan from Steve Kirkland.<sup>2</sup>

The \$8,000 was paid in two separate checks, one February 15, 2014, and one May 5, 2014.<sup>3</sup> Both checks were deposited by Mr. Morningstar. It appears that despite numerous calls from Mr. Boone and Mr. Kirkland, no action was taken on Mr. Boone's case. The last Mr. Boone heard from Mr. Morningstar was in June 2015 when Boone called to request that the money be returned and Morningstar apparently agreed to do so. After that time, Mr. Boone heard nothing further from Mr. Morningstar and the money was not refunded.

The claim was made within two years as required by DSF Rule 2.1.8. However, because Mr. Morningstar was transferred to inactive status due to a possible mental disability, the CSF Committee unanimously voted to abate consideration of Mr. Boone's claim and a second claim against Mr. Morningstar filed by Melody Butler on behalf of Joseph Anthony Roden (CSF 2016-

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<sup>1</sup> Ex. A, Retainer Agreement.

<sup>2</sup> Ex. B, Declaration of Charles Boone.

<sup>3</sup> Ex. C, Redacted checks.

27). The disciplinary action against Mr. Morningstar was abated at the same time and remains abated. As part of my investigation, I spoke with the bar's disciplinary counsel but was unable to speak with Mr. Morningstar.

### **FINDINGS AND CONCLUSIONS**

1. Claimant Charles P. Boone was injured by attorney Jonah Morningstar. CSF Rule 2.1.1. Mr. Morningstar's loss was \$8,000.<sup>4</sup>
2. Because no legal services were provided, it appears that there is no offset to the loss suffered.
3. The loss was caused by Morningstar's dishonest conduct which was either "defalcation" (misappropriation of funds by a fiduciary), or "other wrongful taking." CSF Rule 2.1.2.
4. The loss was not incurred by a financial institution covered by a bond, insurance, or surety contract. CSF Rule 2.1.4.
5. The loss arose from either "an established attorney-client relationship" or Morningstar's "failure to account for money or property entrusted to [him] in connection with the lawyer's practice of law. \* \* \*" CSF Rule 2.1.5.
6. Given Mr. Boone's lack of funds and status as being incarcerated, his ability to collect the amount claimed has been limited. Mr. Boone did make numerous calls and had Mr. Kirkland make numerous calls to demand return of the money to no avail.
7. CSF Rule 2.1.7.
8. The claim is timely as it was filed within two years of delivering the funds to Mr. Morningstar. CSF Rule 2.1.8.
9. The loss arose from the lawyer's practice of law in Oregon. CSF Rule 2.1.9.

### **CONCLUSION**

For the reasons set forth above, it would be just and appropriate to approve \$8,000 of this claimant's request for reimbursement by the Client Security Fund.

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<sup>4</sup> In order to obtain the \$8,000, Mr. Boone had to take out a loan at 4% interest. He has not sought reimbursement of 4% interest and, under the CSF Rules, it does not appear that he is entitled to that additional reimbursement.

CLIENT SECURITY FUND  
INVESTIGATIVE REPORT

Re: Claim No. 2016-27  
Claimant: Joseph A. Roden through attorney-in-fact Melody Butler  
Attorney: Jonah Morningstar  
Investigator: Daniel Steinberg  
Date: July 5, 2018

**RECOMMENDATION**

I recommend approving \$9,635.50 being requested by claimant's attorney-in fact at the time the claim was made by Melody Butler.

Mr. Roden died on March 25, 2017, almost a year after his claim was filed. Because the claim was filed in a timely manner and because the CSF through no fault of the claimant failed to act within a "reasonable time" as required by CSF Rule 4.4, the claim was an otherwise valid and reimbursable claim and thus, should be paid.

**CLAIM INVESTIGATION SUMMARY**

Attorney Jonah Morningstar was placed on inactive status pursuant to Bar Rule 3.2(c)(1)(ii) now renumbered to 3.2(c)(1)(B). The order transferring him to inactive status was dated July 27, 2016. The underlying facts of this case are similar to a number of other cases which constitute the basis for several disciplinary complaints against Mr. Morningstar. Because of Mr. Morningstar's current status, the facts are undisputed.

On January 21, 2014, Melody Butler hired Mr. Morningstar to pursue an appeal and post-conviction relief for Joseph Roden who was incarcerated in Ontario, Oregon. She claims to have paid him \$9,385.50 for fees and \$250 for filing fees for a total of \$9,635.50.

She has provided proof of payment of \$8,000.<sup>1</sup> However, there has been no dispute from Mr. Morningstar regarding the alleged amount paid. While I did speak with disciplinary counsel for the bar, I was unable to speak to Mr. Morningstar.

The agreement between Ms. Butler and Mr. Morningstar was purely verbal. There was no written fee agreement between Mr. Roden and Mr. Morningstar or between Ms. Butler and Mr. Morningstar. Mr. Morningstar did visit Mr. Roden four times and apparently ordered a

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<sup>1</sup> Ex A. Proof of payment.

transcript for review on appeal although there is no invoice included in the materials for that review.

Mr. Morningstar did email Ms. Butler several times to request additional money and at least once to describe the transcript review process, which he estimated would cost approximately “\$10,000 in legal fees.”

In October 2015 Mr. Morningstar stopped returning emails or telephone calls from Ms. Butler. Additionally, Mr. Morningstar had no additional conversations or communication with Mr. Roden after that time.

Ms. Butler filed the claim, purportedly on behalf of Mr. Roden on April 12, 2016, and on or about May 27, 2016, obtained a durable power of attorney from Mr. Roden. See attached.

In conversations with Ms. Butler, she indicates that she thought she was hiring Mr. Morningstar to do work for Mr. Roden. Ms. Butler is not sophisticated and does not seem able to distinguish the difference between Mr. Morningstar being her attorney, or Mr. Morningstar being Mr. Roden’s attorney merely being paid for by Ms. Butler.

### **FINDINGS AND CONCLUSIONS**

1. Claimant Melody Butler was injured by attorney Jonah Morningstar. CSF Rule 2.1.1.
2. Butler’s loss was the \$9,635.50 she paid to him for legal services.
3. While Morningstar did provide some legal services, including visits to Roden and, presumably, began a review of the transcript to find issues for appeal, no substantive legal services were provided which would constitute an offset to the loss suffered.
4. The loss was caused by Morningstar’s dishonest conduct, which was either “defalcation” (misappropriation of funds by a fiduciary), or “other wrongful taking.” CSF Rule 2.1.2.
5. The loss is not covered by a fund similar to the Client Security Fund in another state or jurisdiction, nor by any enforceable bond, remit, or contract. CSF Rule 2.1.3.
6. The loss was not incurred by a financial institution covered by a bond, insurance, or surety contract. CSF Rule 2.1.4.
7. The loss arose and was because of either “an established attorney-client relationship” or Morningstar’s “failure to account for money or property entrusted to the lawyer in connection

with the lawyer's practice of law or while acting as a fiduciary in a matter related to the lawyer's practice of law." CSF Rule 2.1.5.

(NOTE: This conclusion comports with *In re Spencer*, 335 Or 71 (2002)(the Supreme Court held: "When a person delivers funds, securities, or other properties to a lawyer who is considering to represent that person, the person has entrusted those materials to the lawyer as a lawyer and, as such, is as much entitled to be considered a client for that limited purpose as if the person had made a confidential verbal communication to the lawyer.")

Because there is no written fee agreement between Morningstar and Roden or between Morningstar and Butler, we are left with Butler's subjective belief regarding the attorney-client relationship. She understood that she was hiring a lawyer which she was paying to perform services. She acknowledges that those services were to be performed on behalf of Mr. Roden but she does not understand the difference between this being an attorney she is hiring and this being an attorney being hired by her for someone else.

8. The claim is timely. Claimant filed this claim within two years of realizing that Mr. Morningstar had terminated communication and ceased working on the matter. Ms. Butler has not taken any additional legal steps against Mr. Morningstar other than making demands for payment. However, under the circumstances, it seems unlikely additional efforts would be successful.

9. The loss arose from the lawyer's practice of law in Oregon. CSF Rule 2.1.9.

### **CONCLUSION**

For the foregoing reasons, it would be appropriate for this Committee to approve payment of this claimant's request in the amount of \$9,635.50.

CLIENT SECURITY FUND  
REVISED INVESTIGATIVE REPORT

Re: Claim No. 2018-09  
Claimant: Tom Lasota  
Attorney: Matthew A. Wilson   
Investigator: Lucille Sage  
Date: June 29, 2018 (original version submitted May 4, 2018)

**RECOMMENDATION**

I recommend approving \$30,608 of the \$50,000 being requested by claimant.

\$30,000 was the actual amount of money that claimant gave to the attorney. He received nothing in return – neither legal services nor repayment.

The additional \$20,000 being sought by claimant is for interest and costs associated with his efforts to *recover* the \$30k that was misappropriated by the attorney. CSF Rule 2.4 states that the costs of recovery are not reimbursable by the Fund, *except for* “the claimant’s actual expense incurred for court costs, as awarded by the court,” which may be reimbursed. The awarded court costs in the present case were \$608.

Accordingly, I recommend that we approve the \$608 in awarded court costs plus the \$30,000 taken by the attorney, for a total reimbursement of \$30,608.

**RECENT COMMITTEE ACTIVITY IN THIS MATTER**

- 5/12/18 CSF Committee meeting – claim/original report by L. Sage was discussed at length. Action was deferred and committee members were asked to contact me with additional questions that could be investigated before the July CSF meeting.
- 5/30/18 Email from L. Sage to committee members, soliciting additional Qs. NONE WERE RECEIVED.

The 5/30 email provided a **summary of the facts which caused me to conclude that the requirements of CSF Rule 2.1.5(i) were met** – that is, that the \$30k loan in this matter arose from, and because of, the lawyer-client relationship:

1. In the affidavit submitted by Mr. Lasota – see Ex. A, attached – the claimant shows how the loan request & response flowed from Wilson’s status as the attorney for Lasota’s company; the two were inextricably intertwined. Lasota loaned \$30,000 to Wilson because Wilson was his attorney, and he would have collected on the loan earlier, but-for the fact that Wilson was the attorney for Lasota’s company.

2. Wilson used his law practice as a storefront, to get Lasota in the door. After Wilson had essentially ‘captured’ Lasota as his client, he solicited him for money and promised to provide free legal services (which he never provided) simply “to continue to string Lasota along,” so that Lasota would not initiate collection efforts against his attorney. (Ex. B, OSB Trial Panel Opinion, Finding of Fact #8, p. 17).

3. Wilson functioned as the attorney in their relationship, by preparing the loan documents (poorly and not as represented, all to Wilson’s benefit) while continuing to advise Lasota, and did not ever tell Lasota to get independent counsel. There was no separation between the attorney-client and borrower-lender roles.

4. Wilson lied to Lasota about the collateral that secured the loan. In disbaring Wilson for this transaction, the Bar trial panel specifically found that, among other misconduct, Wilson misrepresented to Lasota “that he had property that had at least \$30,000 in equity and that [Wilson] would give Lasota a Deed of Trust for [Wilson’s] home to secure the loan.” *Id.* at 18. “The Trial Panel finds that [Wilson] acted intentionally in his communications with Lasota in making affirmative misrepresentations and omitting material information from Lasota.” *Id.* at 20.

5. In sum, Wilson acted as Lasota’s attorney only to get access to loaned funds, and then continued acting as Lasota’s attorney to avoid Lasota demanding that the loan be repaid. He used his status as the attorney for Lasota’s business to create and maintain control over the situation, and his dishonest conduct caused the loss that Lasota suffered. If Wilson had not been the attorney for Lasota’s new business, Lasota would not have loaned him funds or would have hired an attorney to properly document the loan. To my mind, these facts provide a more-than-adequate basis for the Committee to conclude that the loan arose from, and because of, Wilson’s role as the claimant’s attorney.

### ORIGINAL CLAIM INVESTIGATION SUMMARY

Attorney Matthew A. Wilson was disbarred in February 2018 for the conduct that gave rise to the current claim for CSF reimbursement.

The underlying facts in this case are well documented by the OSB Disciplinary Trial Panel and the two-volume transcript of the disbarment proceeding.<sup>1</sup>

Claimant Tom Lasota sought legal services from attorney Wilson in March 2012, when a friend referred claimant to Wilson, “to assist with business law matters.”<sup>2</sup> Lasota “was interested in finding an attorney who could provide him with day to day advice and to walk him through

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<sup>1</sup> The panel’s February 2018 opinion is attached as Exhibit B, and I will provide the disbarment proceeding transcript upon request. The disciplinary trial panel’s decision to disbar was not appealed by Mr. Wilson, and became final on April 16, 2018.

<sup>2</sup> Ex. A, Declaration of Claimant Thomas Lasota, ¶ 2, p. 1.

the process of starting a new business[.]”<sup>3</sup> After they met, Wilson “verbally agreed to act as [Lasota’s] attorney for the company formation and [serve as] general counsel.”<sup>4</sup>

However, in addition to discussing with this new client “his extensive legal background in business formation and related matters,”<sup>5</sup> Wilson also used the meeting as an opportunity to talk with Lasota about a company – Group Hive LLC – in which *Wilson* was a principal.

Instead of sending Lasota retainer agreement, immediately after their meeting Wilson sent an email to Lasota, asking about his willingness to loan money to Group Hive.<sup>6</sup> The email solicited a potential loan from Lasota with terms of “\$30k for 90 days.”<sup>7</sup>

Wilson then sent Lasota a Secured Promissory Note, Personal Guaranty, Security Agreement, and Deed of Trust for Wilson’s personal residence on SW Adele Drive in Portland. Wilson was asked to but did not acknowledge any encumbrances on the Adele Drive property that was to serve as collateral.<sup>8</sup>

Lasota paid Wilson \$30,000. He subsequently learned that the Deed of Trust that Wilson had drafted could not be recorded because it was not notarized and did not contain a legal property description.

From that point forward, Wilson made an array of promises that he did not keep – most notably, his pledge to repay the \$30,000. He promised to revise the Deed of Trust but did not. He promised to raise money through other investors and use those funds to pay off the note, but did not. He offered to draft, free of charge, some documents for the LLC that Lasota had wanted to form, but did not. He offered to begin a repayment plan by diverting to Lasota 75% of the rental income that Wilson could receive by renting out his home on Adele Drive, but did not.

The OSB Disciplinary Trial Panel found that even Wilson’s testimony at the disciplinary proceeding *regarding* the proffered rental income was false,<sup>9</sup> and that Wilson had simply “promised free legal services to Lasota in forming an LLC in order to continue to string Lasota along.”<sup>10</sup> Wilson had also transferred money back and forth between his law firm account and the bank account for Group Hive.<sup>11</sup>

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<sup>3</sup> Ex. B, Trial Panel Opinion, p. 7.

<sup>4</sup> Ex. A, Declaration, ¶ 2, p. 1.

<sup>5</sup> *Id.* at ¶ 3, p. 1.

<sup>6</sup> Ex. B, Trial Panel Opinion, p. 7.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 8. Wilson knew that the Adele home did not have \$30,000 in equity because he had not made a payment on his mortgage for two years, he had already pledged the house as collateral to another investor, and he did not act to save the house from its eventual foreclosure. *Id.* at 9-10.

<sup>9</sup> *Id.* at 9.

<sup>10</sup> *Id.* at 11. *See also* Ex. A, Declaration (attachment Ex. 2, p. 2): “I would be happy to help you with the Articles of Organization and Operating Agreement at no cost other than you would have to cover the filing fees with the State.”

<sup>11</sup> *Id.* at 12.

Lasota repeatedly wrote to Wilson and expressed a willingness to work with him on a plan for repayment. When he received only hollow promises, he eventually retained a second attorney who sent a demand letter and then filed suit against Wilson and Group Hive, to collect on the debt. See Ex. C, Complaint. Lasota was awarded \$40,000 plus attorney fees and \$608 in court costs. Ex. D, Court record of Judgment Lien. More than four years have passed since entry of that judgment, and still Wilson has not paid Lasota.

### FINDINGS AND CONCLUSIONS

1. Claimant Tom Lasota was injured by attorney Matthew Wilson. CSF Rule 2.1.1.
2. Lasota's loss was the \$30,000 that he loaned to Wilson plus \$608, which is the "actual expense incurred for court costs, as awarded by the court." CSF Rule 2.4. The total reimbursable loss is \$30,608.

**NOTE:** I am new to the Committee, and acknowledge that members may want to discuss whether we should reimburse *any* amount over the \$30,000 – even when it is a small amount for costs which are specifically contemplated by the rule.

3. Because no legal services were ever provided, there is no offset to the loss suffered.
4. The loss was caused by Wilson's dishonest conduct, which was either "defalcation" (misappropriation of funds by a fiduciary), "other wrongful taking," or both. CSF Rule 2.1.2.
5. The loss is not covered by a fund similar to the Client Security Fund in another state or jurisdiction, nor by any enforceable bond, agreement or contract. CSF Rule 2.1.3.
6. The loss was not incurred by a financial institution covered by a bond, insurance or surety contract. CSF Rule 2.1.4.
7. The loss arose from, and was because of, either "an established attorney-client relationship" or attorney Wilson's "failure to account for money or property entrusted to the lawyer in connection with the lawyer's practice of law or while acting as a fiduciary in a matter related to the lawyer's practice of law." CSF Rule 2.1.5.

See summary of facts on pages 1-2 of this report.

The \$30,000 loan was intricately intertwined with Lasota's belief that he had just hired an attorney who was going to help him form a company and serve as counsel to the LLC.

8. As a result of attorney Wilson's dishonest conduct, a civil judgment was entered against him, which remains unsatisfied. CSF Rule 2.1.6(ii).

9. A good faith effort has been made by the claimant to collect the amount, to no avail. CSF Rule 2.1.7. (He domesticated the judgment in California and has engaged in bank account garnishment efforts for the past 4 years.)

10. The claim is timely. Claimant filed his claim within a few days of Wilson being disbarred. Mr. Wilson was disbarred on February 19, 2018, and the claim was filed on February 22, 2018.

11. The loss arose from the lawyer's practice of law in Oregon. CSF Rule 2.1.9.

### **CONCLUSION**

For the reasons set forth above, it would be just and appropriate to approve \$30,608 of this claimant's request for reimbursement by the Client Security Fund.

Print Judgments..... Washington Co Circuit Court  
Case#..... C135854CV Lasota Thomas/Group Hive LLC  
Civil Contract

1 Judgment General Creates Lien Judgment Status..... Unsatisfd  
Docket Entry Date... 11/06/13 Docket Entry Time... 3:54 PM  
Judgment Date..... 10/24/13 Volume/Page.....  
Judgment..... \$40,000.00  
Jgm Attorney Fees... \$763.00  
Jgm Court Costs..... \$608.00

INTEREST ON PRINCIPAL 12% PER ANNUM FROM 3/21/12  
TIL PD;  
POST JGM INT @ ATTY FEES/COSTS @ 9% PER ANNUM FROM  
DATE OF JGM TIL PD

PTY	JGMT	ROLE	PLAINTIFF	ROLE	JUDGMENT STATUS
1	Plaintiff	LASOTA THOMAS		Creditor	

PTY	JGMT	ROLE	DEFENDANT	ROLE	JUDGMENT STATUS
1	Defendant	GROUP HIVE LLC		Debtor	Unsatisfied
2	Defendant	WILSON MATTHEW A		Debtor	Unsatisfied

EVT	ENTER DT	FILE DT	EVENT/FILING/PROCEEDING	SCD DT	TIME
13	11/06/13	10/24/13	Judgment General Creates Lien		
		10/24/13	Signed		
			JUD 1 Wipper Janelle Factora		
			Related event # 15		

\*\*\*\*\* END OF DATA \*\*\*\*\*



**Oregon State Bar**  
**Meeting of the Board of Governors**  
May 18, 2018  
**Special Open Session Minutes**

President Vanessa Nordyke called the meeting to order at 4:03 p.m. on May 18, 2018. The meeting adjourned at 4:25 p.m. Members present from the Board of Governors were Colin Andries, John Bachofner, Chris Costantino, Eric Foster, John Grant, Rob Gratchner, Guy Greco, Eddie Medina, Tom Peachey, Kathleen Rastetter, Liani Reeves, Julia Rice, Kerry Sharp, and David Wade. Not present were Michael Levelle, Michael Rondeau, Whitney Boise, Per Ramfjord, and Traci Rossi. Staff present were Helen Hierschbiel, Amber Hollister, Susan Grabe, Jonathan Puente, Kay Pulju, and Dani Edwards. Also present was Jennifer Nichols, ONLD Chair.

**1. Call to Order/Finalization of Agenda**

The board accepted the agenda, as presented, by consensus.

**2. Public Affairs Committee: 2019 OSB Law Improvement Package**

- A.** Ms. Rastetter presented the Bar's package of 2019 law improvement proposals as approved by the BOG Public Affairs Committee. **[Exhibit A]**

**Motion:** The board voted unanimously in favor of the Public Affairs Committee motion to accept the standards. The motion passed.

**3. Board Development Committee: Appointment Recommendation for State Professional Responsibility Board.**

- A.** Mr. Greco presented recommendations to appoint Kelly D. Lemarr and Richard Weill to the State Professional Responsibility Board. **[Exhibit B]**

**Motion:** The board voted unanimously in favor of accepting the Board Development Committee's recommendations for appointment. The motion passed.

**4. Approve Minutes of May 1, 2018 Special BOG Meeting**

**Motion:** Mr. Greco moved, Mr. Bachofner seconded, and minutes from the May 1, 2018 meeting were approved unanimously. The motion passed. **[Exhibit C]**

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** May 18, 2018  
**Memo Date:** May 18, 2018  
**From:** Kathleen Rastetter, Public Affairs Committee Chair  
**Re:** 2019 OSB Law Improvement Program

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### **Action Recommended**

Approve the Public Affairs Committee (PAC) recommendation to include twelve proposals submitted as part of the 2019 Oregon State Bar (OSB) Law Improvement Program package for submission to Legislative Counsel's office for bill drafting.

### **Background**

Every long session, the OSB submits proposed legislation as part of the Law Improvement Program to the Oregon State Legislature for passage. On May 2, 2018, the PAC hosted the OSB Legislative Forum. This year six OSB sections, workgroups, and committees submitted twelve proposals for consideration by the Board of Governors (BOG) to be included as part of the 2019 Law Improvement program package.

The OSB's Law Improvement package is intended to include proposed legislation from sections, workgroups, and committees that clarify statutory ambiguities, remove unnecessary procedural requirements, modify unforeseen glitches in previous legislation, or otherwise improve the administration of justice. Policy changes are also included in the bar package of legislation when deemed appropriate. In order for a legislative concept to be considered at the Legislative Forum, it must be approved by a majority of the section executive committee, and we encourage executive committees to be representative of the diverse views on the section. Bar groups are encouraged to be mindful of differing viewpoints in the practice area.

The proposals were reviewed by the PAC and OSB General Counsel to ensure that they meet the criteria established by both the OSB policies and bylaws, and the U.S. Supreme Court case, *Keller v. State of California*, 499 US 1, 111 S.Ct 2228 (1990).<sup>1</sup>

### **What is the Keller Rule?**

In 1990, the United States Supreme Court ruled in *Keller v. State Bar of California*, 499 US 1, 111 S.Ct 2228 (1990) that an integrated (mandatory) bar's use of compulsory dues to finance political and ideological activities violates the 1st Amendment rights of dissenting members when such expenditures are not germane to the bar's purpose,

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<sup>1</sup> For more information on the Oregon State Bar bylaws and the *Keller* case, please visit [http://www.osbar.org/leadership/bog/bog\\_resources.html](http://www.osbar.org/leadership/bog/bog_resources.html).

which the court identified as regulating the legal profession and improving the quality of legal services.

*Keller* does not prohibit integrated bars from using member dues to advance political or ideological positions that are not germane to the bar's purpose; however, it requires that dissenting members receive a refund of the portion of dues attributable to the non-germane activity.

### **What are the OSB Public Affairs Legislative Guidelines<sup>2</sup>?**

The OSB's policies and Bylaws limit legislative or policy activities to those reasonably related to any of the following subjects:

1. The regulation and discipline of lawyers;
2. The improvement of the functioning of the courts including issues of judicial independence, fairness, efficacy and efficiency;
3. The availability of legal services to society;
4. The regulation of lawyer trust accounts;
5. The education, ethics, competence, integrity and regulation of the legal profession;
6. The provision of law improvement assistance to elected and appointed government officials;
7. Issues involving the structure and organization of federal, state and local courts in or affecting Oregon;
8. Issues involving the rules of practice, procedure and evidence in federal, state or local courts in or affecting Oregon; and
9. Issues involving the duties and functions of judges and lawyers in federal, state, and local courts in or affecting Oregon.

If the BOG approves a particular proposal for drafting, there are still several opportunities for the board to review the legislative concept before filing. The legislative concepts are not submitted to the legislature until the fall of 2019. Throughout this process, the board will have the ability to ask questions, review the process and proposals, and, if necessary, pull a concept from the package at any point.

Below is the list of legislative proposals from the six bar groups reviewed by the PAC. Legislative concepts that receive approval for drafting will be submitted to Legislative Counsel's office to be drafted. Those bills that receive final BOG approval will be introduced through the Judiciary Committee, and pre-session filed for the 2019 legislative session.

Direct link to proposals: <https://publicaffairs.osbar.org/2019-legislative-concepts/>

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<sup>2</sup> Adopted by the Board of Governors in April 22, 2016 as the OSB Legislative Guidelines incorporating the Conference of Chief Justices Regulatory Objectives.

### **Legislative Proposals**

The PAC recommends that the BOG approve all twelve of these proposals.

1. The PAC recommends approval for the twelve proposals listed below:
  - a. OSB Board of Governors
    - i. Legal Aid Statutory Allocation
    - ii. Agency *pro hac vice* Fees
    - iii. OSB Membership Fees
    - iv. Oregon Department of Revenue Information Sharing
    - v. Electronic Email Address Disclosure
  - b. Business Law Section – Ratification of Defective Corporate Acts
  - c. Debtor/Creditor Section – Lien Information Statements
  - d. Elder Law Section – Heir Liability for Deferred Property Taxes
  - e. Military & Veterans Section
    - i. Housing hotline and Assistance for Servicemembers
    - ii. Court Diversion for Injured Servicemembers
  - f. Nonprofit Section – ORS Chapter 65 Update
  - g. Sustainable Futures Section – Prudent Investor Rule

For each of the proposals listed above, the PAC recommends that the section or committee move forward with its proposal(s) with the expectation that each group will implement the suggestions of the PAC and report back on its progress.

# OREGON STATE BAR

## Board Development Committee Agenda

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**Meeting Date:** May 18, 2018  
**Memo Date:** May 9, 2018  
**From:** Dawn M. Evans, Disciplinary Counsel  
**Re:** Recommendations for appointments to the State Professional Responsibility Board for two unexpired terms in Region 4 and Region 5

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### **Action Recommended**

Make recommendation to Board of Governors to fill one vacancy each in Region 4 and Region 5 on the State Professional Responsibility Board.

### **Background**

#### **State Professional Responsibility Board**

Region 4 member: Kelly D. Lemarr

Region 5 member: Richard Weill

Vacancies have occurred as a result of changes in employment that resulted in two members' relocation outside of the Region in which they were serving. Appointments are being sought for the unexpired terms of the departing members. Richard Weill served a one-year term during 2015 and is eligible to serve a second term pursuant to BR 2.3(a). Given his prior service, he will be able to dive right into service without training. Kelly Lemarr is an attorney with St. Andrew Legal Clinic and will bring experience in family law that will assist in analyzing cases in that area of practice, which is a subject matter area that is frequently the subject of complaints. Kelly has prior experience as a member of a Local Professional Responsibility Committee in Multnomah County. They are recommended for appointments to expire on the dates indicated:

Kelly D. Lemarr, term expiring 12/31/20

Richard A. Weill, term expiring 12/31/19

**Oregon State Bar  
Meeting of the Board of Governors  
May 1, 2018  
Open Session Minutes**

President Vanessa Nordyke called the meeting to order at 11:00 a.m. on May 1, 2018. The meeting adjourned at 12:04 p.m. Members present from the Board of Governors were John Bachofner, Whitney Boise, Chris Costantino, Eric Foster, John Grant, Rob Gratchner, Guy Greco, Michael Levelle, Eddie Medina, Tom Peachey, Julia Rice, Michael Rondeau, Traci Rossi, Kerry Sharp, and David Wade. Not present were Colin Andries, Per Ramfjord, Kathleen Rastetter, and Liani Reeves. Staff present were Helen Hirschbiel, Amber Hollister, Kay Pulju, Susan Grabe, Jonathan Puente, Kateri Walsh, and Dani Edwards. Also present were Daniel Crowe and Maxine Bernstein, Oregonian Reporter.

**1. Call to Order/Finalization of Agenda**

**2. Approval of Meeting Minutes.**

**Motion:** Approve minutes from the April 20, 2018, Board of Governors meeting.

Mr. Rondeau moved, Mr. Bachofner seconded. The board approved the minutes unanimously.

Mr. Bachofner noted that the draft minutes from the April 20 board meeting accurately reflected the board's decision to only refund the portion of Mr. Lindsay's member fees that are attributable to the publication of the Specialty Bar Statement on page 43 of the April 2018 Bar Bulletin.

**3. Requests for Refund of Bar Dues for Publication of the OSB & Specialty Bar Statements in the April 2018 Bulletin**

Ms. Hirschbiel presented information on the responses from members and the public regarding the OSB and Specialty Bar Statements published in the April 2018 Bulletin. Ms. Hirschbiel noted that there were three decisions for the board to consider: the amount indicated the board would discuss the legal analysis of the refund options available during closed session. Additional discussion during the closed session will include the procedure to handle future request for refunds.

At Mr. Bachofner's request, Ms. Hirschbiel provided a summary of the cost scenarios as outlined in the agenda materials. President Nordyke reminded the board of OSB bylaw 12.6 and relating to the bar's requirement to refund only the portion of member fees attributed to the specialty bar statement.

Mr. Crowe inquired as to the board's interest in allowing public comment on this topic. President Nordyke allowed Mr. Crowe to address the board whereby he indicated it was his

understanding that the April 20 BOG decision was to refund bar members their entire membership fee without limitation. Mr. Crowe further indicated he felt it was appropriate for the board to refund the full membership dues to each requesting member to ensure the impact on the bar was as significant as the impact on its members. Mr. Crowe further indicated that if the BOG did not refund member fees in full, the bar would be subject to litigation and possible de-unification on the basis that the organization could no longer effectively self-regulate.

**Executive Session** (pursuant to ORS 192.660(1)(h)) - General Counsel Report

The Board went into closed session.

The Board went into open session.

**Motion:** Motion to refund membership fees attributed to the publication of the Specialty Bar Statement on page 43 of the April 2018 Bar Bulletin due to the confusion created by the placement of the Specialty Bar Statement next to the OSB Statement.

Mr. Bachofner moved, Mr. Peachy seconded, and the board voted unanimously to adopt the motion.

**Motion:** Motion to refund Shawn Lindsay in the amount of \$1.12 plus interest from the date fees were due until the date of the refund.

Mr. Wade moved, Mr. Foster seconded, and the board voted unanimously to adopt the motion.

Ms. Costantino clarified interest is based on the statutory interest. Mr. Bachofner further clarified the refund amount would be rounded up to the nearest cent.

**Motion:** Motion to direct the CEO, pursuant to OSB Bylaws Section 2.800 to approve future “opt-out” refund requests, in an amount and manner consistent with its decision at today’s meeting. Future partial payments will be adjusted to account for variations in interest accrued and the CEO will report back to the board on the status of requests.

Mr. Grant moved, Mr. Wade seconded, and the board voted unanimously to adopt the motion.

**Oregon State Bar**  
**Meeting of the Board of Governors**  
**June 22, 2018**  
**Open Session Minutes**

President Vanessa Nordyke called the meeting to order at 1:02 p.m. on June 22, 2018. The meeting adjourned at 4:38 p.m. Members present from the Board of Governors were Colin Andries, John Bachofner, Whitney Boise, Chris Costantino, Eric Foster, John Grant, Guy Greco, Michael Levelle, Eddie Medina, Per Ramfjord, Kathleen Rastetter, Liani Reeves, Julia Rice, Kerry Sharp, and David Wade. Not present were Rob Gratchner, Tom Peachey, Traci Rossi, and Michael Rondeau. Staff present were Helen Hirschbiel, Amber Hollister, Dawn Evans, Susan Grabe, Dani Edwards, Keith Palevsky, Jonathan Puente, and Kay Pulju. Also present: Jennifer Nicholls, ONLD Chair; Carol Bernick, PLF CEO, and Rob Raschio, PLF Liaison.

**1. Call to Order/Finalization of Agenda**

The board accepted the agenda, as presented, by consensus.

**2. 2018 Strategic Areas of Focus**

**A. New Lawyer Program Review**

Ms. Costantino updated the board on the review of new lawyer programs, which was the subject of a joint meeting between the Policy & Governance and Budget & Finance Committees in May. Continued discussion took place at the June meeting.

**B. Futures Task Force Progress Report.**

Ms. Hirschbiel presented the Futures Task Force progress report. The Referral Fee Committee and Alternative Pathways Task Force have been and will continue meeting. An OSB law clerk has been working to develop resources for self-navigators dealing with housing issues.

**C. Diversity Action Plan Update**

**1. Membership Goal 2, Strategy 2**

President Nordyke identified the board's responsibilities as outlined in the Diversity Action Plan (DAP), Membership Goal 2, Strategy 2. She encouraged BOG members to participate in the Harvard Project Implicit Bias tests found online.

The board discussed accountability around the goals and strategies relevant to the board. Moving forward the Board Development Committee and Immediate Past President will work together to determine what program will be scheduled for annual board member training. Board members noted that in addition to attending board trainings all board members must remain independently accountable for implementing board actions outlined in the DAP.

**2. Other DAP Implementation Updates**

Mr. Puente updated the board on progress of implementation of the DAP. The climate survey to gather baseline data is scheduled to launch in the fall. The Diversity & Inclusion department is connecting with legal employers to discuss retention of non-dominant culture attorneys. The department is also working with the Advisory Committee on Diversity and Inclusion to develop a toolkit on lawyer retention for legal employers.

Mr. Puente updated the board on the department's program evaluation and review process. The department has been evaluating the OLIO Orientation and the department's fellowship and stipend programs to seek efficiencies and increase impact.

### 3. BOG Committees, Special Committees, Task Forces and Study Groups

#### A. *Ad Hoc* Awards Committee Formation

Ms. Pulju requested volunteers to serve on an *Ad Hoc* Awards Committee. She outlined the purpose of the committee and the timeline of the award honoree selection process. Ms. Nordyke, Mr. Bachofner, Mr. Grant, Ms. Reeves, Ms. Rastetter, and Mr. Andries volunteered to serve on the committee.

#### B. Public Affairs Committee

Ms. Rastetter presented information on the addition of one legislative proposal that would make an administrative change to ORS Chapter 9. The intent of the administrative change is to correct a drafting error that occurred in the 2015 legislative session.

**Motion:** Mr. Bachofner, Mr. Boise, Ms. Costantino, Mr. Foster, Mr. Grant, Mr. Greco, Mr. Medina, Mr. Ramfjord, Ms. Rastetter, Ms. Reeves, Ms. Rice, Mr. Sharp, and Mr. Wade voted in favor of the Public Affairs Committee motion to add the proposal outline in Exhibit A to the bar's legislative package. Mr. Andries abstained. The motion passed.

#### C. Budget & Finance Committee

Mr. Wade provided an update on the bar's reserves and finances. Of particular note, revenue for the Admissions Department and Lawyer Referral Services are up from what is budgeted. Based on the high Client Security Fund claim volume the committee may suggest an increase in the Client Security Fund Assessment for 2019 to maintain adequate reserves.

#### D. Policy and Governance Committee

##### 1. Bulletin Editorial Function Review

Ms. Costantino presented the committee's motion to amend the bylaws as outlined in Option 1, waive the one-meeting notice requirement for amending the bylaws, and review editorial policies at the July meeting. Ms. Costantino noted that the Committee is also considering whether to propose the creation of an Editorial Advisory Committee at a later date. **[Exhibit A]**

**Motion:** The board voted unanimously in favor of the motion to amend the bylaws and waive the one-meeting requirement. The motion passed.

2. Ms. Costantino presented the committee motion to create a Program Review Policy. Mr. Andries asked whether the policy included an opportunity to provide substantive

comments during the review process, and Ms. Hirschbiel confirmed a comment field was added to the Program Review Policy scoring form.

**Motion:** The board voted unanimously in favor of adopting the Policy & Governance Committee's recommended Program Review Policy. The motion passed.

**E. Board Development Committee**

**1. Appointments to Bar Groups and Affiliated Boards**

Mr. Greco presented the committee's recommendations for appointments to various bar groups. **[Exhibit B]**

**Motion:** The board voted unanimously in favor the Board Development Committee's recommended for appointments to the Client Security Fund Committee, the House of Delegates, and the nomination recommendations for the Ninth Circuit Judicial Conference Lawyer Representatives. The motion passed.

**Motion:** The board voted unanimously in favor the Board Development Committee's recommendations for appointments to the Oregon Law Center and Legal Aid Services of Oregon board. The motion passed with Ms. Reeves abstaining.

**2. Input on Board of Bar Examiners Appointment Candidates**

Mr. Greco summarized the committee's discussion of the BBX appointment input. The board discussed its concerns about the reappointment of members for more than two terms. The BBX's institutional structure and appointment process create barriers to change and do not promote diversity. The immediate past president was tasked with communicating the board's input to the BBX.

**4. Professional Liability Fund**

Mr. Rachio updated the board on PLFs operations including a screening process to ensure there were not securities issues in the underwriting excess program. The PLF is expressed its gratitude for the service of long-time public member Tim Martinez who will be cycling off the PLF Board of Directors this year.

**5. OSB Committees, Sections, Councils and Divisions**

**A. Oregon New Lawyers Division**

Ms. Nicholls presented on the activities of the ONLD since the last BOG meeting including the reception for Oregon's newest lawyers, the completion of the essay contest, and various other activities.

**6. Closed Sessions – see CLOSED Minutes**

**A. Executive Session (pursuant to ORS 192.660(1)(f) and (h)) - General Counsel/UPL Report/Judicial Proceedings**

**The board went into closed session.  
The board reconvened in open session.**

**Motion:** Ms. Reeves moved to authorize the filing of a civil injunction against Erick Soto in UPL Case Nos. 2017-34, 35, 36 and 37, pursuant to OSB Bylaw 20 and ORS 9.166, and Mr. Bachofner seconded. The board voted unanimously in favor of the motion. The motion passed.

**The board went into closed session.**  
**The board reconvened in open session.**

**Motion:** Mr. Bachofner moved to approve the proposed *Keller* Arbitration Agreement as to form, pursuant to OSB Bylaw 12.601, and Mr. Foster seconded. The board voted unanimously in favor of the motion. The motion passed.

**The board went into closed session.**  
**The board reconvened in open session.**

**Motion:** Mr. Wade moved to recommend that the CEO allow Ms. Hollister to waive conflict and continue to serve as Bar's counsel in the *Keller* arbitration. Mr. Grant seconded the motion. The motion passed unanimously.

**7. BOG Committees, Special Committees, Task Forces and Study Groups Cont.**

**A. Legal Ethics Committee**

Ms. Hirschbiel presented the Legal Ethics Committee recommendation to withdraw OSB Formal Op No 2005-180 and amend OSB Formal Op No 2005-168. She explained that the current opinions are inaccurate because they do not cite the most current versions of the Oregon Rules of Professional Conduct.

**The board went into closed session.**  
**The board reconvened in open session.**

**Motion:** Mr. Wade moved to reject the recommendations of the Legal Ethics Committee and to instruct the Committee to revise the opinion to conform to existing rules. Mr. Greco seconded. Ms. Reeves voted in favor. Mr. Grant, Mr. Medina, Ms. Foster, Ms. Rastetter, Ms. Costantino, Mr. Ramfjord, Mr. Sharp, Ms. Rice, Mr. Andries, and Mr. Boise voted against. Motion failed.

**Motion:** Mr. Ramfjord moved to approve the Legal Ethics Committee's recommendation to withdraw OSB Formal Op No 2005-180 and amend OSB Formal Op No 2005-168, and Ms. Rastetter seconded. Mr. Boise, Mr. Grant, Mr. Medina, Mr. Foster, Ms. Reeves, Ms. Rastetter, Mr. Ramfjord, Ms. Costantino, Ms. Rice, Mr. Grant, Mr. Andries, Mr. Bachofner. Mr. Wade and Mr. Greco opposed. No abstentions. Motion passed.

**B. MCLE Committee**

Ms. Hollister presented the MCLE Committee's proposal to recommend a mandatory mental health and substance use MCLE requirement to the Oregon Supreme Court. She explained that the PLF and OAAP proposed the change. Ms. Bernick informed the board of the ongoing significant national increase in need around these issues. The board discussed the urgency of the need for the proposed change to protect the public.

**Motion:** Mr. Greco moved to recommend the proposed rule changes and send them to the Supreme Court for consideration. Mr. Bachofner seconded. Mr. Boise, Mr. Grant, Mr. Medina, Ms. Reeves, Mr. Andries, Ms. Rice, Ms. Rastetter, Mr. Wade, and Mr. Sharp voted in favor. Mr. Ramfjord, Ms. Costantino, and Mr. Foster voted against. Motion passed.

**Motion:** Mr. Greco moved, Ms. Costantino seconded, to make a modification of the proposed rule to indicate that the new lawyer practical skills requirement in MCLE Rule 3.3 would be reduced to nine credits and replace all references to ten practical skills credits in the rule. Motion passed unanimously.

**8. Becker Capital Management Investment Advisory Agreement**

**A. Approval of Designated Representatives**

Ms. Hirschbiel requested the board's approval to identify Keith Palevsky, Director of Finance and Operations, as the Bar's representative for modifications with Becker Capital Management investment portfolio.

**Motion:** Mr. Andries moved to approve Keith Palevsky as the Bar's representative. Ms. Costantino seconded. Motion passed unanimously.

**9. Consent Agenda**

Ms. Nordyke asked if any board members would like to remove any items from the consent agenda for discussion and a separate vote. No one asked to do so.

**Motion:** Mr. Greco moved, Mr. Wade seconded, and the board voted unanimously to approve the consent agenda and past meeting minutes.

**A. Report of Officers & Executive Staff**

Report of the President

Ms. Nordyke updated the board on recent activities.

Report of the President-elect

Ms. Costantino updated the board on recent activities.

Report of the Executive Director

As written.

Report of Regulatory Services Director

As written.

Report of the MBA Liaison

Ms. Costantino updated the board on recent meetings.

**10. Good of the Order (Non-action comments, information and notice of need for possible future board action)**

Ms. Nordyke thanked members for their participation.

The meeting adjourned.

# OREGON STATE BAR

## Policy & Governance Committee Agenda

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**Meeting Date:** June 22, 2018  
**From:** Helen M. Hirschbiel, CEO  
**Re:** Editorial Function Review

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### **Action Recommended**

Approve existing editorial policies and consider bylaw amendments related to editorial function.

### **Background**

This Committee is engaged in an overview of The Bulletin's editorial function and policies as part of its work plan. The current bylaws and editorial policies that relate to The Bulletin are attached.

At present, the bar relies on The Bulletin's Editor and staff to determine content and set editorial policies. The Chief Executive Officer retains authority to make the final determination of whether materials meet editorial policies.

The Board has expressed an interest in exploring other approaches to The Bulletin's editorial function. In considering options, staff focused on methods that would foster increased member input, transparency and accountability for The Bulletin's editorial function.

Further, there have been significant staffing changes at The Bulletin in the last few years, and there are likely to be additional changes in the future. For this reason, it is important to create structures that will maintain the high standards that have long been a hallmark of the publication.

### **The Approach of Other Mandatory Bars**

Mandatory bars typically utilize an advisory committee or editorial board to assist with the development of content, the drafting of editorial policies, and the review of materials prior to publication.

The Washington State Bar Association uses an Editorial Advisory Committee<sup>1</sup> to work with the editor and WSBA staff overseeing publication of WSBA's official magazine, NWLawyer. The committee is charged with establishing guidelines and editorial policy, maintaining an editorial calendar, writing articles, securing content, identifying topics and issues relevant to members, identifying authors for content, reviewing articles, and advising on issues related to content.

In California, editorial staff has primary responsibility for determining the editorial content to be published in the California State Bar Journal. Oversight of the editorial staff and

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<sup>11</sup> Information about the WSBA Editorial Advisory Committee is available at <https://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/editorial-advisory-committee>

Publication, however resides with the bar's Executive Director, and the designated Board Committee and ultimately, the Board of Trustees.

The Idaho State Bar has an editorial board, which is tasked with determining the theme, selecting and recruiting authors for lead articles, and reviewing the content of each issue. Idaho employs a managing editor that staffs the editorial board, who addresses content matters directly with the editorial board. The managing editor reports to the deputy executive director.<sup>2</sup>

The Missouri Bar also has an Editorial Board, which primarily concerns itself with making policy decisions (pending approval by the Board of Governors) regarding the Journal of The Missouri Bar (such as establishing advertising rates). A sub-group of the Editorial Board conducts a review of submitted articles to ensure that they are of general interest to members of The Missouri Bar. The executive director also reviews each issue of the journal prior to publication.

The Hawaii State Bar utilizes an editorial board (comprised of volunteer attorneys) to completely manage the content of its monthly magazine. The bar staff, including the executive director, do not collaborate with the editorial board on content. Instead, staff has a regular column in which to include news on bar activities and events. The staff may also request an extra page or space to publish other important or timely articles from time to time.

Until recently, the Virginia Bar used a Communications Committee to assist with editorial review of its bar publication. It is in the process of creating a new process for editorial review.

**Option 1: Amend Bylaws to Require Board Approval of Editorial Policies.  
Review and Approve Current Editorial Policies.**

In order to provide greater Board oversight of The Bulletin, staff recommends that the bylaws be amended as follows to require Board approval of editorial policies:

Subsection 11.2.2 Editorial Policies

~~The Chief Executive Officer may establish editorial standards for bar communications and material permitted by the Bar to be included in its communications concerning~~ 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 11.2.3 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 ~~policy~~ section and to accept or reject material submitted to the Bar for

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<sup>2</sup> The Idaho State Bar editorial guidelines are available at <https://isb.idaho.gov/wp-content/uploads/advauthorguidelines.pdf>,

publication based on that determination. ~~Editorial standards must comply with Article 10 Diversity.~~

If the Committee approves this recommendation, staff further recommends that the attached Editorial Policies and Guidelines be submitted to the Board for its approval.

This approach would provide additional Board oversight for the Bulletin. It would not, however, give Board members (or any other volunteers) a direct voice in editorial decisions. Editorial decisions would remain entirely a staff responsibility. Staff may choose to seek input from one or more Board members, but would not be required to do so.

## **Option 2: Create an Editorial Advisory Committee**

In addition to Option 1, the Policy & Governance Committee should consider whether to establish an Editorial Advisory Committee to provide input on editorial policies and content. The following proposed bylaw amendments would implement this second option:

### **Section 11.2 Editorial Standards**

#### **Subsection 11.2.1 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.

This approach would provide greater Board accountability for The Bulletin and a vehicle for continued member input on content and editorial policies. Further, discussion of editorial policies and content at public meetings would increase transparency of the editorial process.

If the Policy & Governance Committee is interested in pursuing this approach, staff would seek additional information and input to develop a proposed charge for the Editorial Advisory Committee, as well as a recommendation for its size and constituents, and bring options back to the Policy & Governance Committee for further consideration.

## **Options**

### **1. Option 1:**

- a. Recommend the Board amend Bylaws to require Board approval of editorial policies
- b. Recommend Board waive the one-meeting notice requirement; and
- c. Recommend the Board approve current editorial policies.

### **2. Option 2:**

- a. Recommend the Board amend Bylaws to establish an Editorial Advisory Committee.
- b. Gather additional information about the possible make-up and role of an editorial advisory committee.

### **3. Maintain Status Quo.** This option would retain the status quo.

Attachments: OSB Bylaws Article 11

The Bulletin Editorial and Advertising Guidelines

## **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**

The Chief Executive Officer may establish editorial standards for bar communications and material permitted by the Bar to be included in its communications concerning 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. The Chief Executive Officer as sole discretion to determine whether material submitted meets the standards set forth in or adopted pursuant to this policy and to accept or reject material submitted to the Bar for publication based on that determination. Editorial standards must comply with Article 10 Diversity.

### **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.

### **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.

## **Editorial and Advertising Guidelines**

### **Oregon State Bar Bulletin**

#### **Definitions and Purposes**

The Bulletin is published for members of the Oregon State Bar. The purpose of the Bulletin is to provide the members of the Oregon State Bar with information that will directly affect their practice of law in Oregon, will aid and improve their business, and will keep them informed on activities and issues in the legal profession. Humor and human-interest articles are also published. It is not a consumer magazine, nor a law library text/review book. We strive to publish articles that are topical, thought-provoking, and address issues and topics of interest to significant segments of the bar. We aim to be read, be quoted and be retained.

The Bulletin is published 10 times a year – monthly, except for two-month issues in February-March and August-September. The print version is published in a standard magazine format, 8 1/2 x 11 inches, about 56-72 pages per issue, and the online version is published in manner intended to replicate the presentation of the print version. As a general rule, each issue contains two main feature articles, regular and semi-regular columns, and regular departments, such as "Among Ourselves" and "Moves." The Bulletin also contains a section known as "Bar News." The purpose of this section is to update members on state bar meetings, events and policies; and law-related developments, law-related organizations, judicial updates, and other news items of potential interest to OSB members.

#### **Article Submission**

Articles should be approximately 1,500-2,500 words in length, unless another arrangement between the editor and author(s) is made. All submitted articles should be delivered electronically using standard word-processing software. An emailed cover letter should accompany the article containing: a) name(s) of author(s); b) a suggested title and appropriate subheads for the article; c) an outline of the article; and d) a brief (2-3 sentence) biography of the author(s). Authors must fully disclose any personal or professional involvement in the subject of any article. If any such disclosure involves a pending legal matter, that information will be published as an editor's note to the article.

Footnotes should be typed on a separate page at the end of the article, although every attempt should be made by the author(s) to incorporate necessary information within the body of the article. Footnotes are used only to amplify a point in the text or cite a source and should not become a separate article in themselves. Generally, the Bulletin uses "A Uniform System of Citation," a reference guide published by the Harvard Law Review Association, for footnote style. If possible, footnotes should be limited to no more than 15 per article.

Upon receipt of an unsolicited article, idea outline or query letter, the author will receive an "acknowledgement" message from the editor stating that the article, idea outline or query letter will be reviewed by the editor to determine whether it answers the majority of the guidelines listed below. The editor will contact the author within two to three weeks regarding the possible publication of the article. Query letters are strongly encouraged prior to the submission of articles.

Submitted articles become the property of the Oregon State Bar, unless a different arrangement is made between the editor and the author(s). Artwork, photographs and illustrations accompanying unsolicited or solicited articles are gladly accepted, but their use is not guaranteed. Submitted artwork, photographs and illustrations, whether published or unpublished, will only be returned at the sender's request.

#### **General Publication Policies**

In general, all articles published in the Bulletin must be germane to the law, lawyers, the practice of law, the courts and judicial system, legal education or the Oregon State Bar. All opinions, statements and conclusions expressed in submitted articles appearing in the Bulletin are those of the author(s) and not necessarily those of the editorial staff, employees of the Oregon State Bar, or members of the Board of Governors. Publication of any article is not to be deemed an endorsement of those opinions, statements and conclusions expressed by the author(s). [Any content attributed to the Oregon State Bar Board of Governors must be approved by the bar's CEO or General Counsel.](#)

All submitted material is subject to editing by the editor. Material is edited for style, clarity and accuracy, and for purposes of space considerations. Some editing may involve selective omission of portions deemed by the editor to be less important than others. References to personal characteristics (e.g., age, race, ethnicity, gender identity) of any person described or quoted in an article submitted for publication will be removed unless the description is germane to the article and has been reviewed and approved by the person described. The editor will make every reasonable effort to inform the author of changes and to involve the author in any editing of technical, controversial or sensitive material. The editor retains at all times authority regarding story placement, headlines and article scheduling.

#### **Feature Articles**

The following guidelines will be applied to every major article submitted for publication, whether unsolicited or solicited, and the author should edit his or her own work if it does not meet the following criteria:

1. Does the content of the article directly affect the practice of law in Oregon?
2. Will the information in the article help Oregon State Bar members in their daily business activities?

3. Is the topic of timely importance?
4. Is there broad interest to the majority of Oregon State Bar members?
5. Does the author(s) of the article have the necessary expertise to write about the subject in question, or has he or she conducted sufficient research to do so?
6. Is the article of an appropriate length to fully (but not overly) cover the subject? If determined by the Bulletin editor to be overly long, can it be shortened? If determined to be too brief, can it be expanded upon?
7. Is the subject matter new material, not something already covered in the Bulletin within the last year or two?
8. Does the author present ideas in a balanced manner rather than presenting one side of an issue? If not, has the opposing viewpoint also been presented alongside the main feature?
9. Does the article contain information not already covered in another publication, such as in a local daily, weekly or monthly?
10. Would the article be more appropriately published in a section newsletter or other law-related publication than the Bulletin?

There are occasional cases where established guidelines will be waived and material need not satisfy all of the guidelines set forth above. Examples include: human-interest articles about persons in the legal community; humorous or anecdotal articles; historical pieces; and creative writing. Such submissions are evaluated on a case-by-case basis by the editors, who retain responsibility for story evaluation.

#### **Non-Feature Articles**

*Moves and Among Ourselves:* As a courtesy to OSB members, the Bulletin provides at no charge separate columns announcing lawyer relocations and promotions ("Moves"), and other news of attorney members ("Among Ourselves"). Subjects of both columns must be members of the Oregon State Bar. (Paid announcements are discussed below in "Advertising; Lawyer Announcements.") Because of the volume of mail received, individual submissions for these columns will not be acknowledged by the editor, except where a specific request for response is made by the author(s). Photographs are published for a fee.

*Columns:* Space is made available for publication of columns, some of which may recur from issue to issue, e.g., Managing Your Practice, Practice Tips, Legal Heritage, On Professionalism and Law & Life. Columns are subject to all policies outlined here. Publication of columns does not constitute a permanent agreement for ongoing publication; the status of all columns is subject to review by the editor and the publications team (See "General Publications Policies; Story Development").

*Departments:* The Bulletin also includes some dedicated article department that appear in most if not all issues, such as Bar Counsel and Legal Writer columns. It also saves room for President's Messages a particular bar president may wish to submit during his or her term and Chief Justice messages from time to time.

*Opinions:* Opinion pieces are published in the column "Parting Thoughts." Opinion pieces must be arranged in advance with the editor, before consideration of publication. Opinion pieces may address any topic of law or legal practice, but may not contain language constituting an attack upon an individual, group or organization, and may not promote individual products, services or political candidates.

*Continuing Legal Education (CLE) Information:* Coverage of Legal Publications and CLE seminars sponsored by the Oregon State Bar is provided on a space-available basis. The Bulletin places a low priority on providing editorial coverage of non-Oregon State Bar CLE activities and publications; display and classified advertising may be purchased to publicize non-Oregon State Bar CLE activities and publications.

#### **Letters to the Editor**

The Oregon State Bar realizes that a wide range of subject matters are to be expected in letters to the editor. The Bulletin strives to print as many letters as possible. Therefore, brevity is important, and preference will be given to letters that are 250 or fewer words. Preference will be given to letters in response to articles, columns or letters to the editor recently published in the Bulletin. Letters from Oregon State Bar members receive top priority for publication in the next available issue.

Guidelines are designed to set a standard for acceptable material. Letters must be addressed directly "To the Editor" and original to the Bulletin. No unsigned or anonymous letters will be printed; the executive director may waive this requirement, if such waiver is requested.

When responses occur over several issues, the editor reserves the right to cease printing letters on the subject in question. The editor also reserves the right to hold a letter to the editor until a subsequent issue. Letters from non-Oregon State Bar members are published if space permits and if the subject matter is deemed to be of interest to Oregon State Bar members.

Letters to the editor may be edited for grammatical errors, style or length, or in cases where language or information is deemed unsuitable or inappropriate for publication. The editor reserves the right to select or withhold letters for publication, and to edit any and all letters chosen for publication. Profane or obscene language will not be accepted. The Bulletin will not publish letters containing language constituting an attack upon an individual, group or organization. Letters may not promote individual products, services or political candidates.

### **Copyright and Compensation**

All material published in the Oregon State Bar Bulletin is copyrighted. Unless other arrangement is made between the editor and author(s), all material published remains the property of the Oregon State Bar and/or the author(s). The Bulletin holds right of first publication for all solicited articles and all unsolicited articles accepted for publication.

Permission for reprinting must be requested in writing; permission to reprint must be granted prior to publication. Any material originally submitted to and published in the Bulletin may be reprinted by another publication with appropriate credit given to both the author(s) (if appropriate) and the Oregon State Bar Bulletin as original source(s) for the material.

The Oregon State Bar will not compensate for any unsolicited or solicited articles, published or unpublished artwork, photographs, illustrations, etc., unless agreed upon between the sender of the material and the editor.

### **Advertising**

Advertising is sold to OSB members, and to advertisers in the general public as well. Except where noted, all advertising policies and pricing apply to OSB members and non-members equally.

*Classified Advertising:* Firms or organizations offering professional employment opportunities or services are available at the same rate to OSB members and non-members. The Bulletin will not publish employment announcements for employers who do not comply with OSB Bylaw 10 (diversity). Advertising for alcohol, tobacco and tobacco products, and firearms of all kinds are not accepted for publication. The Bulletin will not publish advertising for law-related services provided by disbarred attorneys. Non-position and non-service classifieds are available to OSB members at a reduced rate. The editor reserves the right to reject any advertisement at any time.

*Display Advertising:* Display advertising is available for purchase by both OSB members and non-members. Contact information is available in each issue of the Bulletin and current rates are available from the bar's website.

*Lawyer Announcements* are available to announce changes in law firms or practices and are available only to members of the Oregon State Bar, or their law firms or offices.

*House and Filler Advertising. Advertising space may be available at no charge for Oregon State Bar programs, legal community partners and nonprofit organizations. Organizations recognized*

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~~by the State of Oregon as nonprofit organizations, or possessing the nonprofit status outlined in IRS Code 501(c)(3), may qualify for discounted or free advertising in the Bulletin. Free advertising is offered available on a space-available basis; the amount of space available for each issue will be determined only after layout is complete for all editorial content and other advertisements. Requests for free advertising space must be made to the Editor, camera-ready basis only; such space will not be guaranteed.~~ Guaranteed paid advertising is available at a discount to recognized nonprofit organizations. The editor reserves the right to reject any advertisement at any time.

### **Subscriptions and Circulation**

The Bulletin is mailed to all active, inactive, active pro bono, retired and student members of the OSB and is also available in electronic format on the bar's website. Subscriptions are available to non-OSB members at the rate of \$50 per year. Complimentary copies of the publications are mailed to Oregon's law schools, a number of other state bars who reciprocate for mutual editorial benefit, and local law libraries, on request. Complimentary copies are available at the discretion of the editor or the executive director.

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** June 22, 2018  
**From:** Guy Greco, Board Development Committee Chair  
**Re:** Appointment recommendations to various bar and bar-affiliated groups

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### Action Recommended

Approve the Board Development Committee's recommendations for member and non-member appointments to the following groups.

### Background

#### Client Security Fund Committee

The Client Security Fund Committee investigates and recommends acceptance or rejection of claims for reimbursement of lawyer theft or misappropriation of client money. The committee is in need of one new member and **Stephanie Thompson** (065251) is recommended based on her experience and the balance she brings to the committee's gender, geographic, and practice areas. If appointed, Ms. Thompson's term would expire on December 31, 2019.

#### House of Delegates

Region 2: Wendy Walker, public member, term expires 4/19/2021

Region 3: Victory Walker, 014483, term expires 4/20/2020

Region 4: James Marron, 001482, term expires 4/20/2020

Region 5: Michael J. Patterson, public member, term expires 4/19/2021

Dan Simon, 124544, term expires 4/20/2020

Kevin Parks, 096728, term expires 4/20/2020

#### Oregon Law Center and Legal Aid Services of Oregon Board

The OSB Board of Governors has authority to make appointments to these two governing boards. The boards consist of the same members, and one new member is needed. **Ivan Resendiz Gutierrez** (154617) is recommended for a three-year appointment.

#### Ninth Circuit Lawyer Representative Recommendations

The US District Court requests appointment recommendations from the OSB Board of Governors for lawyer representatives for the 9<sup>th</sup> Circuit Judicial Conference. **Erin Biencourt** (131669) is recommended based on her experience in tribal law as well as the geographic and gender balance she would bring.

**Oregon State Bar  
Board of Governors Meeting  
June 22, 2018  
Executive Session Minutes**

Discussion of items on this agenda is in executive session pursuant to ORS 192.660(2)(f) and (h) to consider exempt records and to consult with counsel. This portion of the meeting is open only to board members, staff, other persons the board may wish to include, and to the media except as provided in ORS 192.660(5) and subject to instruction as to what can be disclosed. Final actions are taken in open session and reflected in the minutes, which are a public record. The minutes will not contain any information that is not required to be included or which would defeat the purpose of the executive session.

A. Unlawful Practice of Law Litigation

1. Divya Khullar, Emmanuel Rosario, Alexander Pena & Khullar Law

The UPL Committee seeks authority to file a suit for a civil injunction against Erick Soto as an additional defendant in the bar's suit seeking to enjoin persons from the unlawful practice of law under ORS 9.166.

B. Pending Non-Disciplinary Litigation

Ms. Hollister informed the board of non-action items.

C. Threatened Litigation

Ms. Hollister informed the board of non-action items.

D. Other matters

Ms. Hollister sought the board's input on and provided legal advice with respect to additional legal matters.

**Oregon State Bar**  
**Meeting of the Board of Governors**  
July 27, 2018  
**Special Open Session Minutes**

President Vanessa Nordyke called the meeting to order at 11:04am on July 27, 2018. The meeting adjourned at 11:15am. Members present from the Board of Governors were Colin Andries, John Bachofner, Chris Costantino, Eric Foster, John Grant, Rob Gratchner, Guy Greco, Eddie Medina, Tom Peachey, Liani Reeves, Julia Rice (phone), Whitney Boise, Kerry Sharp, David Wade and Traci Rossi (phone.) Not present were Kathleen Rastetter Michael Rondeau, and Per Ramfjord. Staff present were Helen Hierschbiel, Amber Hollister, Susan Grabe, Jonathan Puente, Kay Pulju, and Dani Edwards. Also present was Jennifer Nichols, ONLD Chair.

**1. Call to Order**

Ms. Nordyke called the meeting to order. No additions to the agenda were presented.

**2. Ad Hoc Awards Committee**

Ms. Nordyke presented the committee's recommended award recipients. **[Exhibit A]**

**Motion:** The board voted unanimously in favor of approving the award recommendations. Ms. Nordyke and Ms. Reeves abstained.

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** July 27, 2018  
**Memo Date:** July 27, 2018  
**From:** BOG Awards Committee  
**Re:** Award recommendations for 2018

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### Action Recommended

Approve the following slate of recipients for the 2018 OSB President's Award, Wallace P. Carson Jr. Award for Judicial Excellence and Award of Merit. Endorse President Nordyke's selections for the President's Special Award of Appreciation.

President's Membership Service Award  
Hon. Beth A. Allen

President's Public Service Award  
Lorena M. Reynolds  
Laura M. Kerr

President's Diversity & Inclusion Award  
Stella K. Manabe  
Jonathan A. Patterson

President's Public Leadership Award  
Elise Bouneff, Kristen Connor, Randy Compton and Laura Shipley

President's Innovation & Technology Award  
Hon. Ann Aiken

Wallace P. Carson Jr. Award for Judicial Excellence  
Hon. Patricia Crain  
Hon. Youlee Yim You

OSB Award of Merit  
Andrew Morrow

President's Special Award of Appreciation  
Ryan W. Collier and Stephanie M. Palmblad

## **Background**

The ad hoc Awards Committee met by conference call on July 17 and in person on July 27 to review nomination materials and develop the recommendations detailed above. Members of the committee are: Vanessa Nordyke (Chair), Liani Reeves, Kathleen Rastetter, Colin Andries, John Grant and John Bachofner. The annual Awards Luncheon will take place on Wednesday, November 7, at the Sentinel Hotel in Portland.

*Letter to the Editor, Oregon State Bar Bulletin  
September 6, 2018*

As a coalition of national diverse bar associations, we stand united with the Oregon State Bar and the Oregon Specialty Bar Associations as they speak out against xenophobia and hate violence.

The Oregon State Bar and the Oregon Specialty Bar Associations, including our local affiliate bar associations, issued a statement condemning white nationalism and calling on the legal community to oppose the normalization of racism and violence, as published in the April 2018 Oregon State Bar Bulletin. Since its publication, we have received unacceptable reports that many of the leaders of the Oregon Specialty Bar Associations have been subject to harassment and threats that are intended to impact their professional licenses.

As attorneys in a region known for its relative lack of diverse membership at all levels and, more particularly, in senior positions, the voice and vision of these specialty bars and their leaders are critical. They make our profession stronger. They make our communities stronger. They serve as the role models our communities need.

These specialty bars are giving voice to our common mission to promote a more inclusive profession and society. Speaking out against white nationalism and the normalization of hate is not “political.” It is a moral imperative. We reject the harassment these bar leaders face for speaking out for our highest ideals.

All bar associations and lawyers have an obligation to promote diversity and inclusion and to stand up for the rights of minority and marginalized communities. That is why we join with our Oregon bar associations in rejecting hate and condemning white nationalism.

Erica V. Mason  
President  
Hispanic National Bar Association

Sarretta C. McDonough  
President  
National Association of Women Lawyers

Pankit J. Doshi  
President  
National Asian Pacific American Bar Association

Joseph Drayton

President  
National Bar Association

D'Arcy Kemnitz  
Executive Director  
National LGBT Bar

Joel West Williams  
President  
National Native American Bar Association



**YOU CAN'T CHANGE WHAT YOU CAN'T SEE**

Interrupting Racial & Gender Bias  
in the Legal Profession





# YOU CAN'T CHANGE WHAT YOU CAN'T SEE

## Interrupting Racial & Gender Bias in the Legal Profession

This report was prepared and written for the American Bar Association's Commission on Women in the Profession and the Minority Corporate Counsel Association by Joan C. Williams, Marina Multhaup, Su Li, and Rachel Korn of the Center for Worklife Law at the University of California, Hastings College of the Law.



Cover design by Amanda Fry/ABA Design.

The materials contained herein represent the opinions of the authors and/or the editors, and should not be construed to be the views or opinions of the law firms or companies with whom such persons are in partnership with, associated with, or employed by, nor of the American Bar Association or the Commission on Women in the Profession unless adopted pursuant to the bylaws of the Association.

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# Foreword

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For decades, the American Bar Association Commission on Women in the Profession (“the Commission”) and the Minority Corporate Counsel Association (“MCCA”) have worked tirelessly to combat gender and racial bias in the legal profession. Nonetheless, statistics on women’s advancement have not changed appreciably over the years. In 2016, the Commission and MCCA partnered with the Center for WorkLife Law at the University of California, Hastings College of the Law to conduct research to understand further law firm and in-house lawyers’ experiences of bias in the workplace. This new research confirms that many of the traditional diversity tools we have relied upon over the years have been ineffective, and the findings have served as the foundation in developing the next generation of diversity tools that you will find in *You Can’t Change What You Can’t See: Interrupting Racial & Gender Bias in the Legal Profession*.

The first part of this research report details four main patterns of gender bias, which validate theories that women lawyers long have believed and feelings they long have held. Prove-It-Again describes the need for women and people of color to work harder to prove themselves. Tightrope illustrates the narrower range of behavior expected of and deemed appropriate for women and people of color, with both groups more likely than white men being treated with disrespect. Maternal Wall describes the well-documented bias against mothers, and finally, Tug of War represents the conflict between members of disadvantaged groups that may result from bias in the environment.

The second part of the research report offers two cutting-edge toolkits, one for law firms and one for in-house departments, containing information for how to interrupt bias in hiring, assignments, performance evaluations, compensation, and sponsorship. Based upon the evidence derived from our research, these bias interrupters are small, simple, and incremental steps that tweak basic business systems and yet produce measurable change. They change the systems, not people.

Considerable time, energy, and money were invested to develop persuasive proof of why we need to take a different approach to diversity issues and to develop the toolkits that can be used to make those changes. Taken together, the survey results serve as a reminder of the importance of the connections we make between individuals. Through sharing, we are reminded that we are not alone in our experiences in the workplace, and that is an important first step in making the work environment more inclusive and welcoming.

Jean Lee, President and CEO  
Minority Corporate Counsel Association

Michele Coleman Mayes, Chair, 2014–2017  
ABA Commission on Women in the Profession

# Acknowledgments

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The ABA Commission on Women in the Profession and the Minority Corporate Counsel Association would like to thank the following individuals for generously donating their time to this important project.

## Working Group Members\*

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Thank you to Microsoft Corporation and Walmart for their early support in completing this project.

# Executive Summary

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This report is the first of its kind to provide a comprehensive picture of how implicit gender and racial bias—documented in social science for decades—plays out in everyday interactions in legal workplaces and affects basic workplace processes such as hiring and compensation.

In April 2016, the American Bar Association’s Commission on Women in the Profession, the Minority Corporate Counsel Association, and the Center for WorkLife Law at the University of California, Hastings College of the Law launched a survey seeking to understand in-house and law firm lawyers’ experiences of bias in the workplace: 2,827 respondents completed the survey, and 525 respondents included comments.

The survey asked respondents whether they had experienced the patterns of gender and racial bias that have been documented in decades of experimental social psychology studies. In addition, the survey asked whether attorneys had experienced implicit bias in basic workplace processes (hiring, assignments, business development, performance evaluations, promotions, compensation, and support). Also included was a series of questions about sexual harassment.

To examine how bias affects workplace experiences in the legal profession, we compared the reported experiences of women of color, men of color, white women, and white men. This report shares the survey findings and paints a picture of how bias affects law firm and in-house attorneys. All differences discussed in the following text are statistically significant unless otherwise noted.

## Women and people of color reported Prove-It-Again (PIA) and Tightrope bias

*Prove-It-Again.* Women of color, white women, and men of color reported that they have to go “above and beyond” to get the same recognition and respect as their colleagues.

- Women of color reported PIA bias at a higher level than any other group, 35 percentage points higher than white men.
- White women and men of color also reported high levels of PIA bias, 25 percentage points higher than white men.
- Women of color reported that they are held to higher standards than their colleagues at a level 32 percentage points higher than white men.

Mistaken for janitors? Men of color and women of all races receive clear messages that they do not fit with people’s image of a lawyer.

- Women of color reported that they had been mistaken for administrative staff, court personnel, or janitorial staff at a level 50 percentage points higher than white men. This was the largest reported difference in the report.

- White women reported this bias at a level 44 percentage points higher than white men, and men of color reported this bias at a level 23 percentage points higher than white men.

*Tightrope.* Women of all races reported pressure to behave in feminine ways, including backlash for masculine behaviors and higher loads of non-career-enhancing “office housework.”

- White women reported doing more administrative tasks (such as taking notes) than their colleagues at a level 21 percentage points higher than white men, and women of color reported doing more of this type of office housework at a level 18 percentage points higher than white men.

## Significant bias against mothers reported—and against fathers who take parental leave

*Maternal Wall.* Women of all races reported that they were treated worse after they had children; that is, they were passed over for promotions, given “mommy track” low-quality assignments, demoted or paid less, and/or unfairly disadvantaged for working part-time or with a flexible schedule. Women also observed a double standard between male and female parents.

- White women reported that their commitment or competence was questioned after they had kids at a level 36 percentage points higher than white men. Women of color reported this at a level 29 percentage points higher than white men.

About half of people of color (47% of men of color and 50% of women of color) and 57% of white women agreed that taking family leave would have a negative impact on their career. 42% of white men also agreed, indicating that the flexibility stigma surrounding leave affects all groups, including majority men.

## Bias is pervasive throughout lawyers’ work lives

Most of the biggest findings of the survey had to do with bias existing in the basic business systems of attorneys’ workplaces. Women and people of color reported higher levels of bias than white men regarding equal opportunities to:

- Get hired
- Receive fair performance evaluations
- Get mentoring
- Receive high-quality assignments
- Access networking opportunities
- Get paid fairly
- Get promoted

In other words, gender and racial bias was reported in all seven basic workplace processes.

## Women of color often reported the highest levels of bias of any group

In almost every workplace process, women of color reported the highest levels of bias. For example:

- Women of color reported that they had equal access to high-quality assignments at a level 28 percentage points lower than white men.
- Women of color reported that they had fair opportunities for promotion at a level 23 percentage points lower than white men.

As a trend throughout the report, we often found that women of color reported the highest levels of bias overall.

## Bias in compensation

The gender pay gap in law has received significant media attention, but much less attention has been paid to bias in compensation systems. Large amounts of bias were reported by both white women and women of color, and these were some of the widest gaps in experience described in the report:

- Women of color agreed that their pay is comparable to their colleagues of similar experience and seniority at a level 31 percentage points lower than white men; white women agreed at a level 24 percentage points lower than white men.
- Similarly, when respondents were asked if they get paid LESS than their colleagues of similar experience and skill level, women of color agreed at a level 31 percentage points higher than white men, while white women agreed at a level 24 percentage points higher than white men.

The racial element of the gender pay gap is rarely discussed and demands closer attention.

In another surprising finding, in-house white women reported roughly the same level of compensation bias as their law firm counterparts. With so much attention placed on the partner pay gap, in house is thought to be a more equitable environment for women in terms of pay. These data suggest that may not be the case.

## Differences between law firm and in-house lawyers' experiences reported

Women of all races and men of color reported lower levels of bias in house than in law firms, whereas white men reported lower levels of bias in law firms than in house.

## Sexual harassment

About 25% of women but only 7% of white men and 11% of men of color, reported that they had encountered unwelcome sexual harassment at work, including unwanted sexual comments, physical contact, and/or romantic advances. Sexist comments, stories, and jokes appear to be widespread in the legal profession: more than 70% of all groups reported encountering these. Finally, about one in eight white

women, and one in ten women of color, reported having lost career opportunities because they rejected sexual advances at work.

## Although implicit bias is commonplace, it can be interrupted

Implicit bias stems from common stereotypes. Stereotype *activation* is automatic: we can't stop our brains from making assumptions. But stereotype *application* can be controlled: we can control whether we act on those assumptions. We've distilled that research in our Bias Interrupter Toolkits, available at the end of this report. These Toolkits provide easily implementable, measurable tweaks to existing workplace systems to interrupt racial and gender bias in law firms and in-house departments. Many bias interrupters will help individuals with disabilities, professionals from nonprofessional families ("class migrants"), and introverted men, in addition to leveling the playing field for women and attorneys of color.

# Introduction

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“Being a minority woman lawyer in a male dominated industry is difficult. The continued lack of support, respect, and compensation is draining and enraging.”

—*Black woman, in-house lawyer*

Since 1970, the legal profession has more than doubled in size.<sup>1</sup> One of the main factors for this increase is the entrance of women into the profession. Whereas women comprised only 3% of lawyers in 1971, today women make up 36% of the legal profession.<sup>2</sup>

In 1970, black lawyers were just 1.3% of the legal profession and Latinos less than 1%. Today, 5% of lawyers are black, 4% are Latino, and 3% are Asian Pacific American<sup>3</sup>—numbers that have barely changed since the early 2000s.<sup>4</sup> People of color remain underrepresented in the legal profession although they comprise almost 27% of J.D. recipients.<sup>5</sup>

Though the total number of women and people of color in the legal profession has increased overall, most diverse lawyers remain stuck in the lower ranks of the profession. Only 18% of equity partners are women, which is only 2% higher than it was ten years ago.<sup>6</sup> Only 7.5% of law firm partners are people of color, which is less than 5% higher than it was twenty-four years ago.<sup>7</sup>

In response to this lack of diversity, law firms and legal departments have invested considerable resources in diversity trainings and other measures,<sup>8</sup> such as mentorship programs and employee resource groups. Diversity efforts largely have been unsuccessful.<sup>9</sup> Women and people of color are not advancing through law firms and legal organizations in the manner or at the pace of majority men’s continued advance.<sup>10</sup>

The glass ceiling for women has been documented for decades,<sup>11</sup> as has the lack of progress for attorneys of color.<sup>12</sup> Women of color are leaving the profession at alarmingly high rates: 75% leave by their fifth year and 85% before their seventh associate year.<sup>13</sup> That attrition rate, which is the highest of any group, has remained consistent since at least the late 1990s.<sup>14</sup>

This study differs from previous studies for several reasons. One reason is that it uses a unique methodology. Long-established literature in experimental social psychology documents both racial and gender bias by means of laboratory studies. Typically, these are matched resume studies, in which the same resumes, some bearing male or white-sounding names and others bearing female or African American-sounding names, are reviewed. These studies have documented implicit bias over and over, but they raise an obvious question: Do they describe what actually happens at work?

A few experimental studies attempt to answer this question. One asked law firm partners to evaluate a memo by a third-year associate.<sup>15</sup> Each partner evaluated the exact same memo, except half of the partners were told the associate was white and half were told the associate was black. The partners found 41% more spelling errors

in the memo they thought was written by a black associate. Partners graded the white author as having “potential” and being “generally good” and graded the black author as needing “lots of work” and “average at best,” even though the memos were identical.

An important study about the legal profession is the 2006 report by the American Bar Association’s Commission on Women in the Profession titled *Visible Invisibility: Women of Color in Law Firms*. It was the first study in the legal profession to focus specifically on the experiences of women of color (prior studies had focused on either women or people of color). The *Visible Invisibility* report surveyed a national sample of lawyers to try to understand the experiences of women of color in law and to understand why the attrition rate for women of color in the profession was so high. In doing so, it revealed that women of color reported hostile work environments and little access to opportunities to advance or receive support, compared to white men.\* The results of this study were startling. When writing this report ten years later, we wondered “have things gotten better?” We often refer to *Visible Invisibility* as a benchmark to assess how much the experiences of women of color have—or have not—changed.

Experimental studies rarely involve practicing attorneys. Most experimental studies involve college student subjects; the obvious question is whether the kinds of bias documented in the laboratory occur in actual legal workplaces. The Center for WorkLife Law developed the Workplace Experiences Survey, which is a ten-minute survey designed to assess whether the patterns of implicit bias documented in experimental studies are occurring in today’s workplaces—and to document which specific business systems are affected. For this report, we asked attorneys whether they had encountered the kinds of bias documented in experimental studies during their careers. Then we compared the answers of white women, men of color, women of color, and white men.

We put special focus on the experiences of women of color, building on the work of *Visible Invisibility* and other studies that have shown that the experiences of women of color differ from both white women and men of color.<sup>16</sup> One-way ANOVAs testing differences between racial groups showed that in some instances, Asian women reported statistically significant differences in experiences when compared with other women of color (black women, Latina women, women of other races.) To present as full a picture as possible, we reported these findings throughout the report where significant differences arose.<sup>†</sup>

We found precisely the same kinds of bias that have been documented so often in the lab. The Workplace Experiences Survey provides a vivid picture of the everyday workplace interactions that can create an unwelcoming climate for white women, for men of color, and especially for women of color.

The Workplace Experiences Survey also tested for bias in basic workplace processes: hiring, assignments, business development, performance evaluations, promotions, compensation, and support. Our study was designed to compare law firms with in-

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\* In this report we use the terms *white men* and *majority men* interchangeably.

† Comparisons between Asian men and Black men, Latino men, and men of other races are available upon request. A technical appendix with means tables used in ANOVA calculations is available at <http://www.worklifelaw.org/projects/women-in-the-legal-profession/biasinterrupters>.

house legal departments. We found that attorneys from different demographic groups experienced workplace processes in different ways.

Both in law firms and in house, we found important parallels between patterns of racial and gender bias. Three of the four basic patterns of bias are triggered by race and by gender: Prove-It-Again, Tightrope, and Tug of War. A fourth type of bias, triggered by parenthood, affects not only women and people of color but also white men. Women of color often reported the highest levels of bias of any group, especially for Prove-It-Again and workplace processes.

**Prove-It-Again** bias has been documented in studies for more than forty years.<sup>17</sup> The studies show that women and people of color often need to provide *more* evidence of competence than majority men in order to be seen as *equally* competent.<sup>18</sup> Prove-It-Again bias stems from the fact that when most people think of a lawyer, a white man comes to mind. Because women and people of color don't fit that image, they often have to prove themselves more than majority men do.

All groups stereotyped as less competent than majority men will encounter Prove-It-Again bias. Studies have documented that not only women and people of color but also individuals with disabilities and professionals from blue-collar backgrounds (class migrants) tend to encounter Prove-It-Again problems.\*

**Tightrope** bias. Prove-It-Again bias stems from stereotypes about how certain groups *do* behave; Tightrope bias stems from stereotypes about how certain groups *should* behave. The Workplace Experiences Survey found that often a narrower range of behavior is accepted from women and people of color than from white men.<sup>19</sup> Most of the forty years of research on Tightrope bias examines gender dynamics.<sup>20</sup> Prescriptive stereotypes mandate that women should be modest, self-effacing, and nice—good team players. Prescriptive stereotypes mandate that men should be direct, assertive, competitive, and ambitious—leaders. Consequently, the kind of competitive, assertive behavior needed to get ahead in the law often is more readily accepted in men than in women.<sup>21</sup> Women often walk a tightrope between exhibiting the kind of behavior expected of women and the kind of behavior expected of lawyers.

The Workplace Experiences Survey found that a similar phenomenon is triggered by race. Not only women of all races but also men of color felt less free to express anger at work compared to white men.

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\* Researchers Lauren Rivera and András Tilcsik sent more than three hundred fictitious resumes to 147 top law firms. “All applicants were in the top 1% of their class and were on law review” and had identical (and impressive) work and academic achievements. The researchers also inserted subtle cues about social class “via accepted and often required portions of resumes: awards and extracurricular activities.” For example, the lower-class applicant was listed as enjoying pick-up soccer and country music and volunteered as a mentor for fellow first-generation college students, whereas the upper-class applicant enjoyed sailing and classical music and volunteered as a generic student mentor.

The employers overwhelmingly favored the higher-class man: over 16% of his resumes resulted in a callback. Only about 1% of the lower-class man's resumes did so, even though he was just as qualified. Unfortunately, this study was published after our survey ended, and we did not ask about social class.

The bottom line: both women and people of color have been invited into today's legal workplaces, but the kinds of behaviors white men exhibit in order to get ahead are less likely to be accepted from other groups. Instead, women and people of color are more likely than white men to report that they are expected to be “worker bees” who keep their heads down but do not seek the limelight.

**Maternal Wall** bias is triggered by motherhood, and once triggered, it can be the strongest form of bias. More than twenty years of studies show that motherhood can trigger negative competence and commitment assumptions.<sup>22</sup> In addition, mothers walk a special tightrope: if they work too much, they may be seen as bad mothers; if they work too little, they may be seen as bad workers. Our survey found that this type of bias can affect fathers too.

**Tug of War** bias occurs when bias against women or people of color creates conflict within each group. For example, if there is a slot for only one woman, women may compete against each other to claim that one spot—a pure example of how gender bias in the environment fuels conflict among women. Similar dynamics sometimes affect people of color.

Each of these four types of bias can influence workplace processes such as hiring, performance evaluations, and compensation. The first goal of this report is to pinpoint how bias affects workplace interactions. The second goal is to introduce bias interrupters that organizations can use to interrupt the constant transmission of bias through basic business systems. Bias interrupters are small tweaks to existing systems that interrupt bias in an evidence-based, metrics-driven way. This approach to eliminating bias is very different from traditional bias trainings. Indeed, bias interrupters often work without ever talking about bias.

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Bias interrupters are small tweaks to existing systems that interrupt bias in an evidence-based, metrics-driven way.

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We all have biases. Now it's time to interrupt them.

## About This Study

This study was commissioned by the ABA Commission on Women in the Profession and the Minority Corporate Counsel Association. The Center for WorkLife Law at the University of California, Hastings College of the Law designed and implemented the survey and analyzed the survey data. The survey consists of fifty-two Likert scale questions and twenty-five demographic questions. The Likert scale questions were based on social science studies documenting implicit bias in the workplace.\* The Workplace Experiences Survey asked whether respondents had experienced bias during the past five years of their career. Survey respondents rated fifty-two statements on a 6-point scale from strongly disagree to strongly agree. This is the first comprehensive attempt to measure whether lawyers report having experienced the kinds of bias that are documented in experimental studies.

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\* A bibliography is online at [www.biasinterrupters.org](http://www.biasinterrupters.org).

The survey was distributed between April and June of 2016 through the membership mailing list of the ABA, MCCA, and minority bar associations, such as the Native American Bar Association, the National Asian Pacific American Bar Association, and the Asian American Bar Association. We received 2,827 completed responses. Of the respondents, 63% are women, 28% are people of color, 74% are law firm lawyers, and 63% are below fifty-five years old.

For this report, we conducted group difference comparisons using the Likert scale data. We conducted one-way between subjects ANOVAs for each DV and post-hoc comparisons using the Tukey HSD test. All significant group differences noted in the paper used this method. However, in the text and charts, we collapsed responses to the Likert scale questions into two categories: “agree” (which includes responses “strongly agree,” “agree,” and “somewhat agree”) and “disagree” (which includes responses “strongly disagree,” “disagree,” and “somewhat disagree”). This choice was made with our intended audience in mind to allow us to discuss the data in a way that promotes ease of understanding.\*

The Workplace Experiences Survey also asked four questions regarding sexual harassment. Three of them are on a different metric from the rest of the survey. The three questions covered three main types of sexual harassment and asked the respondents about the frequency of encountering them (never, rarely [once/twice per year], somewhat frequently [once/twice per month], frequently [once/twice per week], very frequently [several times per week], and daily). Thanks to Jennifer Berdahl of the University of British Columbia for allowing us to use the three questions she developed.

Throughout the report, we discuss the differences among the responses of different groups. To maintain consistency and promote accessibility to our audience, we developed the magnitude scale† set forth below:

Difference (D) in Percentage Points		
$D \leq 9.32$ (at and below 20 percentile)	Small	Slightly (higher/lower)
$9.32 < D \leq 13.6$ (between 20 and 40 percentile)	Medium	Higher/lower
$13.6 < D \leq 23.24$ (between 40 and 80 percentile)	Large	Considerably (higher/lower)
$D > 23.24$ (above 80 percentile)	Very large	Substantially (higher/lower)

Finally, 525 survey respondents included comments with their survey. The comments were used throughout the report as qualitative evidence to support or further illustrate quantitative findings. Comments from the survey are indented and in quotation marks.

We begin with the results under the four patterns of gender bias.

\* A technical appendix with means tables used in ANOVA calculations is available at <http://www.worklifelaw.org/projects/women-in-the-legal-profession/biasinterrupters>.

† Methodology for the magnitude scale: we pooled the group differences together (using the percent agree/disagree difference between white men, white women, men of color, and women of color on each question) and noted percentiles of all the statistically significant differences.

# Prove-It-Again

---

"I feel men still don't respect women in the workplace like they respect men. . . . We have to work harder and deal with more, for less pay. . . . I was passed over time and time again for promotions. I left and started my own firm, because I felt it was the only way I might achieve my career goals."

—*White woman, firm lawyer*

Prove-It-Again bias is very common. One survey found that two-thirds of women have experienced it.<sup>23</sup> One reason it is so pervasive is that what pops into most people's minds when they think of a successful lawyer is a white male.<sup>24</sup> People of color and women aren't as good a fit,<sup>25</sup> so they need to work harder to prove themselves. This lack of fit was reflected in comments such as this one:

"Old white men *know* what a successful lawyer looks like: an old white man. When they see a woman, or a person of color, they *\*know\** that's not a successful lawyer."

—*Male, race unknown, firm lawyer*

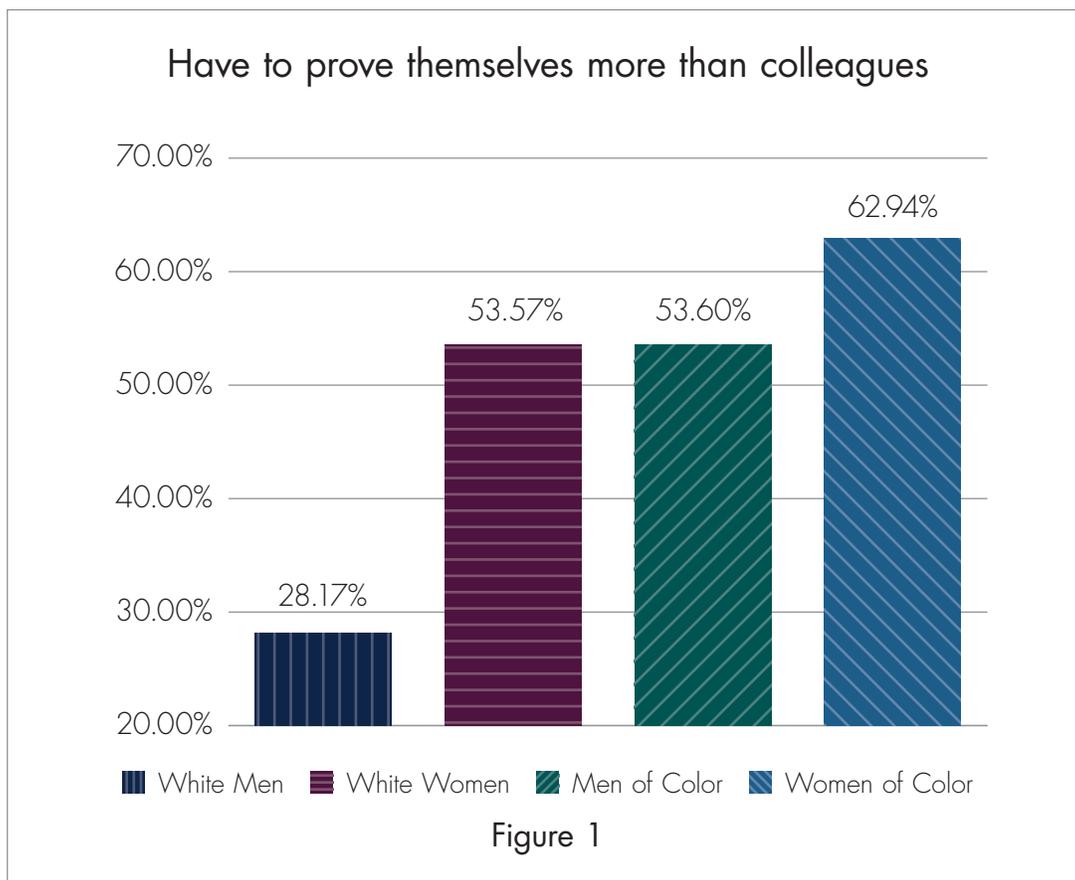
Because majority men fit the stereotype of a good lawyer, they typically have to provide less evidence of competence than people of color and women in order to be judged as equally competent.<sup>26</sup> Because high competency is part of the male stereotype, and low competency is part of the female stereotype,<sup>27</sup> when a woman produces strong work, the stereotype of low-competency sometimes leads her to be judged more harshly.<sup>28</sup> On the other hand, majority men's work product is "presumed to be competent, their mistakes understandable, and their work ethic unquestioned."<sup>29</sup> Women and people of color are not afforded such privilege, and as such are often forced to repeatedly demonstrate their commitment and competence. This can feel exhausting and demoralizing:

"The bar to advancement has been moved several times, and each time the expectations change, there is no 'credit' given for the fact that I was there when the expectations were very different than the current ones, so I feel like I am always running to stay still."

—*White woman, firm lawyer*

"The disparity has made me regret ever going to law school. It i[s] very disheartening to get to a point, know that you do excellent work, but are just not wanted and treated like crap because you are a black woman."

—*Black woman, firm lawyer*



The Workplace Experiences Survey data show that women and people of color reported experiencing Prove-It-Again bias.

Women of color reported PIA bias at the highest level, 35 percentage points higher than white men (see Figure 1).<sup>\*</sup> White women and men of color reported almost the exact same level of PIA bias, 25 percentage points higher than white men. Overall, we see that women and people of color feel they have to prove themselves substantially more than white men to get the same level of respect and recognition as their colleagues.

Looking closer at women of color, we found that black women, Latina women, and women of other races reported higher levels of bias than white and Asian women (who reported similar levels of bias).

Survey comments illustrated the situation of women of color in the workplace:

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Women of color reported PIA bias at the highest level, 35 percentage points higher than white men.

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<sup>\*</sup> To reiterate our methodology for those who may have skipped that section, group differences were calculated using Likert scale data, but findings are discussed using percentages for clarity and ease of understanding. Only significant findings based on mean differences are discussed in the report. For those who do not regularly deal with statistical data, a percentage point is the simple numerical difference between two percentages and a percentage is a number or ratio expressed as a fraction of 100.

"Being a minority woman means your intellect is systematically discounted and caucasian hetero men are unfailingly trusted no matter their competency. I felt like I was constantly trying to prove myself no matter how impeccable my work product was."

—*Woman, race and workplace unknown*

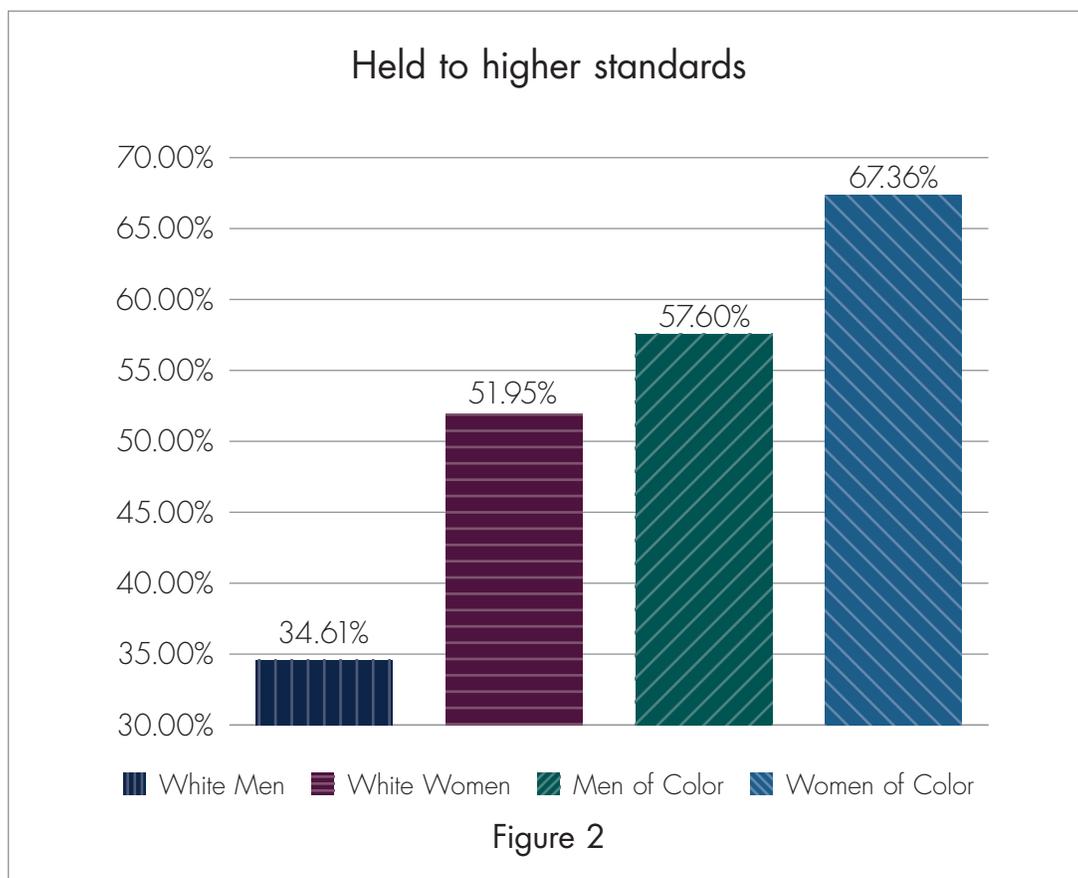
## Higher standards

Double standards in the workplace have been documented for decades.<sup>30</sup> Blind resume studies show that double standards are often applied to women and people of color.<sup>31</sup> One study gave participants two identical resumes, one with an African American-sounding name (Jamal) and the other with a white-sounding name (Greg). Jamal needed eight additional years of experience to get the same number of callbacks as Greg.<sup>32</sup>

The Workplace Experiences Survey found this effect reported in actual workplaces for both race and gender (see Figure 2). Women of color again reported bias at the highest level. Women of color agreed that they are held to higher standards at a level 33 percentage points higher than white men. Men of color and white women also reported being held to higher standards at a level considerably higher than white men. One white woman commented:

"In a male-dominated field I am clearly held to a different standard and treated in a different way, although others may not do this intentionally."

—*White woman, firm lawyer*

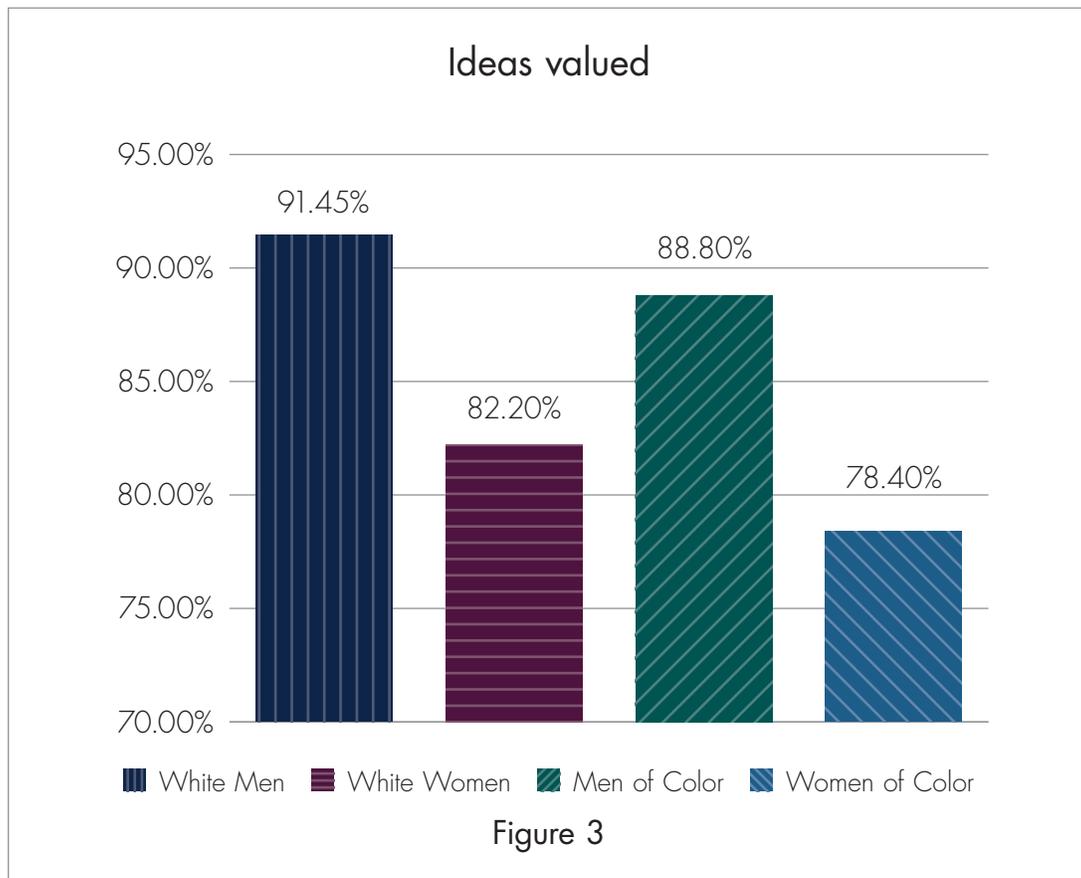


## Ideas valued

Another Prove-It-Again effect is that majority men’s ideas gain respect at a higher level: 91% of white men and 89% of men of color surveyed thought that their ideas are valued in the workplace (see Figure 3).

Women of color agreed that their ideas were valued at a level 13 percentage points lower than white men; white women’s agreement was 9 percentage points lower.

The good news is that most groups feel that their ideas largely are respected at work, although we see a clear gender effect: women feel their ideas are less respected than their male colleagues.



## Stolen idea

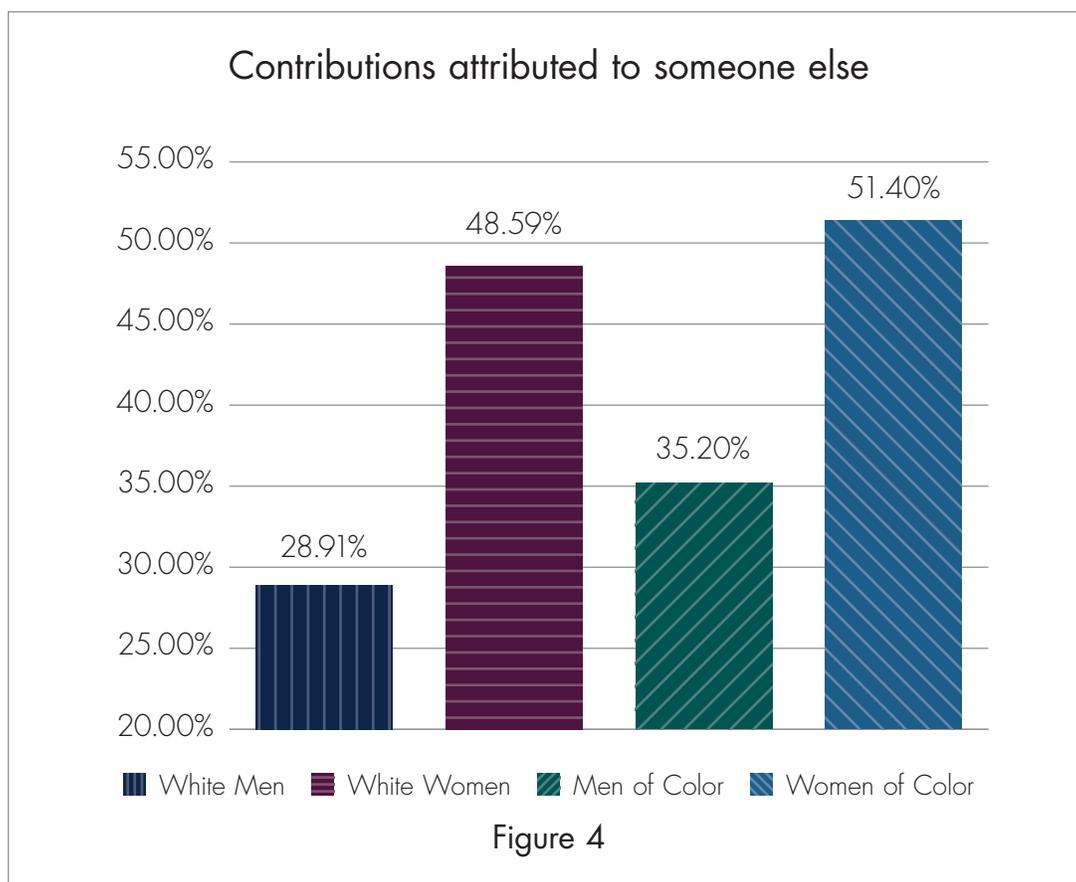
Others often get credit for ideas women originally offered.<sup>33</sup> Often termed the “stolen idea,” this is an example of stereotype expectancy: we see what we expect to see. If a brilliant idea is offered in a meeting, we are more likely to implicitly associate that idea with a white man.

White women and women of color reported very similar levels of the stolen idea: about 50% of women have experienced the stolen idea (see Figure 4). Only about 29% of white men reported experiencing the stolen idea. The gap—about 20 percentage

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If a brilliant idea is offered in a meeting, we are more likely to implicitly associate that idea with a white man.

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points—is considerable and suggests that women in the legal profession consistently feel as though their contributions are being discounted and attributed to someone else. (The difference between white men and men of color was not statistically significant.)

As one survey respondent commented:

“I have had at least one male attorney take credit for my idea, and it was a substantial idea (forming a new practice group). Same guy has taken credit for numerous briefs written by female associates and is widely disliked, yet got promoted and I didn’t.”

—White woman, firm lawyer

## Mistaken for administrative staff

Being mistaken for an admin, or court personnel, or even a janitor is something we’ve been hearing anecdotally from women and people of color for years.<sup>34</sup> Because of the automatic association of lawyers with majority men, lawyers from other groups are much more likely to be mistaken for, or viewed as, less than a lawyer.

In a dramatic finding, the Workplace Experiences Survey showed white men rarely get mistaken for admins or janitors, but women and people of color often do. Only 7% of white male lawyers reported this happening to them, compared with

58% of women lawyers of color (see Figure 5). Half of white women also reported being mistaken for administrative (or custodial) staff. Men of color also reported experiencing this happening at a much higher level than white men: 30% vs. 7%.

This question revealed the largest difference found in the report: the 50 percentage point difference between women of color and white men. Many survey comments illustrated this bias:

"I have been mistaken for the court reporter countless times, by everyone from the JA, to opposing counsel (both male and female), to a judge."

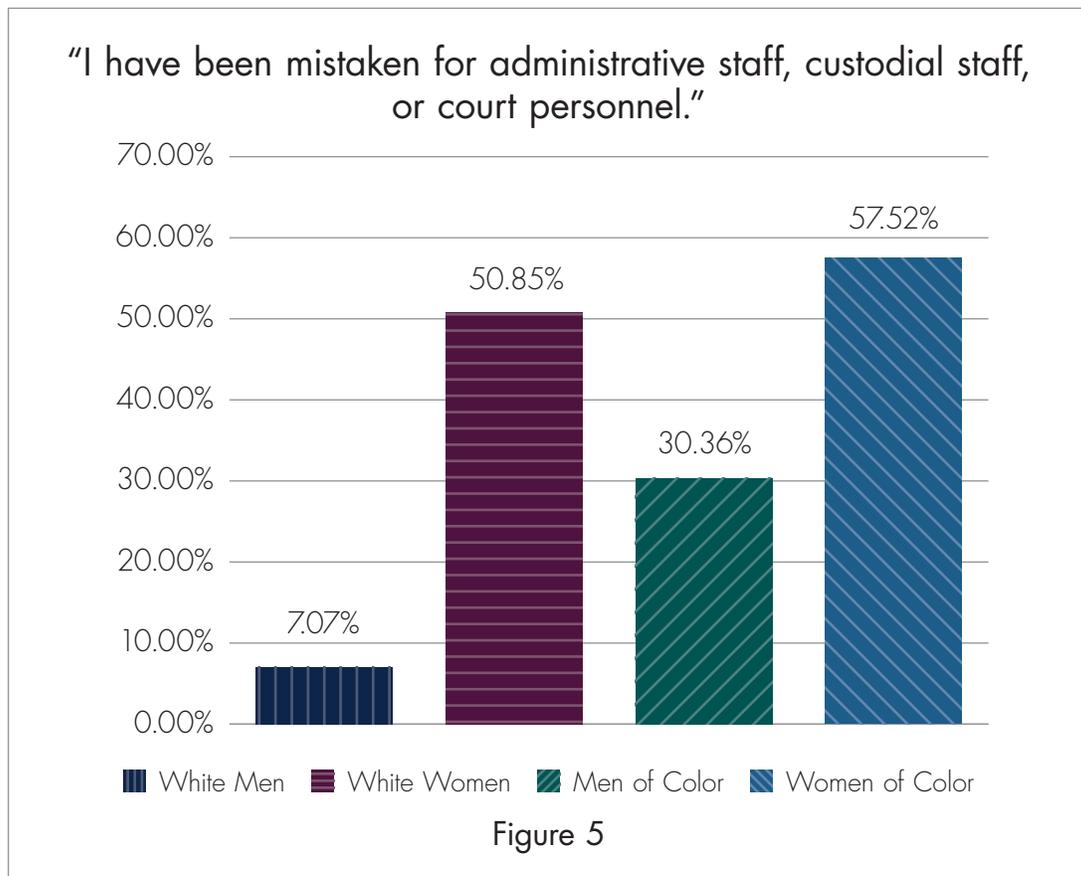
—White woman, firm lawyer

"I've compared notes with the young male attorneys of comparable age and experience (and attractive ones, too)—they never . . . get mistaken for a secretary. The ladies I've spoken with, however, get it constantly."

—White woman, firm lawyer

"I have frequently been assumed to be a court reporter. In my own firm, I've been asked if I am an [legal administrative assistant] on multiple occasions, even after making partner."

—White woman, firm lawyer



## Prove-It-Again conclusions

Overall, the Workplace Experiences Survey data showed that white women, women of color, and men of color all reported Prove-It-Again bias in their workplaces at higher levels than white men. The women lawyers we surveyed reported statistically significant differences from white men for every Prove-It-Again question.

Survey results also showed that women of color sometimes face double jeopardy in the workplace: low-competency stereotypes, triggered by both their race and gender, combine to create an environment in which they have to prove themselves more than any other group to be judged equally competent.

Regression analysis confirmed that women reported higher levels of Prove-It-Again bias after controlling for race, age, workplace type, firm/department size, caregiving responsibilities, and geographic location. White and Asian lawyers reported similar levels of Prove-It-Again bias regardless of gender and other demographic characteristics. Black, Latino, and other lawyers of color reported higher levels of Prove-It-Again bias than white and Asian lawyers regardless of gender and other demographic characteristics. We found a gender difference for people of color who were not of Asian descent: of that group, men reported *substantially* higher levels of Prove-It-Again bias than other men, but women reported only *slightly* higher levels of Prove-It-Again bias than other women.

# Tightrope

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"I have learned that as a woman, I can't get away with as much as a man. I've learned to let men think I'm young and inexperienced, and it's to their detriment when they opposed me in court because I'm intelligent and always well prepared."

—White woman, firm lawyer

"In the past year, I've been called 'overconfident' and 'not deferential enough' by co-counsel, another Asian American female. It was extremely frustrating as I was finally starting to feel confident and assertive and direct—acting as any normal white male attorney in a law firm would. I was subsequently removed from that case."

—Asian American woman, firm lawyer

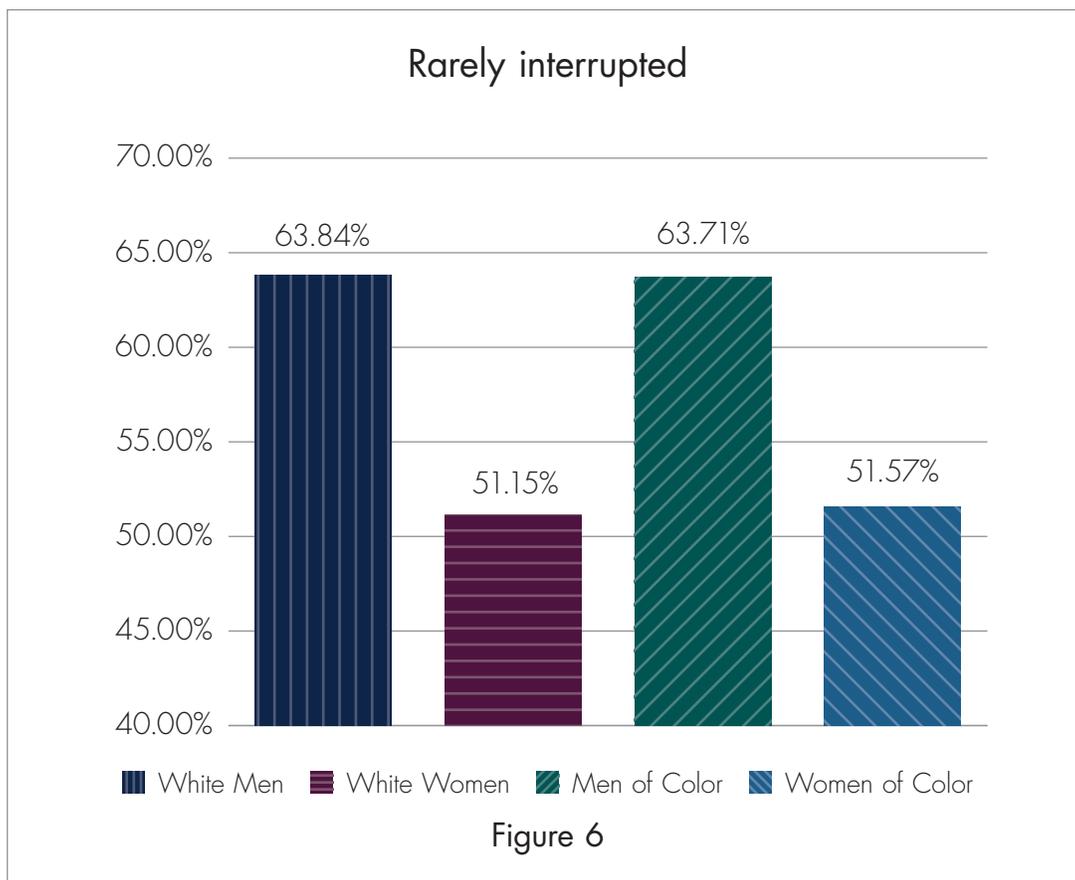
Prescriptive stereotypes dictate how people should behave. Women should be “communal”—helpful, sensitive, modest, and nice—whereas men are expected to be “agentic”—direct, assertive, competitive, and ambitious.<sup>35</sup> Thus, when a man acts assertively, no one blinks an eye. But when a woman behaves in exactly the same way, she may be criticized as “bitchy,” “overly aggressive,” or told to “calm down.” Women walk a tightrope because much of the behavior expected of a lawyer is not expected of a woman.

To succeed as a lawyer, you are expected to be assertive, ambitious, emotionally detached—qualities traditionally coded as masculine.<sup>36</sup> If women behave in those traditionally masculine ways, often they will find themselves being respected but not being liked.<sup>37</sup> On the other hand, if women behave in traditionally feminine ways, they risk being liked but not being respected<sup>38</sup> and thus not “having what it takes to be a lawyer.”

A narrower range of behavior often is accepted from men of color too. On the Workplace Experiences Survey, men of color reported being less free to express anger, even in contexts in which anger is accepted for majority men, and reported more pressures than majority men to be a worker bee.

## Interruptions

Men interrupt to show they are competitive and ambitious—that's socially appropriate behavior for men. But women are supposed to be self-effacing and nice, so interruptions that are accepted in men may well be seen as inappropriate in women.<sup>39</sup>



Experimental studies document that women in mixed-sex groups are more likely to be interrupted than men.<sup>40</sup> The Workplace Experiences Survey confirmed this: white women and women of color reported that they are interrupted at meetings at a higher level than white men and men of color (see Figure 6).

Almost half of women lawyers surveyed reported being interrupted in meetings, compared to only about a third of men.

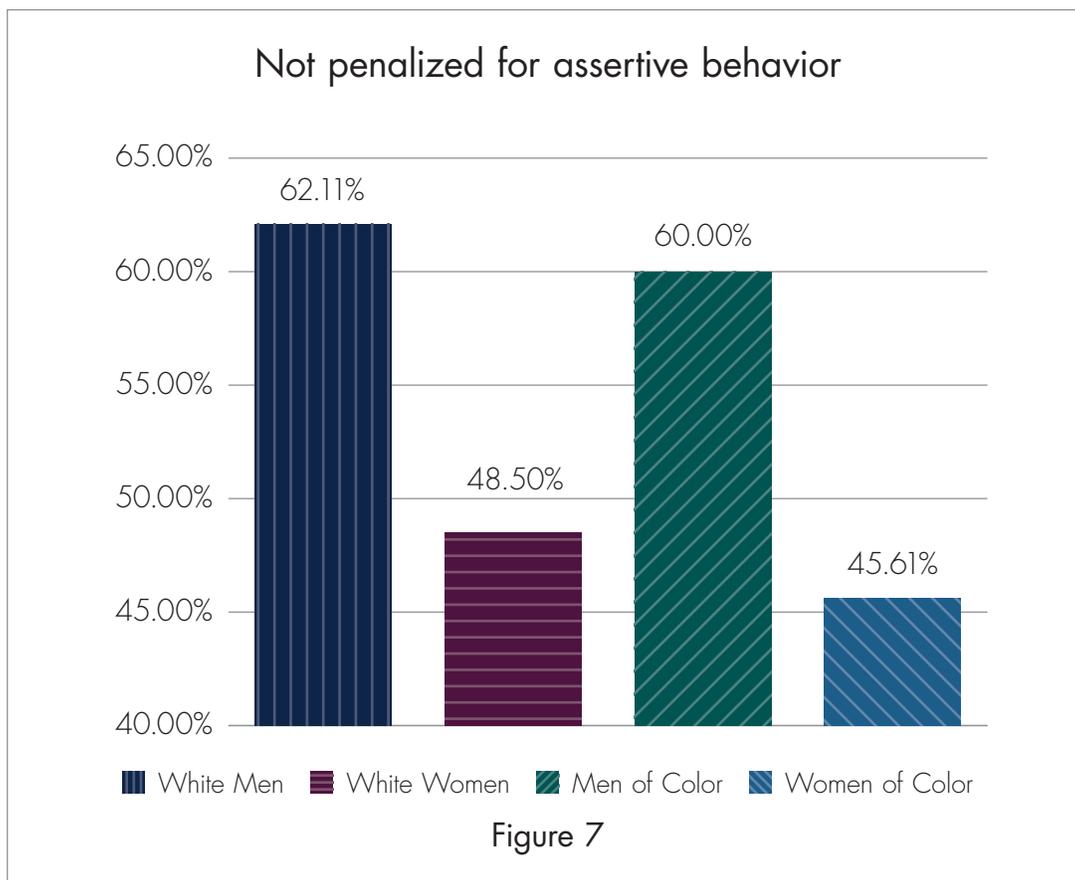
“White men don’t realize how much ‘space’ belongs to them or that they unconsciously feel that they own space. They frequently interrupt others, but if a woman on a conference call states her thoughts, she’s immediately criticized as interrupting.”

—Asian American woman, firm lawyer

## Assertiveness

Because women are expected to be self-effacing team players, they may run into problems when they act assertively as “good” lawyers.<sup>41</sup> One study revealed that men viewed women who spoke tentatively as more trustworthy and likeable than women who spoke assertively.<sup>42</sup>

The Workplace Experiences Survey confirmed that women often receive pushback when they behave assertively. About 60% of white men and men of color reported



that they are not penalized for assertive behavior (see Figure 7). Less than half of women lawyers agreed. Not being able to act assertively makes it harder for women to be seen as forceful and effective lawyers.

White women reported very similar levels of bias as women of color. Comments provided examples:

"I have experienced the most push back from being an assertive and authoritative woman (and minority woman); so there is resentment of my perceived 'masculinity' such that people accuse me of wanting to be feared, when men [are] deemed to simply be 'demanding' or as having 'high standards.'"

*—Black woman, in-house lawyer*

"When I am assertive, I am considered a 'diva' or 'bitch.' I often feel frustrated as it is more difficult, as a woman, to be taken seriously regardless of my qualifications or experience."

*—White woman, law firm lawyer*

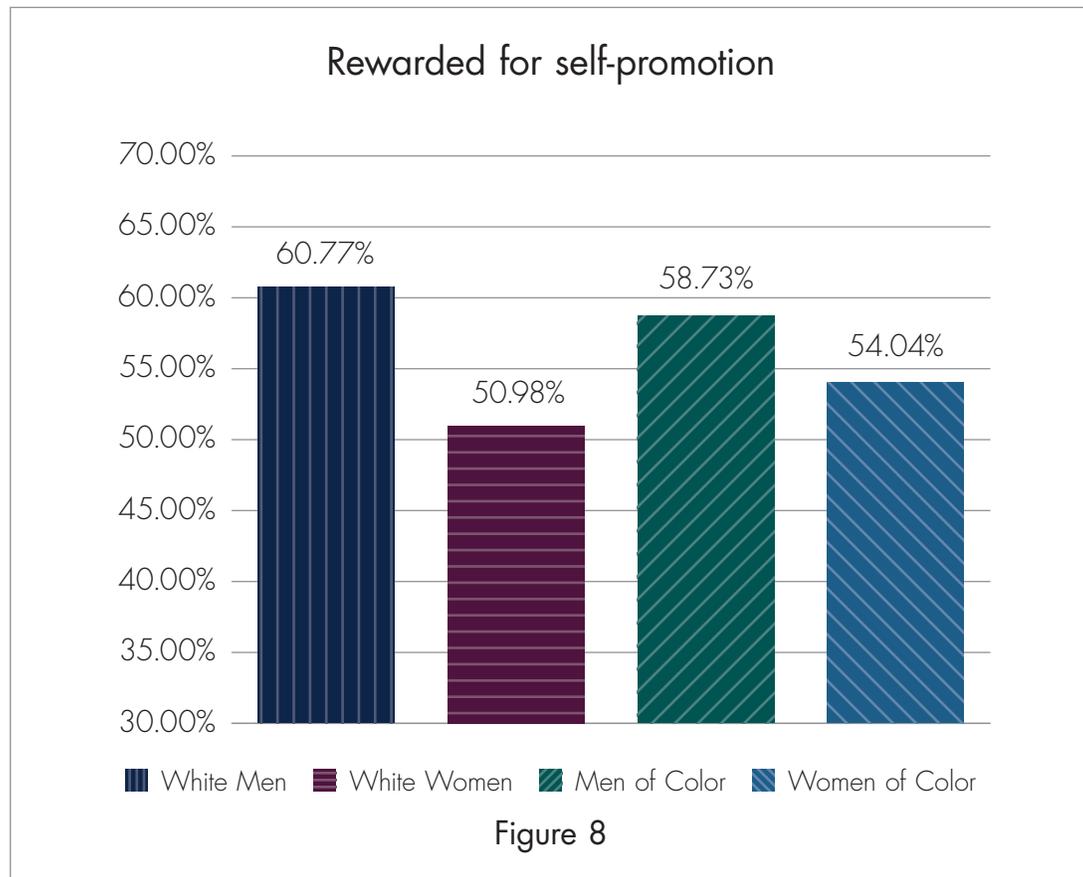
"When women are assertive or ambitious it is seen negatively as opposed to when men are."

*—White woman, firm lawyer*

## Accomplishments

Studies show that self-promotion is often more readily accepted from men than women.<sup>43</sup>

Sixty-one percent of white men reported that they are rewarded for self-promotion, making them the group with the highest level of agreement, followed closely by men of color (see Figure 8). White women reported that their self-promotion was rewarded at a lower level than white men. This was the only statistically significant difference between the groups.



This suggests that women find it harder to advocate for themselves without receiving pushback, which is an important part of getting raises and promotions in many legal workplaces.

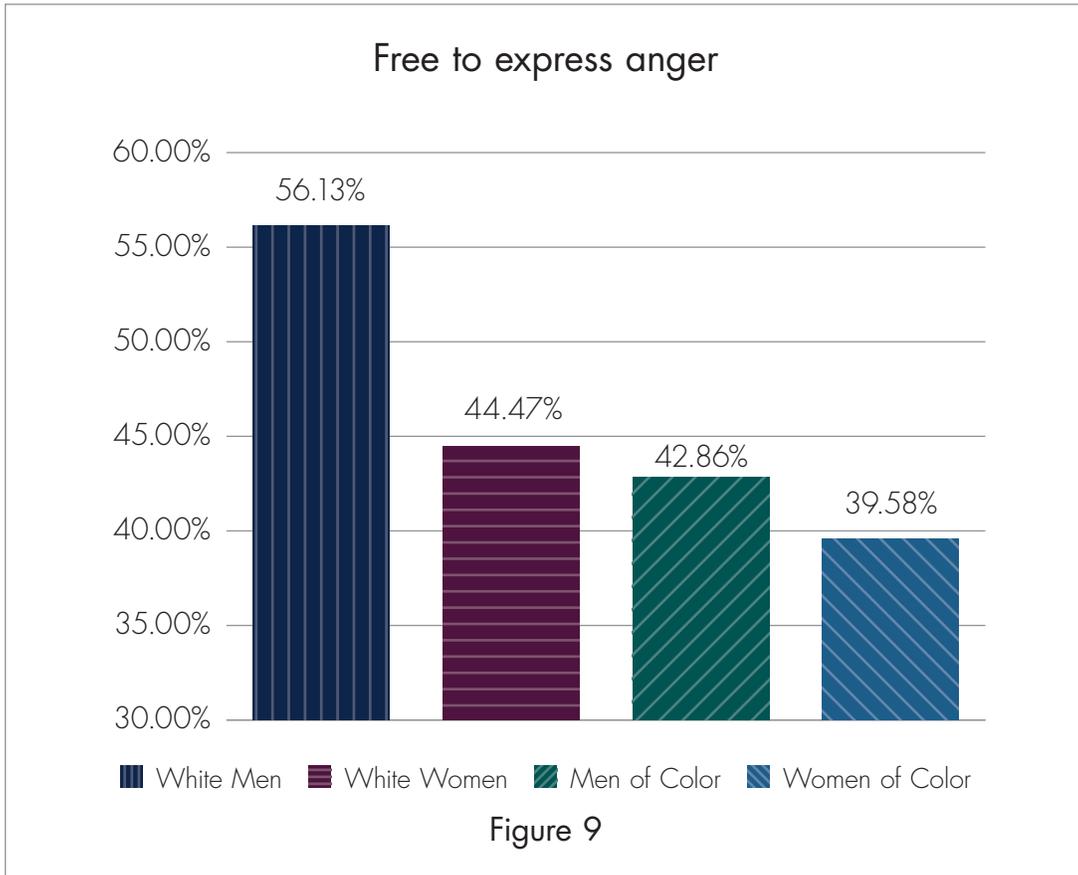
## Anger

Under the looming stereotype of the “angry black person,” black lawyers may feel pressures to avoid showing anger even when anger is justified.<sup>44</sup> Latino lawyers—who may be stereotyped as “fiery” or “emotional”—also may feel pressure to avoid showing anger at work.\*

\* In one study of female scientists, 60% of Latina scientists reported backlash for expressing anger at work.

Gender also can affect who feels free to express anger at work. Studies show that displaying anger at work tends to *increase* the perceived status of a man but *decreases* the perceived status of a woman.<sup>45</sup>

The Workplace Experiences Survey confirmed that white men felt free to express anger at the highest level of any group (see Figure 9). Statistically significantly lower proportions of white women, men of color, and white women all reported that they feel free to express anger.



## Office housework

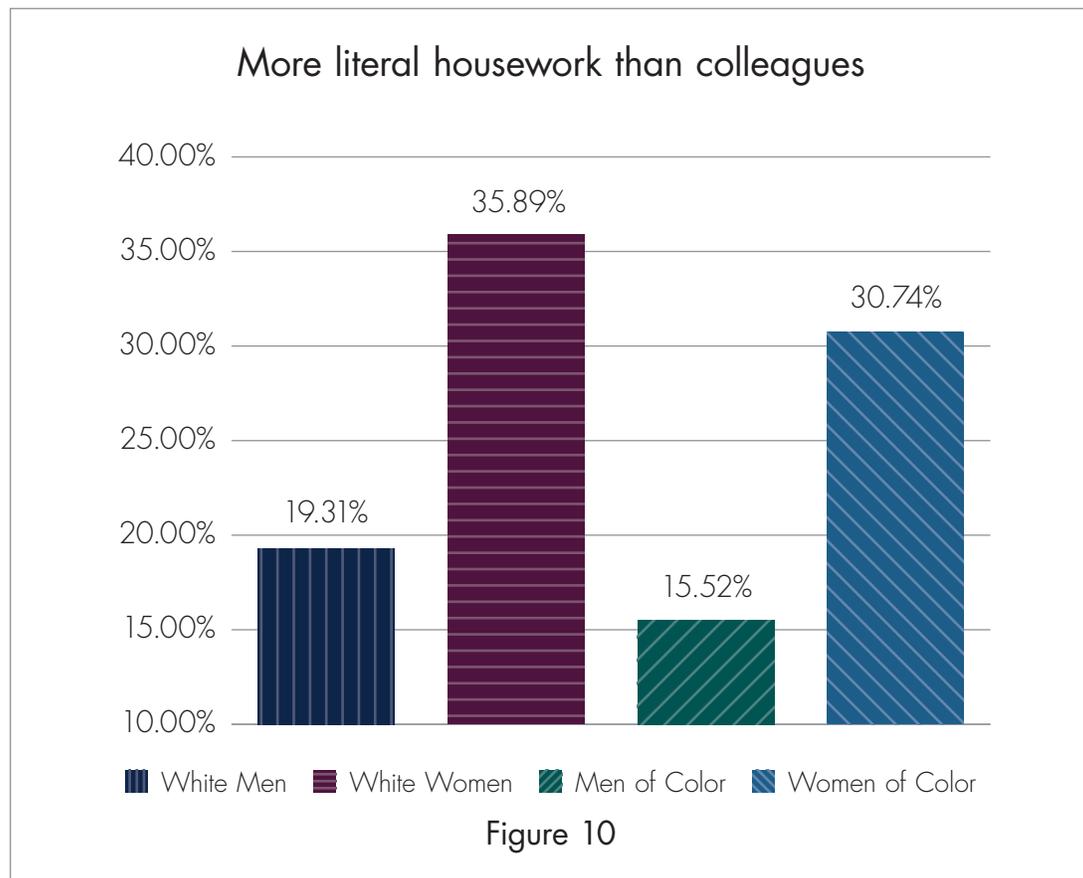
Women are more likely to engage in “organizational citizenship behavior”—and get less credit when they do so.<sup>46</sup> Across industries, studies show that women perform more service-related tasks: tasks that help the organization but don’t necessarily lead to promotion.<sup>47</sup> We call this “doing the office housework.” It includes literal housework (washing the cups), administrative tasks (scheduling meetings), and emotion work (being the peacemaker). Women also do less high-profile, career-enhancing work (the “glamour work”) and more behind-the-scenes work (the “undervalued work.”)<sup>48</sup>

Why do women do more of the office housework? For one, in keeping with prescriptive stereotypes, women are expected to be helpful and “communal.”<sup>49</sup> Because of these stereotypes, women are under social pressures to volunteer for office housework types of activities.<sup>50</sup>

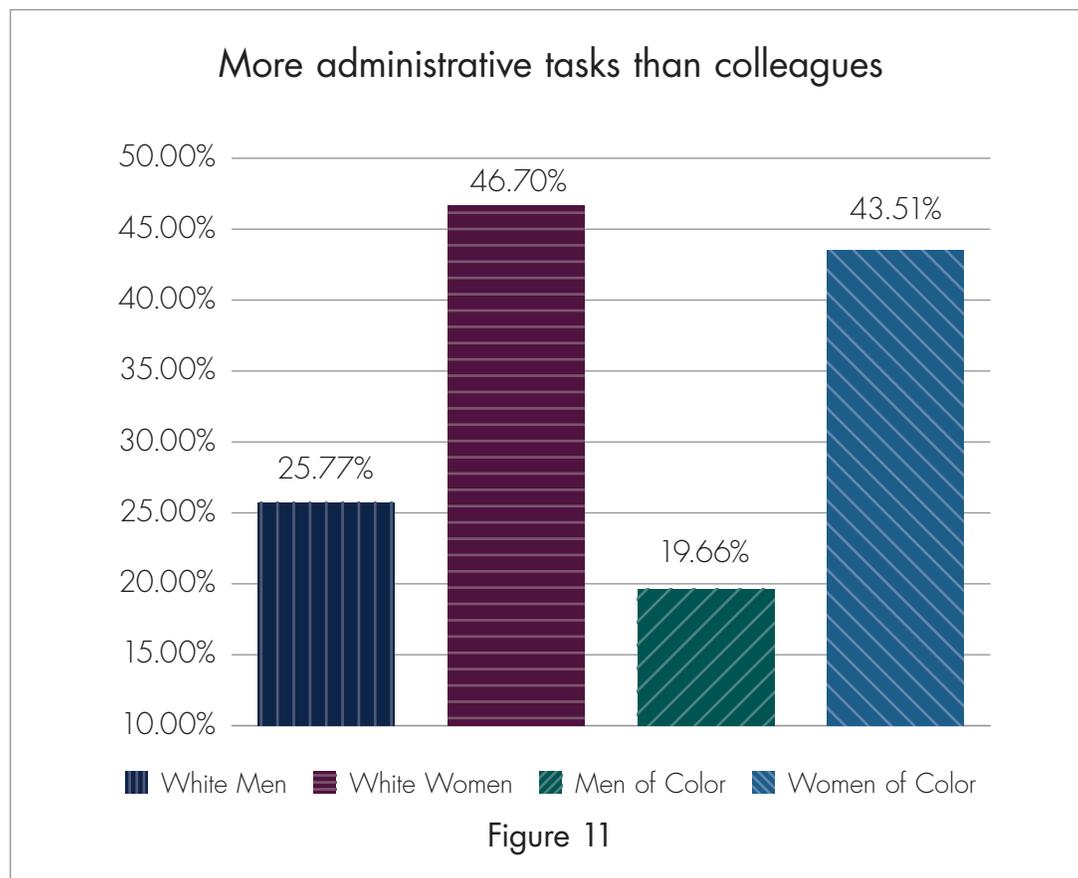
Furthermore, a recent study indicates that women are more likely to be *assigned* the office housework tasks because of the assigner's belief that the woman will accept the task.<sup>51</sup> The consequences of unequal distributions of non-career-enhancing work is that women are less often given the opportunity to develop the skills they need to advance in the workplace, or to prove that they can handle riskier, higher-profile matters.<sup>52</sup> Unequal task assignment is one of the reasons for the lack of women leadership in the law.<sup>53</sup>

Women lawyers of all races reported doing more administrative tasks at a higher level than their male colleagues

The Workplace Experiences Survey found that women do more of the office housework (discussed here) and have less access to the glamour work (discussed later). Women do more literal housework such as cleaning up the food after the meeting, planning parties, and getting the lunch orders (see Figure 10). White women and women of color reported doing this kind of work at a higher level than men did. Among women, Asian women lawyers reported this kind of work at a slightly higher level than white women, who reported it at a slightly higher level than other women of color.



Women lawyers of all races also reported at a considerably higher level than men that they did more administrative tasks (such as coordinating schedules to find a time that works for everyone or taking notes for the group) than their colleagues (see Figure 11). White women reported doing more admin tasks than their colleagues at a level 21 percentage points higher than white men. This is a considerable gap and speaks to a stark difference between the quality of assignments given to men versus women in the legal profession. (The difference between men of color and white men was not statistically significant.)



Asian women reported this bias at a slightly higher level than white women and other women of color.

Some comments:

“Despite superior educational credentials and being a lateral transfer from a far more prestigious firm, I was given an appropriate title but slotted into the subservient, support role (i.e., expected to take notes, get coffee, hang men’s jackets, etc.).”

—White woman, firm lawyer

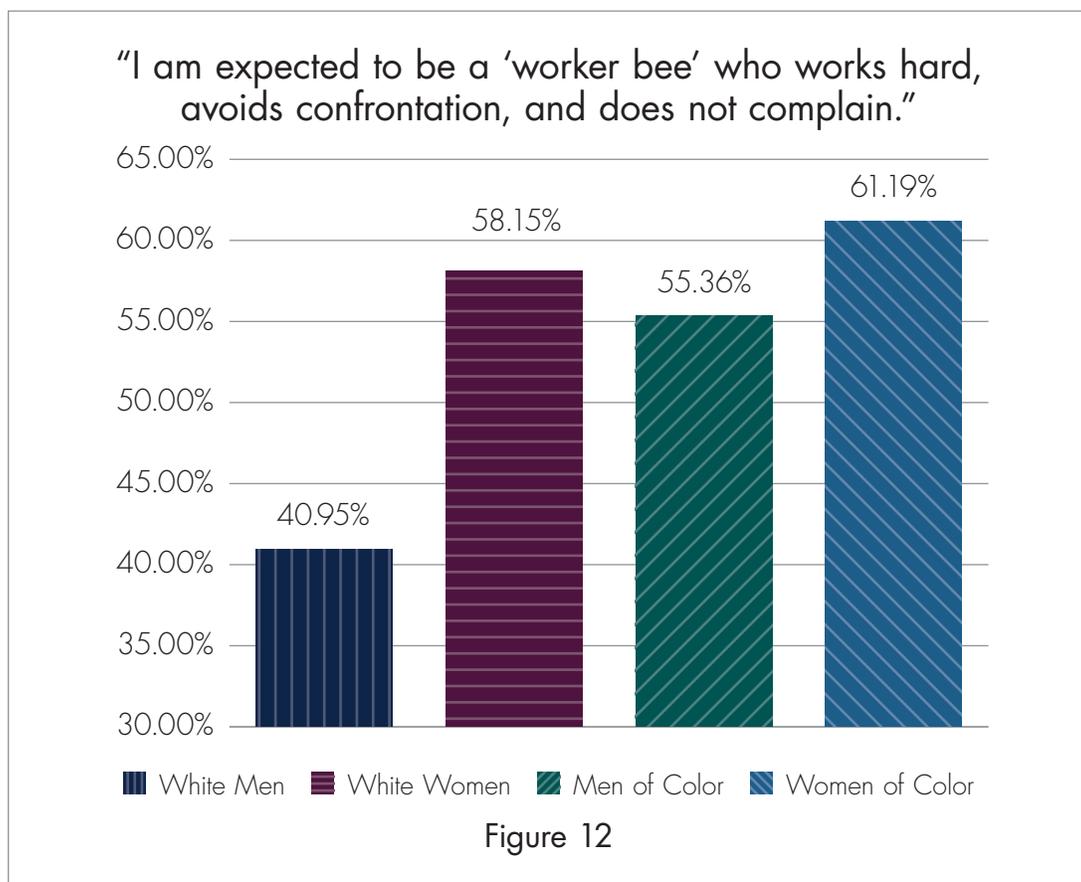
“I was made to take notes during meetings when other associates were invited to participate.”

—White woman, firm lawyer

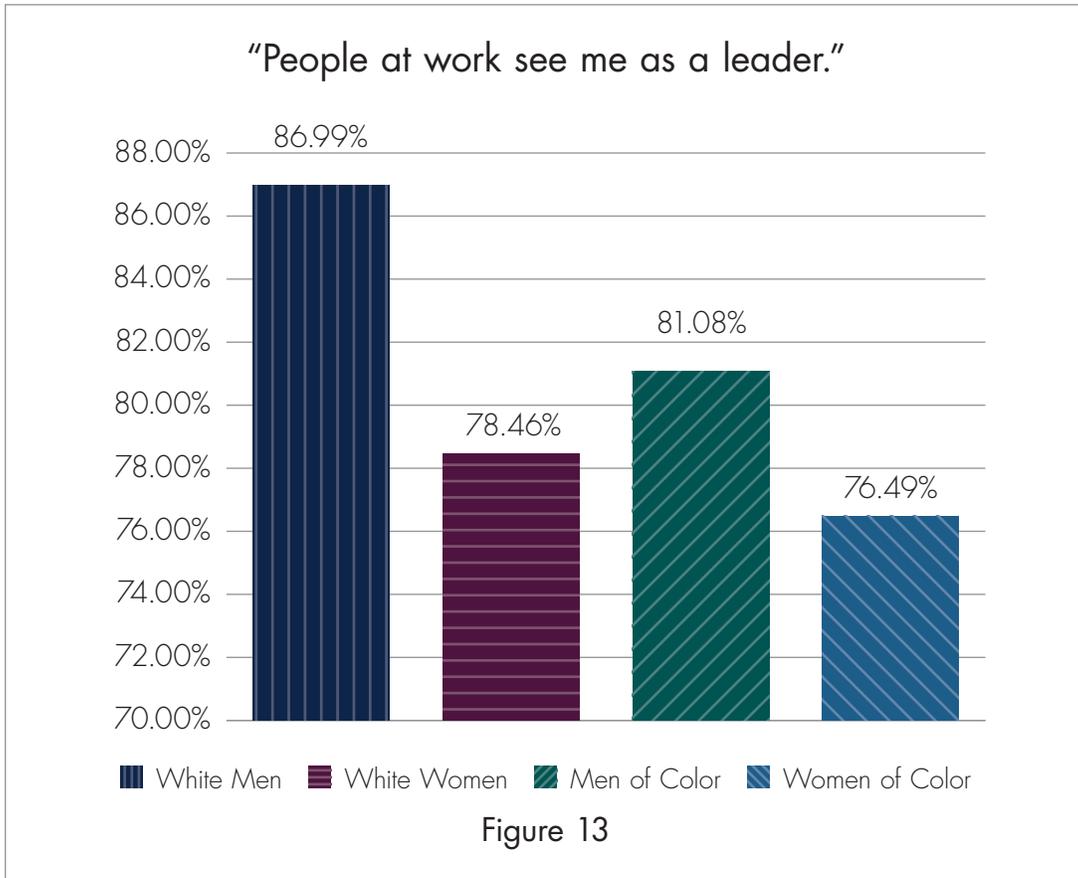
Overall, the finding that women report doing more office housework than men may help explain why women equity partners work more hours than male equity partners, but bill only 78% as much time.<sup>54</sup>

## “Worker bees” vs. leaders

Workplace Experiences Survey responses indicated that women and people of color feel they have been invited into legal workplaces but are expected to exhibit a narrower range of behavior than white men and to play different roles. Majority men are encouraged to be competitive and ambitious, but women and people of color reported at higher levels that they felt pressure to be worker bees who work hard but do not demand leadership roles. White men reported that they felt pressure to be a worker bee at the lowest level of any group (see Figure 12); women of color, men of color, and white women all reported considerably higher levels of this bias.



In contrast, a very high proportion of white men (87%) reported that people at work saw them as leaders (see Figure 13). Women of color and white women reported that people saw them as leaders at the lowest levels of any group. Men of color fell in between, with no statistically significant differences emerging between men of color and other groups.



## Tightrope conclusions

Overall, the Workplace Experiences Survey revealed that a narrower range of behavior is expected of both women and people of color and that both groups report being treated with disrespect at higher levels than white men do. Women, as compared to white men, reported higher levels of agreement that they are interrupted and penalized for assertiveness; women reported at lower levels than white men that they were rewarded for self-promotion and could express anger when it was justified. In addition, women reported higher levels of agreement that they were expected to be worker bees and to do more office housework. Women also reported lower levels of agreement than white men when asked if they were seen as leaders.

Women of color reported experiences similar to those of white women for the Tightrope questions. This was an interesting contrast with the Prove-It-Again questions, in which women of color reported higher levels of bias. When we separated women of color into Asian women and other women of color, we found generally the same result, with two exceptions noted earlier: Asian women reported

higher levels of bias than all other women for the two Tightrope questions regarding literal housework (like planning parties) and administrative roles (like taking notes at a meeting).

Men of color also walk a Tightrope: they reported lower levels of agreement that they could show anger at work than white men did. Men of color also reported higher levels of agreement when asked if they were expected to be worker bees.

Regression analysis confirmed that women reported more Tightrope bias regardless of race, age, workplace type, firm/department size, caregiving responsibilities, and geographic location.

# Maternal Wall

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"I have had male firm owners ask me if I was single or planning on getting married, etc. Completely illegal questions, because they still don't want to hire and/or promote women in case they go out on maternity leave. Unbelievable!"

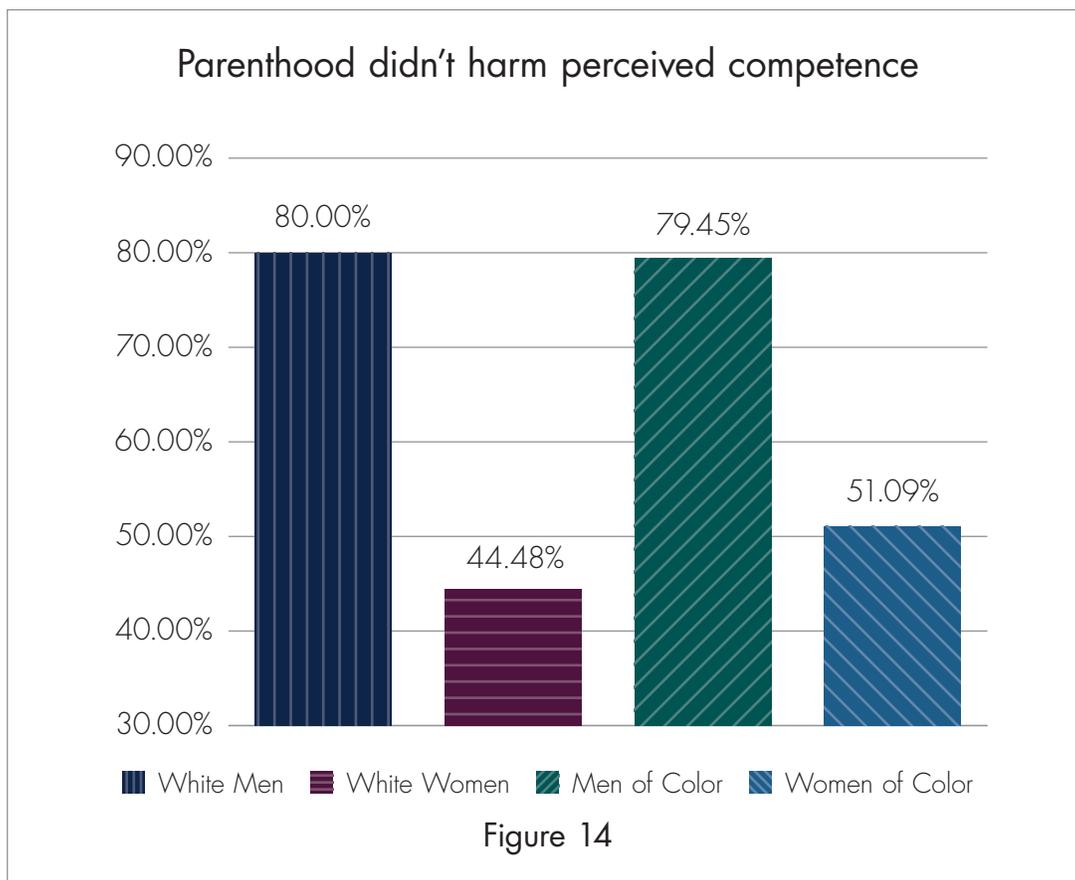
—White woman, firm lawyer

Bias against mothers is well documented. One influential study asked participants to review two identical women's resumes—the only difference between the two was that one resume listed membership in the PTA (signaling motherhood) and the other didn't. The study found that mothers were 79% less likely to be hired, only half as likely to be promoted, and offered an average of \$11,000 less in salary than women without children.<sup>55</sup>

## Negative competence assumptions

Many other studies have documented that motherhood triggers negative competence and commitment assumptions.<sup>56</sup> The American Bar Association's *Visible Invisibility* report found that 72% of women of color but only 9% of white men thought that their colleagues doubted their career commitment after they had (or adopted) children.<sup>57</sup>

The Workplace Experiences Survey confirmed the prior research: a substantially higher proportion of both white men and men of color agreed that their colleagues' perceptions of them didn't change after having children, as compared with women: about 80% of men did not report having their commitment or competence questioned after having children, compared to only 51% of women of color and 44% of white women (see Figure 14). These 29–36 percentage point gaps between men and women reveal very large differences in experience between men and women when they become parents, and this is one of the most dramatic findings of the report.



## The “ideal worker” vs. the “ideal mother”

Much has been written about the difficulties of being a mother and maintaining a professional legal career.<sup>58</sup> Although parents face this problem across all industries, the “all-or-nothing” legal workplace typical in high-powered law firms and many legal departments makes balancing work and family especially acute for parents in the legal profession.<sup>59</sup>

Women commonly face pressures to achieve two incompatible ideals: the ideal worker always available to her employer, and the ideal mother always available to her children.<sup>60</sup> Clearly, some organizations have made progress at reconciling these ideals. Said one woman:

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Women commonly face pressures to achieve two incompatible ideals: the ideal worker always available to her employer and the ideal mother always available to her children.

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“Had both children while spouse and I were both working at Amlaw firms (and both billing in excess of 2400). Had 2 months’ leave with first (firm policy because I had not completed a full year of employment), took maximum leave with second child and requested additional unpaid leave to deal with nanny issues. No pushback from firm, and when firm implemented “merit based” compensation rather than lockstep after 2008 recession, I was promoted and paid more than my peers (and more than under the old lockstep system).”

*—Asian American woman, firm lawyer*

And another emphasized the fact that there has been progress in the profession over the years:

"In the 1970s, if an attorney wanted to continue a late-in-the-day depo due to a child's soccer game, it was denied peremptorily. Now, thanks to accommodations, we all get to have a life. What great progress! My thanks to women lawyers for showing us that such family obligation boundaries can and need to be honored. With over 50% of practicing family lawyers being women, we can easily forget that other areas of the law are not so progressive."

—*White male, firm lawyer*

But overall, it appears that being a lawyer and being a parent—especially a mother—still feels difficult for many and totally incompatible for some:

"It is impossible to find 'work/life balance' as a mother when our jobs simply do not allow you to leave at 5 pm—even if you are told that it is ok. In reality, there is a stigma attached with leaving earlier than 7ish or coming in after 8:45 am—people look at you and you are talked about. I don't see my son awake Monday through Friday. It makes you hate the fact that you became a litigator, but you just don't know what other field you can get into."

—*Asian American woman, firm lawyer*

"Because my billing rates are so high, clients are justified in expecting me to be available at all hours—but I can't do that and be the parent I'd like to be at the same time. My job and my parenting ideals are incompatible. So despite the fact that many of my skills are well-suited to the practice of law, and I work in a firm that is fairly supportive of a flexible schedule, I've recently accepted a position in which a JD is preferred but not required. I'm a little disappointed but also relieved. I'll be getting paid less and have less 'prestige,' but I think overall it will be best for my family and therefore for me."

—*White woman, firm lawyer*

"I was passed over for partner because I had a child. The two male attorneys who were hired at the exact same time as me, who had comparable prior experience, and same job responsibilities were made partner but I was not. When I asked why, I was told it was because I had given birth to a child."

—*White woman, firm lawyer*

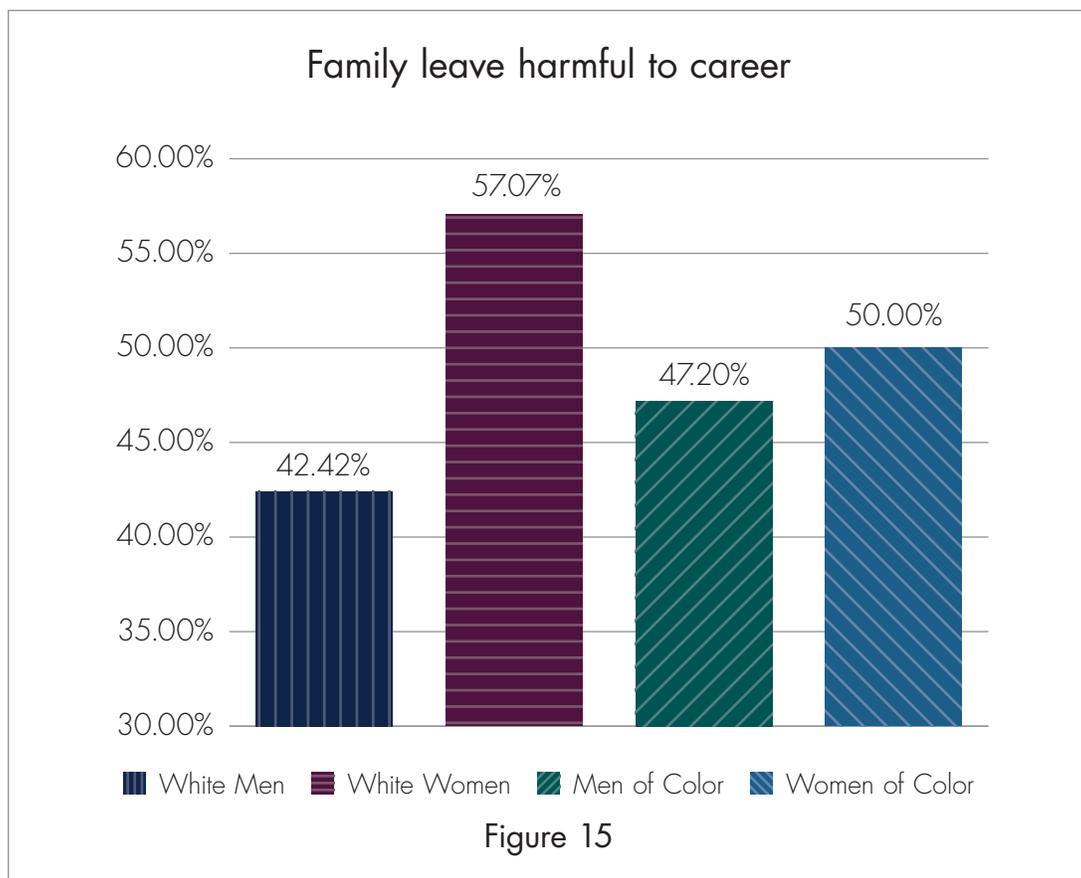
## Parental leave/flexibility stigma

Another aspect of Maternal Wall bias is the “flexibility stigma,” or bias triggered by mothers taking parental leave or working part-time or flexible schedules after they return.<sup>61</sup> This is especially challenging in the legal profession due to the pressures for high billable hours and to remain available to clients 24/7.

The Project for Attorney Retention (PAR), among other organizations, developed best practices for how to incorporate parental leave and part-time schedules into the legal profession without harm to the work product or clients.<sup>62</sup> PAR’s research argued that working part-time or with a flexible schedule would actually *improve* lawyers’ work outputs, wouldn’t harm client relations, and would benefit everyone—both men and women who had families or other caregiving responsibilities.<sup>63</sup> PAR sketched a road map for how lawyers who work part-time can stay on the tenure track and not risk their entire career due to their change in schedule.

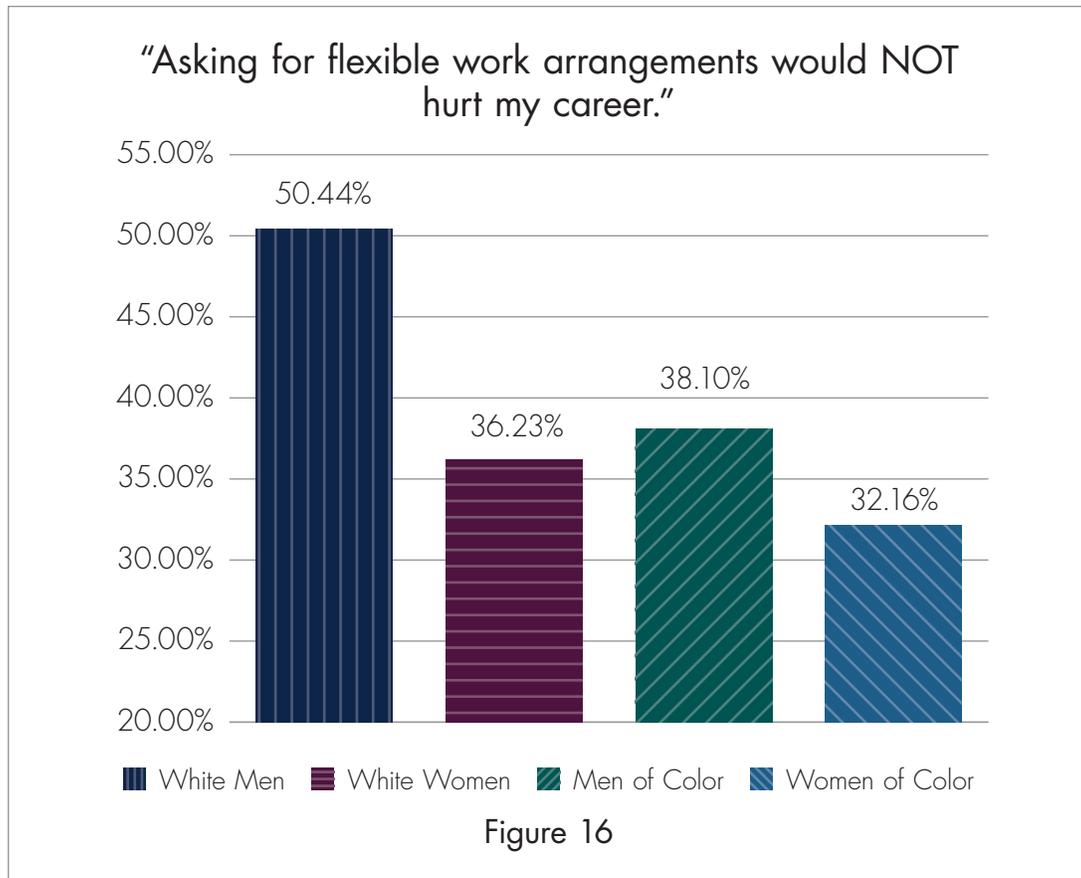
However, although many legal workplaces do have a parental leave and part-time policy on paper, repeated studies have found a dramatic difference between what is written on paper and what happens in reality.<sup>64</sup> Most lawyers, they found, either did not feel they were able to actually use those part-time policies, or believed that if they did avail themselves of part-time policies, it would significantly affect their career in a negative way.<sup>65</sup>

White women agreed at the highest level of any group that taking family leave would hurt their careers (see Figure 15).



An important fact is that 42% of white men also reported that taking leave would hurt their careers, indicating that flexibility stigma affects all groups, including white men.

When asked about working flexible schedules, the majority of lawyers answered that they believed even asking for flexible work arrangements could hurt their career (see Figure 16). Only 32% of women of color and 36% of white women believed that they could ask for flexible work arrangements without hurting their career. As compared with other groups, white men reported the highest level of agreement that they could work part-time without damaging their career, but still only 50% of white men thought so. Men of color also reported the flexibility stigma.



The Workplace Experiences Survey data indicated that more women—but also many men—believe that taking time off to have children or working a flexible schedule is still incompatible with the career of a high-powered lawyer.

Lawyers are not unreasonable for thinking that parental leave or flexible schedules would hurt their careers. Indeed, we received many comments from survey respondents who experienced negative career ramifications after they took parental leave or went to part-time work:

"Having a child was detrimental to career. Was laid off shortly after having a child despite positive performance reviews and performance based bonus. Partnership opportunity was delayed due to flexible work schedule requirement and being out frequently to care for sick child, even though I have exceeded billable requirements and originated close to \$1 million in business."  
—Asian American woman, firm lawyer

"Went on reduced work schedule due to having kids—and suddenly could not get staffed on matters. Basically I have been forced to leave."  
—White woman, firm lawyer

"The treatment I received from my male colleagues after returning from maternity leave was horrible. Some of them wouldn't talk to me and I no longer received assignments from them when I had been the 'go to' before leave. When I asked for a lock on my door so that I could pump without fear of interruption, the managing attorney said he'd buy me a 75¢ wooden wedge for the door. This is at an AmLaw top 100 firm."  
—White woman, workplace unknown

## Step back after kids

Many more survey comments reported another form of Maternal Wall bias: when women returned from parental leave, they found they could not get access to the level of work they were doing before their leave. For some, it took years to return to the level they were at before their leave, and for others, they found leaving their workplace was the only option. This qualitative data supports a study that found that 75% of women return to work after a break only to find the job they returned to was worse, demanded less skill, paid less, and had less room for promotion.<sup>66</sup>

The Workplace Experiences Survey found that only 5% of white men but 20% of white women and 19% of women of color reported that colleagues told them they should stay home or put their career on hold after having children (see Figure 17). Men of color fell in the middle.

### Expected to stay home or put career on hold after having children

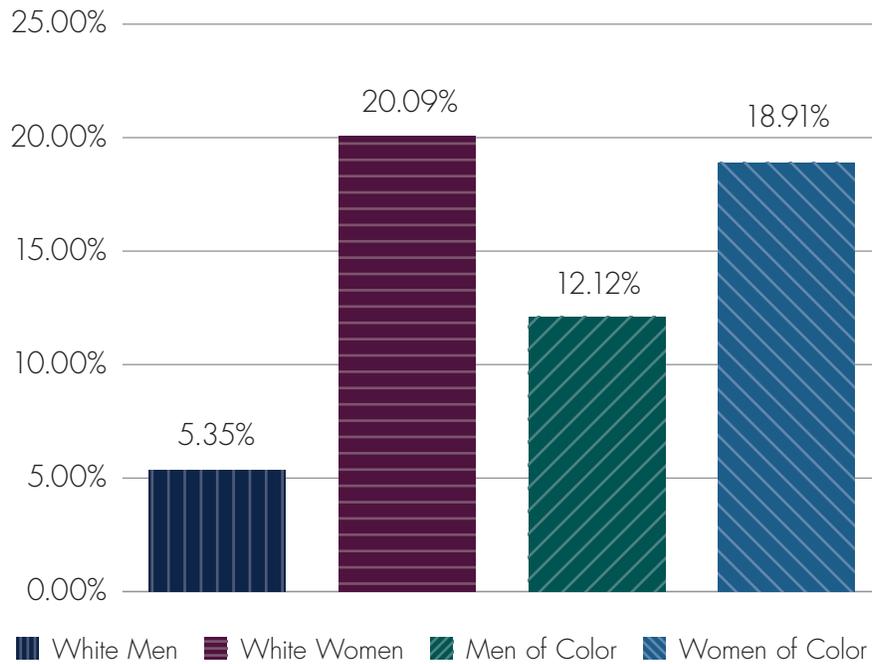


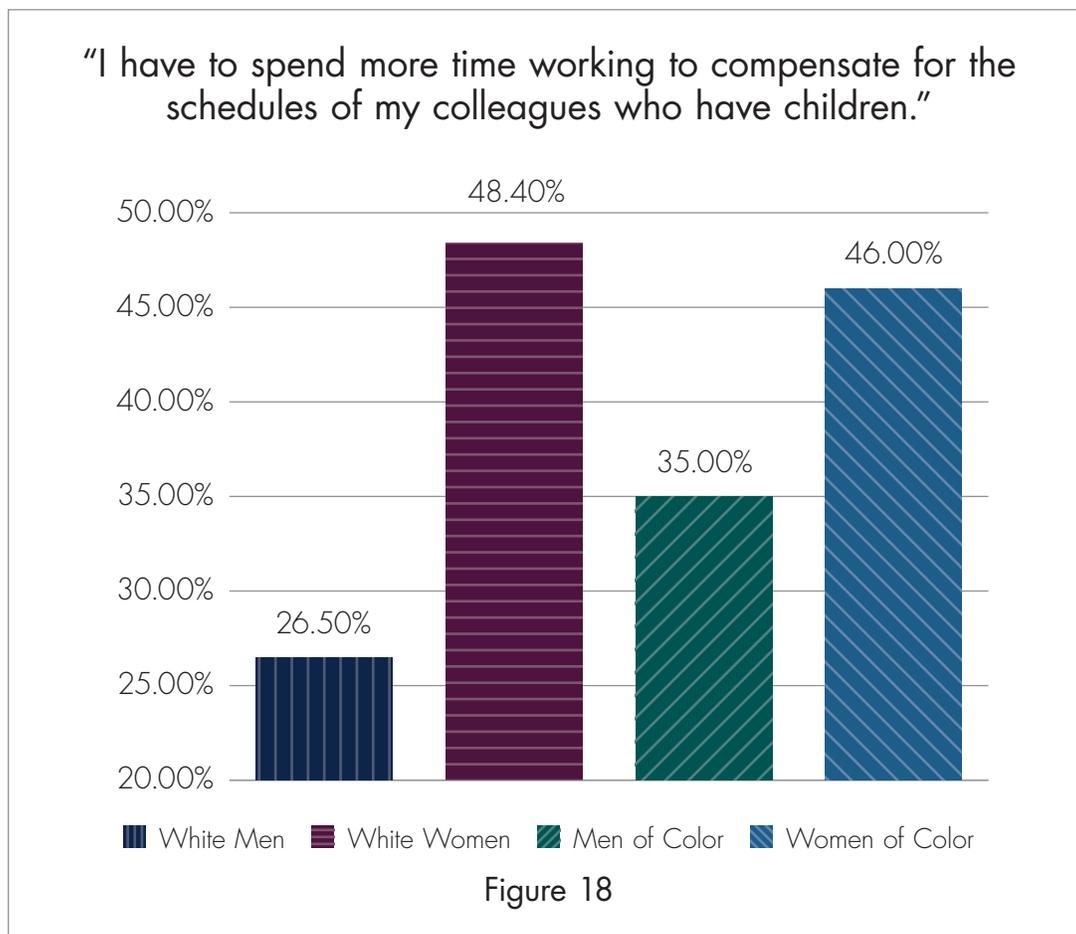
Figure 17

"I made partner in the shortest time of any female. Things were great. I had my son. I worked part time during leave and came back in 9 weeks. My work was gone. It has taken 2 years and a change in focus to get back to the level I was."

—White woman, firm lawyer

## Maternal Wall bias affects nonparents too

The Maternal Wall affects women without children as well as mothers. Among lawyers with no dependent children (see Figure 18), 48% of white women and 46% of women of color reported that they had to work harder to compensate for people with children, compared to only 27% of white men.



A different study found that single women in their thirties work more unpaid overtime than any other group.<sup>67</sup> Women without children often meet the assumption that they can work anytime because they have “no life.” In the Workplace Experiences Survey, among lawyers with no dependent children, 36% of women of color and 37% of white women reported that their colleagues think they have no life, as compared with 15% of white men.

Everyone, of course, has a life: this is a modern version of the “pathetic spinster” stereotype, communicating that a woman who is not a mother has nothing important going on in her life outside of work.

## Maternal Wall conclusions

There's been a lot of discussion in the legal realm about women who "opt out" of the workforce to have and raise children.<sup>68</sup> Some use this theory to explain why there are so few women in leadership positions: women choose not to pursue leadership roles.<sup>69</sup>

The Workplace Experiences Survey data suggest that women who leave the labor force after having children often did not opt out—they were pushed out by Maternal Wall bias. Even women who wish to continue working in precisely the same way as before they had children often face assumptions that they are no longer as competent or committed. In addition, the lack of realistic parental leave and nonstigmatized part-time options make it difficult for many mothers to succeed.

The problem is not just for women who have children. Men who request time off for child care or who request flexible schedules to assist in child rearing also face stigma and can have their career commitment questioned, as having child care responsibilities does not fit into the "ideal worker" role and breadwinner status that men are assumed to play.<sup>70</sup> One study found that when men revealed caregiving responsibilities, it negatively affected their career.<sup>71</sup> A white male lawyer commented that in his firm, "male employees [were] routinely questioned/viewed skeptically by firms when taking parental leave."

Increasingly, men are demanding workplace flexibility so they can spend more time with their families and assist in child care. When deciding which employer to work for, more men, especially millennial men, are using workplace parental leave and flexible schedule policies to help decide where to work.<sup>72</sup>

Regression analysis confirmed that women reported more Maternal Wall bias than men regardless of race, age, workplace type, firm/department size, caregiving responsibilities, and geographic location.

Regression analysis specifically focused on flexibility stigma showed that women reported more bias than men. While no differences emerged in regression analyses between white and Asian lawyers, other people of color reported more bias after controlling for other variables.

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A white male lawyer commented that in his firm, "male employees [were] routinely questioned/viewed skeptically by firms when taking parental leave."

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# Tug of War

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Sometimes bias in the environment can fuel conflict between members of disadvantaged groups. This “tug of war” has been documented among women.<sup>73</sup> Our survey results suggest that bias also can trigger conflict among people of color.

## Tokenism

If women and people of color perceive that there is room for just one or just a few of their group to reach a cherished position, naturally they end up competing for that one slot. The Workplace Experiences Survey data documented that 27% of women of color and 28% of white women felt that there is a “woman’s slot” at work and that they are regularly competing for it. Similarly, 29% of men of color and 31% of women of color felt that there is a “minority slot” and that they are regularly competing for it with their minority colleagues. In other words, almost a third of women lawyers and almost a third of lawyers of color felt that there is only one “slot” for someone like them and that they have to compete with their women and/or minority colleagues.

“Sometimes women of color are literally referred to as ‘twofer’ — i.e., they count in diversity statistics as both women and as lawyers of color. This demeans them, and reduces opportunity for white women, because the white men are using the double-counting to make the workplaces they still control look more diverse on paper than they actually are.”

—White woman, in-house lawyer

## Assimilation

Women use different strategies to navigate and succeed in male-dominated workplaces. Sometimes this leads to conflicts when women fault each other for assimilating too much, or too little. For example, some women join the “boys’ club” and assimilate to the way things are done,<sup>74</sup> and others align with other women. Some women start women’s initiatives, and others distance themselves from other women to gain favor among the men.<sup>75</sup>

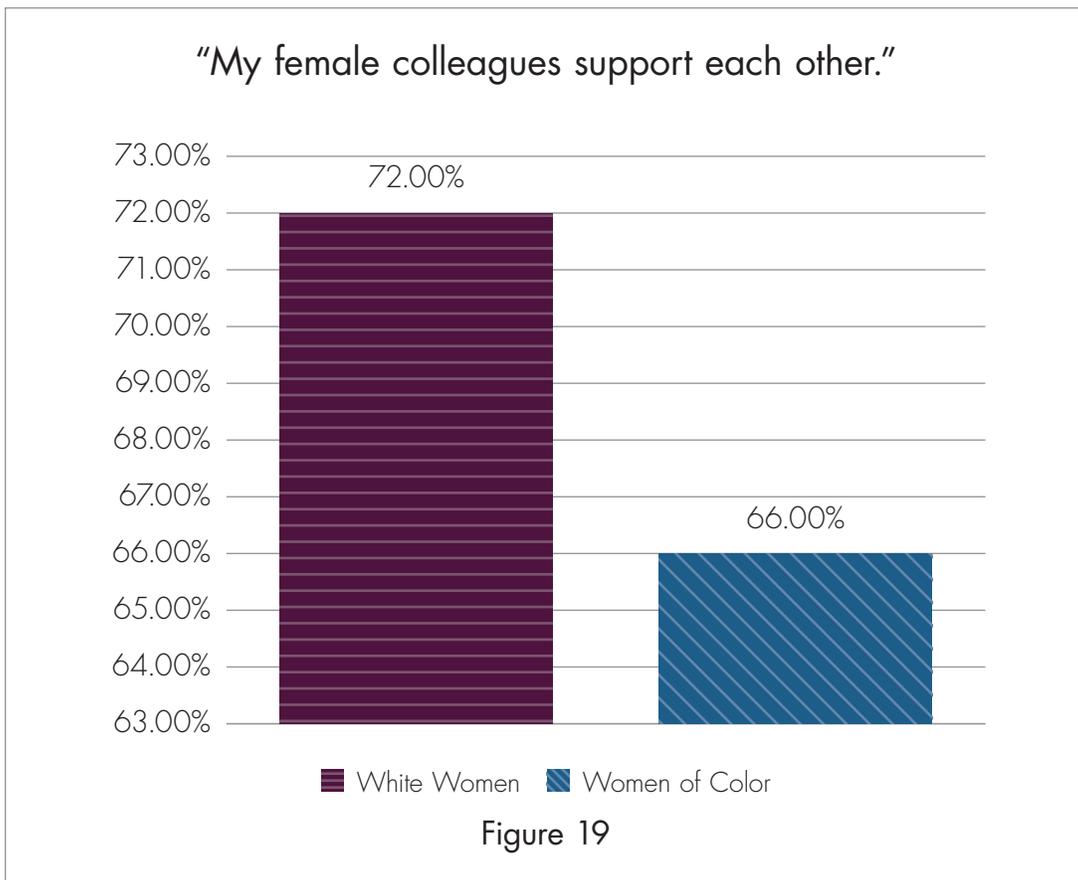
Sometimes the Tug of War has a generational element: more senior women, who had to work long hours and take only brief maternity leaves, may judge more junior women who want to take longer leaves and pursue more work/life balance. The older women may fault the younger women for lack of work commitment, and the younger women may fault the older women for not spending enough time with their families.

More junior women sometimes look at the more senior women and think they have just “turned into men” or think that the more senior women aren’t doing enough to help other women behind them. An example:

“My relationships with women lawyers in the generations ahead of me have often been competitive or have not involved the degree of support that I would expect. Among my peers and with a trusted male mentor, I have commented that older women in leadership roles climbed the ladder and pulled it up behind themselves.”

—Woman lawyer, race unknown, in-house

When the Workplace Experiences Survey asked women lawyers if they feel supported by their female colleagues (see Figure 19), 72% of white women and 66% of women of color said they did. In other words, women of color agreed at slightly lower levels than white women that they feel that their women colleagues support them. This racial difference also was found in a prior study of women scientists.<sup>76</sup>



White women also agreed at slightly higher levels than women of color that some women lawyers just don’t understand what it takes to make it as a lawyer (34% vs. 28%).

About half of all women lawyers, regardless of race, feel that some women lawyers have just “turned into men” and assimilated to the way men’s lives and careers are run.

These findings indicate that the Tug of War is felt more acutely by women of color than by white women, although both groups appear to encounter it in the workplace. The bottom line? If women aren’t supporting each other, it may be because gender

bias in the environment promotes competition through limited opportunities and judgment of other women’s strategies for navigating environments shaped by gender bias.

## Administrative help

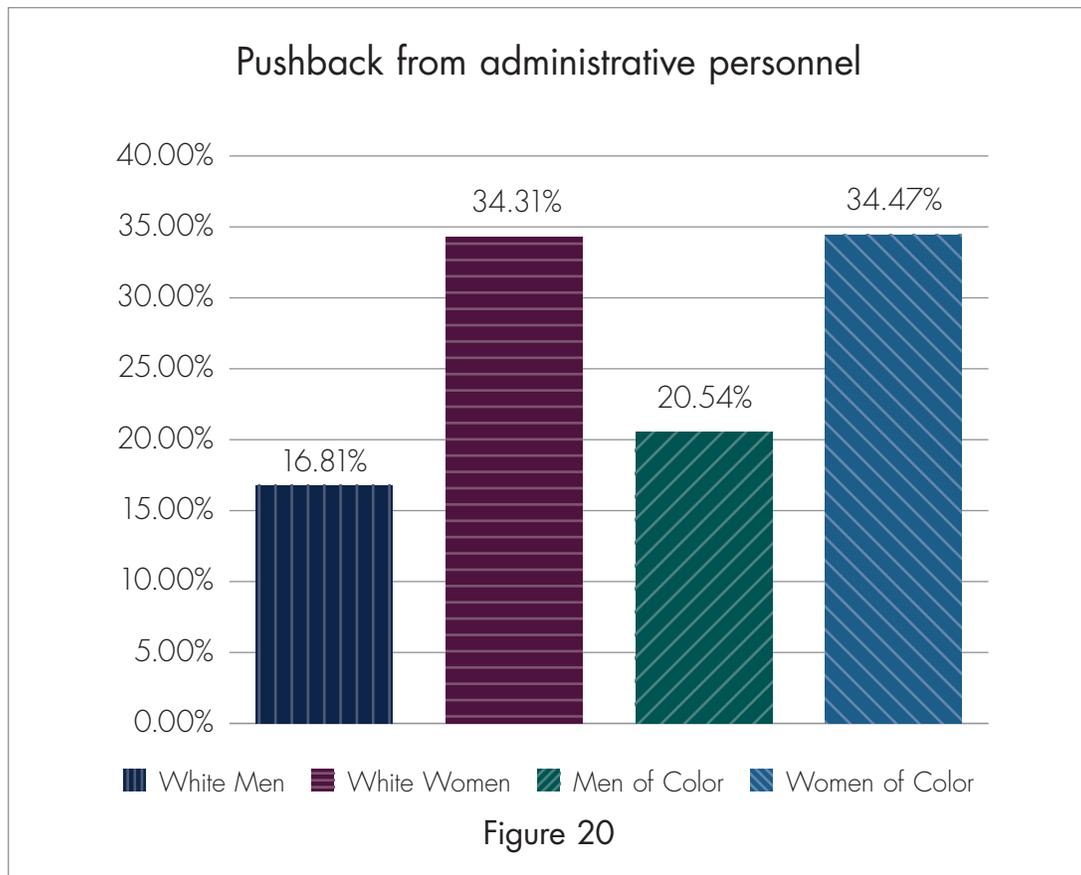
A final—and acute—Tug of War pattern often plays out between women lawyers and their admins. One study found that not a single legal secretary who expressed a preference preferred to work with a woman boss. (The good news is that half of admins had no preference as to whether they worked with men or women.)<sup>77</sup> Quotes from the legal secretaries in that study reveal a classic Tug of War dynamic: “Females are harder on their female assistants, more detail oriented, and they have to try harder to prove themselves, so they put that on you.”<sup>78</sup> This describes how the Prove-It-Again bias faced by women lawyers created conflict with their assistants—a classic situation in which gender bias against women fuels conflict among women.

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Women reported struggling to get the same level of administrative support enjoyed by their colleagues at a level 18 percentage points higher than white men.

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The Workplace Experiences Survey revealed that both white women and women of color find it harder than white men and men of color to get support from administrative personnel (see Figure 20). Women reported struggling to get the same level of administrative support as their colleagues at a level 18 percentage points higher than white men.



## Tug of War conclusions

Overall, women, more than white men, reported that other women have just “turned into men” and that they find it difficult to get administrative help. Women also reported that they feel there is a “woman’s slot” at work and they are regularly competing for it.

People of color also reported feeling that there is one position available to people like them at a higher level than white men, and that they have to compete with other people of color to get it. Finally, women of color reported that they don’t feel supported by other women at a higher level than white women.

Regression analysis confirmed that women reported more Tug of War bias regardless of their race, age, workplace type, firm/department size, caregiving responsibilities, and geographic location.

# Workplace Processes

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"I have been stunned by the level of hypocrisy I have seen (both through my own experiences and through discussions with colleagues) in many law departments which proclaim outwardly to be serious about diversity. Many still tolerate and even foster a caste system which places minorities at the bottom rung in terms of mentoring, promotions, and quality work assignments. Often this occurs as those same companies castigate their outside firms for similar transgressions."

—Black male, firm lawyer

The Workplace Experiences Survey also asked lawyers whether they felt various basic workplace processes were fair: hiring, the allocation of assignments, opportunities to develop business, performance evaluations, promotions, compensation, and access to mentorship and support.

Much attention has been paid to promotions and compensation, which is not surprising: women and attorneys of color are severely underrepresented at the equity partner level, and members of both groups typically get paid much less than their white male counterparts.<sup>79</sup> Some recent studies have assumed that the compensation differentials differ by gender because women partners' originations are lower than men's, although one study found that women partners make less even after holding originations constant.<sup>80</sup> The Workplace Experiences Survey advances the debate because it did not look at originations in isolation. Instead, it looked at many of the processes that lead to lower compensation, from whether they have equal access to desirable assignments, mentoring, and networking to whether they feel their performance evaluations are fair.

Even small amounts of bias add up over time and have large effects on the career prospects of women and people of color.<sup>81</sup> As legal scholar Eli Wald explains: "Caucasian males are able to work longer billable hours, receive superior training, and form stronger mentorship relationships with powerful partners. In turn, these associates receive higher quality assignments and end up better positioned to develop a book of business. As a result, having proven themselves to be the 'ideal workers,' white male associates are privileged to have a better chance of making partner."<sup>82</sup>

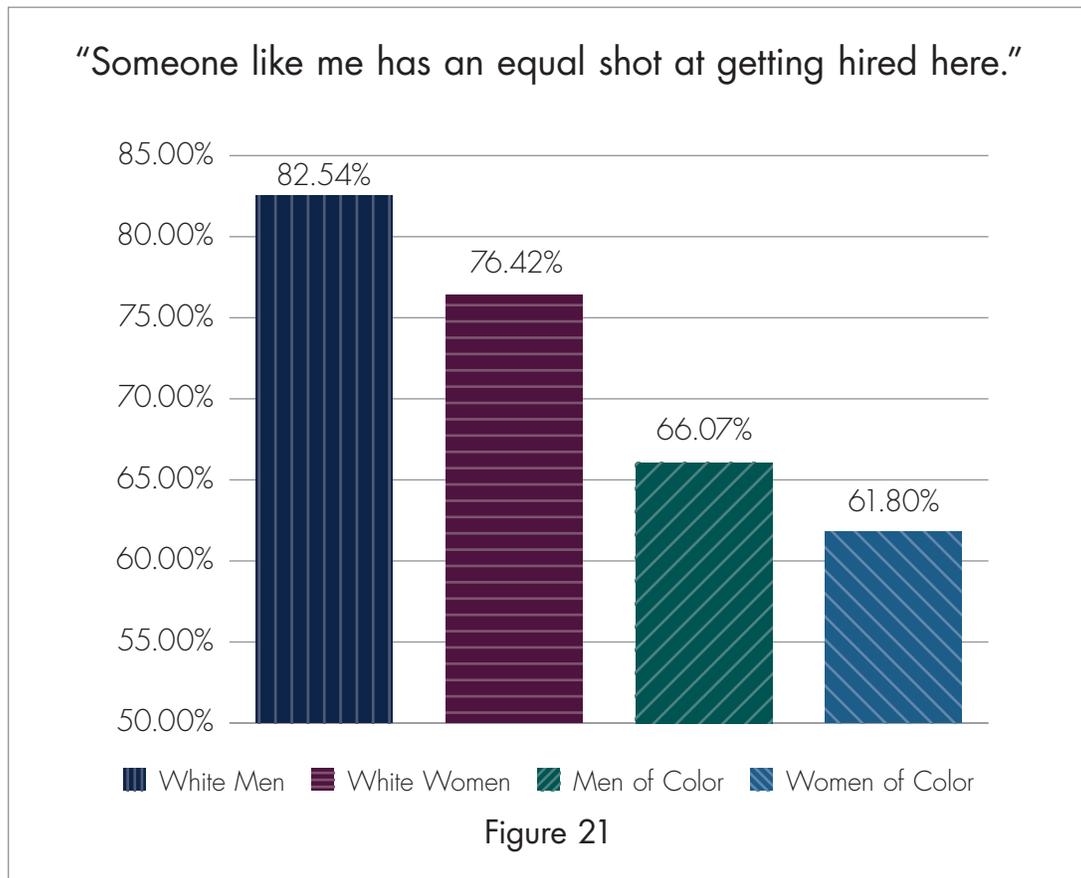
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Even small amounts of bias add up over time and have large effects on the career prospects of women and people of color.

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## Hiring

White men were the group that reported the highest level of agreement that someone like them had an equal shot of getting hired at their workplace (see Figure 21). Women of color were the group with the lowest level of agreement; they agreed at a level 21 percentage points lower than white men. Men of color and white women fell in between, but both groups reported statistically significantly lower levels of agreement than white men. This result indicates that women and people of color perceive more bias in their hiring systems than do white men.



Looking in sharper focus, women of color fell into two distinct groups. Asian women reported similar levels of agreement as white women that they felt that someone like them had an equal shot at getting hired. Other women of color (Black, Latina, and women of other races) agreed at substantially lower levels than Asian or white women. This group of women of color reported the most bias in hiring.

We heard from several people who were the only woman/woman of color/person of color at their firm, and several others who found it difficult to get hired as a woman. One felt she was experiencing a combination of age and gender bias:\*

\* Though we hear anecdotally from lawyers that they experience age-based bias, when we ran regression analyses on the Workplace Experiences Survey data, we did not find age-based bias in hiring. This issue merits further research.

"Being a woman attorney with 25 years' experience is just awful. I cannot find anyone to hire me for a job or salary commensurate with my considerable experience."

—*White woman, firm lawyer*

Getting hired, of course, is only the first step. Once lawyers are hired, their success depends on getting access to good assignments.

## Assignments

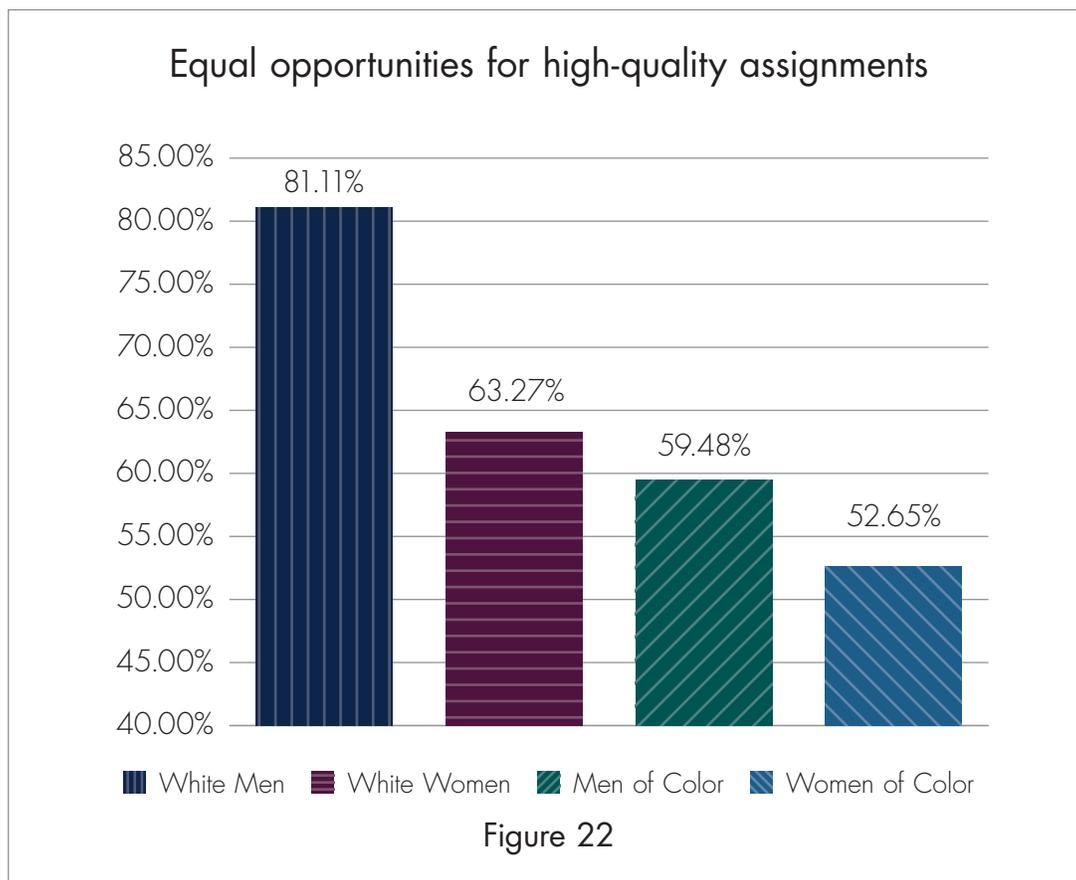
The ABA's *Visible Invisibility* report found that 44% of women of color but only 2% of white men reported being denied desirable assignments. Because women of color were less likely to get good work, by the time they were third and fourth year associates, they had less experience than the white men who had joined the firm at the same time they did. This dramatically lowered their prospects for career advancement and affected their entire career trajectories.<sup>83</sup> Other studies have found that black associates often receive lower-quality work assignments than white associates.<sup>84</sup>

A growing number of studies document that women are less likely than men to get access to career-enhancing "glamour work" than men and more likely to receive large loads of "office housework," which includes literal housework (planning parties) to administrative work (finding a time everyone can meet) to undervalued, behind-the-scenes work (as when a partner does a PowerPoint so another partner can give the presentation at a pitch).<sup>85</sup> Our survey results were consistent with the findings of these other studies.

The Workplace Experiences Survey found that only about half of women of color but 81% of white men reported that they have had equal access to high-quality assignments as their colleagues (see Figure 22). The 28 percentage point gap between white men and women of color is very large and one of the most dramatic findings of this study. There also were large gaps between white men's responses and those of men of color and white women, indicating that women and people of color feel they have a much harder time getting access to high-quality assignments than white men.

"I am a senior Af-Amer practitioner who has outstanding credentials but has routinely been overlooked for the 'plum' opportunities available to my peers."

—*Black male, firm lawyer*



Recall that both women and people of color felt pressure to be worker bees who presumably do what they are told without expecting or demanding career-enhancing work. Asian women reported similar experiences to white women, but Black, Latina, and women of other races reported more bias than either group.

The problem with assignments is not that women don't want the high-profile assignments. The survey asked if respondents were satisfied with their access to high-profile assignments. White men again reported that they were satisfied with their access to high-profile assignments at the highest level of any group. Women of color, white women, and men of color agreed at considerably lower levels (15–20 percentage points lower) and all reported similar levels of bias. White and Asian women reported similar experiences, but other women of color reported being satisfied with their access to assignments at a lower level than either group.

The bias that gives majority men privileged access to desirable assignments typically is unconscious.

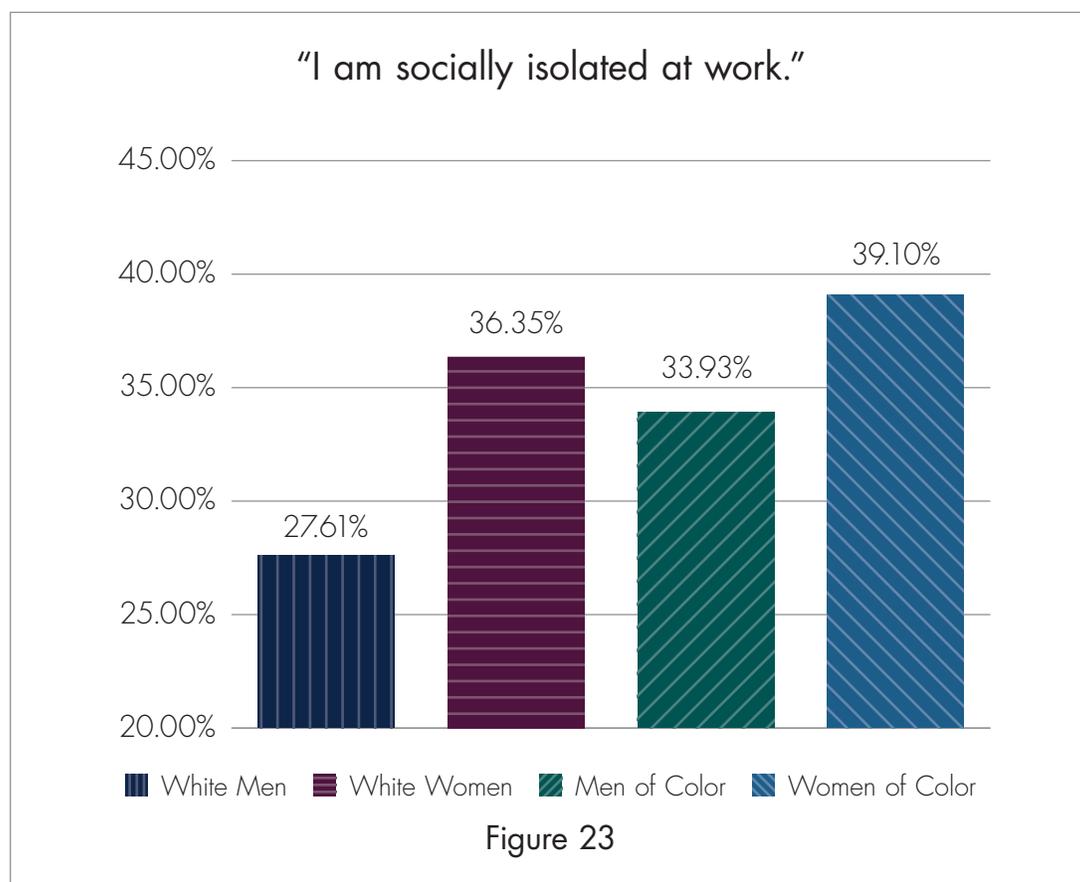
"Their[s] is a very subtle sexism. Men seem to want to work with men and don't always think about bringing in women. They probably don't even realize they're doing it; they just want to be around their buddies (male)."

—White woman, firm lawyer

These findings that women report less access to desirable assignments, combined with our findings (reported earlier) that women of all races reported higher loads of office housework than men, should be considered together. For women, these two factors can add up, making assignments an important, and often overlooked, factor that impedes women's careers.

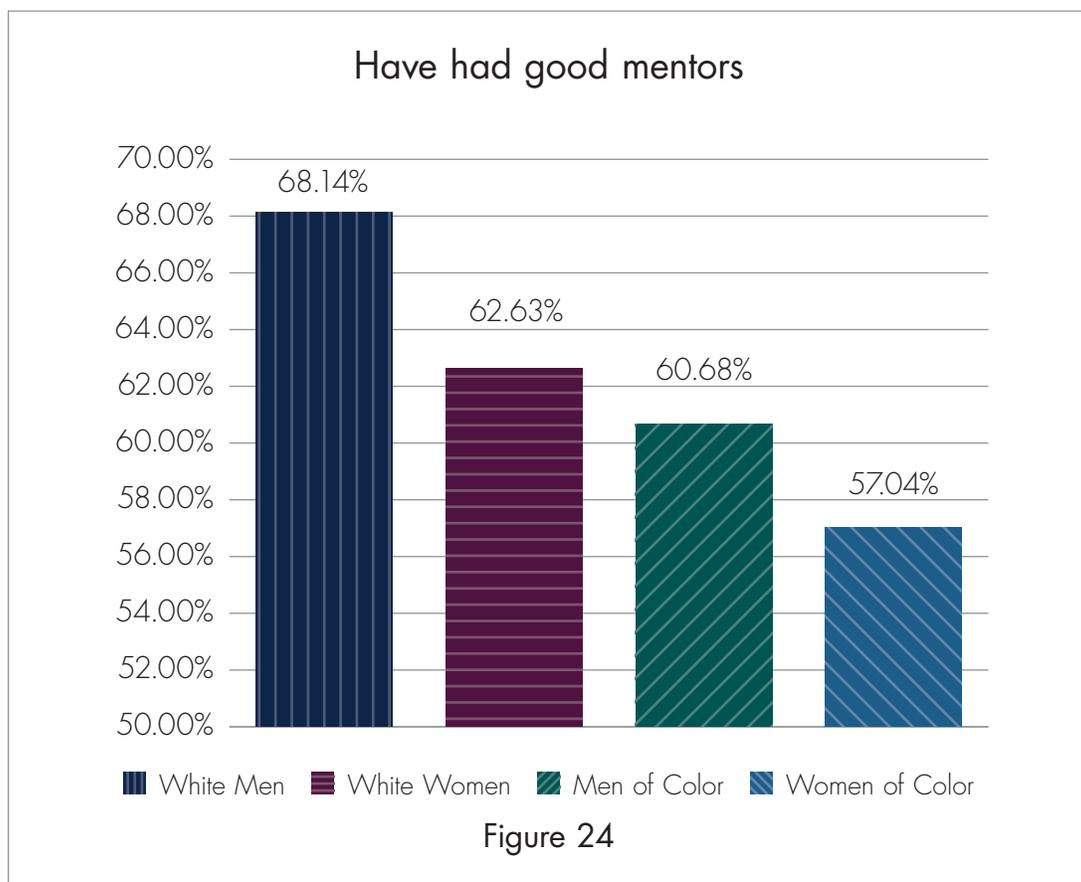
## Support

The Workplace Experiences Survey asked three questions to try to understand whether lawyers from different groups feel they receive the same levels of support at work: equal access to mentoring, sponsorship, and networks. In addition, our survey asked about social isolation. Prior studies have shown that black professionals experience more social isolation at work than their colleagues<sup>86</sup> and that black associates have less social contact with colleagues than do their white peers.<sup>87</sup> The Workplace Experiences Survey found that white men reported the lowest levels of agreement when asked if they felt socially isolated at work (see Figure 23). Levels of agreement by women of color, white women, and men of color were higher, though the difference between men of color and the other groups (including white men) was not statistically significant.



A sponsor is someone who is willing to spend his or her political capital to help your career. Having one can be crucial. Mentors are different: mentoring describes a very broad range of relationships. Sometimes a mentor is someone who truly invests in a protégé's career, but mentoring also can describe the occasional lunch, pep talk, or advice. Both sponsors and mentors are particularly important to women and people of color because people's default networks tend to consist of people like them<sup>88</sup>—so in an environment with predominantly (or only) majority men at the top, the people in leaders' networks tend to lack diversity.

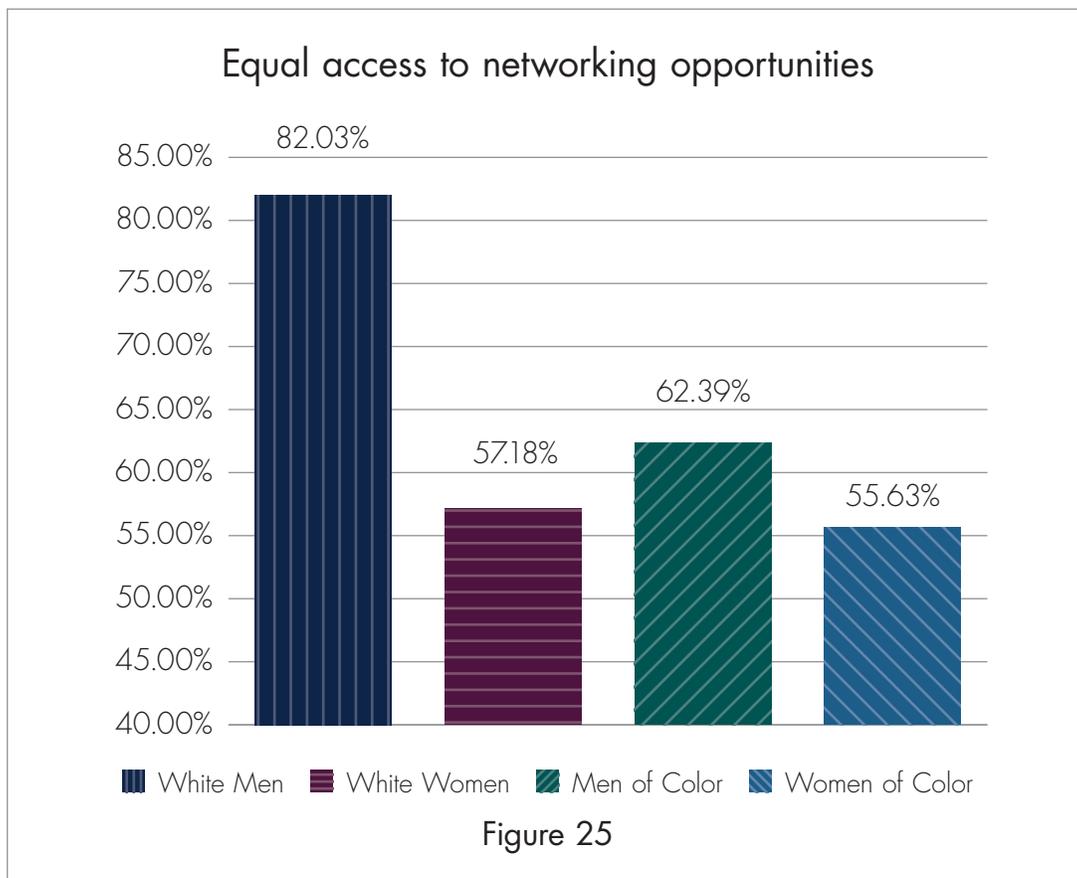
The Workplace Experiences Survey found that women of color had the lowest levels of agreement when asked whether they had access to good mentorship, while white men had the highest level of agreement (see Figure 24). White men agreed that they have had good mentors at a level 11 percentage points higher than women of color. This lack of mentoring can greatly hinder a young lawyer's ability to navigate and advance in his or her career.



Having access to networks, be it formal networks (e.g., alumni associations) or informal networks (e.g., the people who play poker on Tuesdays), can be crucial for a lawyer's ability to access opportunities, navigate workplace problems or politics, and advance in his or her career. Alarming, the *Visible Invisibility* report found that 46% of women of color and 60% of white women reported that they were denied formal or informal networking opportunities.<sup>89</sup>

The Workplace Experiences Survey revealed that majority men agreed at considerably higher levels than any other group that they were given equal access to networking opportunities (see Figure 25). Women of all races reported that they had equal access to networking opportunities at a level about 25 percentage points lower than white men. Men of color reported equal access to networking opportunities at a level 20 percentage points lower than their white counterparts.

The reported gaps between white men and other groups are very large and speak to a substantial difference in experience between white men's ability to network and everyone else's.



One survey respondent characterized the problem as a manifestation of sexism:

“I think the sexism in my office consists of lack of access to networking opportunities such as speaking at union halls, going to union conferences, golf outings, etc.”

—*White woman, firm lawyer*

Another commented on what she viewed as the “good old boys” network operating in her workplace:

“I feel it is very difficult to have a successful career as a female attorney working in a law firm that has been part of the ‘good old boys network’ for many years, particularly in a Southern state. I am expected to work harder than my male colleagues and I do not get paid as much as they do compared to the volume of hours I bill and the volume of clients (and business generally) that I generate for the firm.”

—*White woman, firm lawyer*

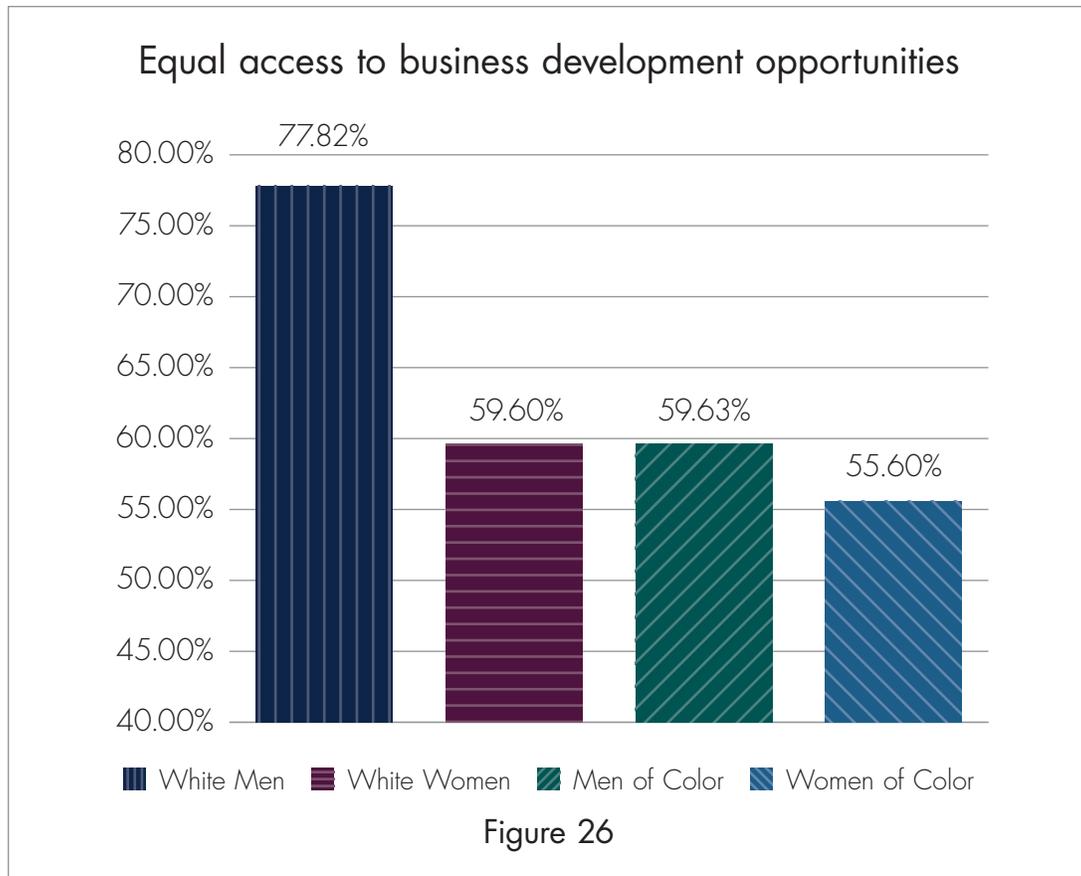
Not reflected in the comments but apparent from the data is that men of color also reported that they lack the same opportunities as white men. The “good old boys” network the commenter referred to often has not just a gender aspect but also a racial one. Men of color feel excluded too.

In a surprising finding, when the Workplace Experiences Survey asked if respondents had had a sponsor who was willing to give up their political capital to help their careers, white men were the group with the *lowest* agreement: 40% of white men and 41% of men of color, compared to 47% of women of color and 50% of white women, reported that they had a sponsor who went to bat for them in their career. This finding merits further study. It is difficult to interpret in light of our other findings.

## Business development

In law firms, business development is typically crucial to advancing a lawyer's career. For in-house lawyers too, getting opportunities to develop your skills and work with different people can be crucial to future career success.

The Workplace Experiences Survey revealed that, again, white men reported that they have equal access to business development opportunities at the highest level of any group (see Figure 26). The gap between white men and other groups is large: between 18 and 22 percentage points. White women, men of color, and women of color all reported that they don't get the same opportunities to develop business as do white men.



"I have been practicing 17 years and am very discouraged at this point in my career. It is still very much a good old boys' network. New male associates are included in golf and hunting trips with clients and thus building relationships. It is very difficult as a female to 'bond' with male clients."

—White woman, firm lawyer

Although this comment stresses the role of gender, our data clearly reveal that men of color also reported unequal access to business development opportunities.

Further analysis revealed that Black, Latina, and other women of color reported this bias at the highest level, followed by white women and Asian women (who reported similar levels of bias).

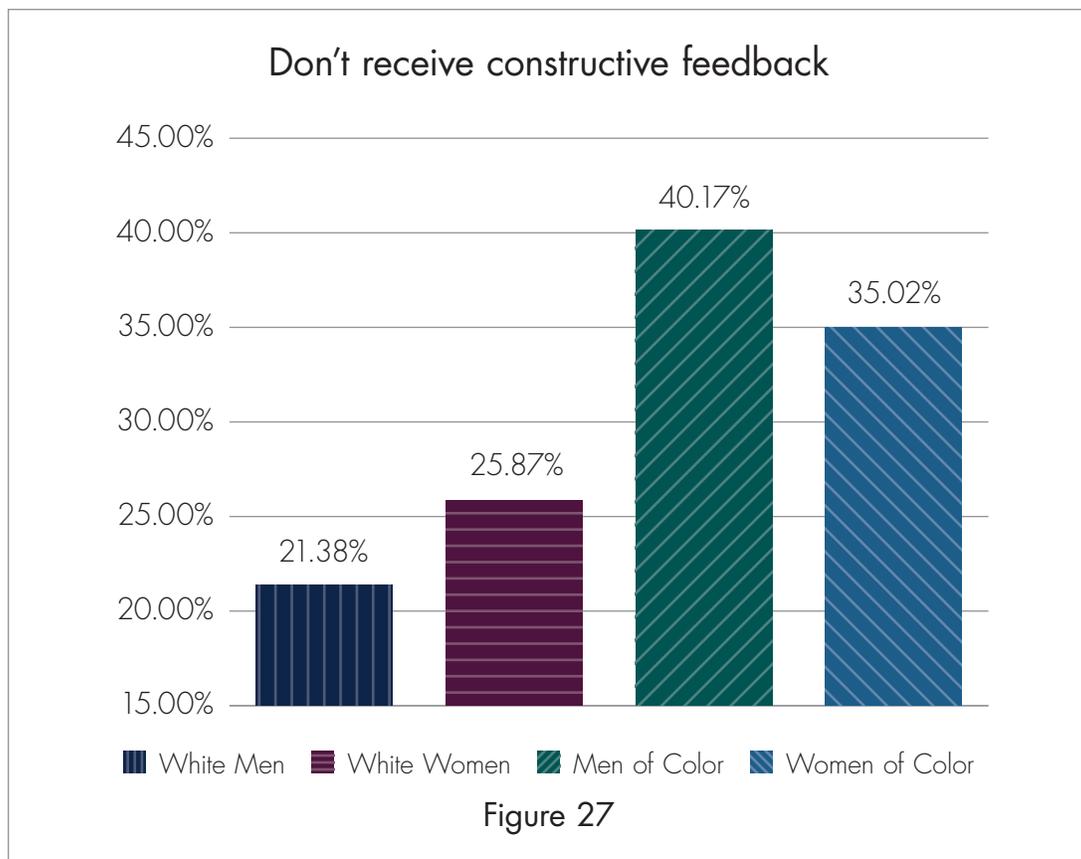
## Performance evaluations

The good news is that more than two-thirds of all survey respondents reported their performance evaluations have been fair. Less good news is that once again differences emerged among different groups. Again, white men reported the highest levels of agreement that they receive fair performance evaluations, while women of color reported the lowest level of agreement. White women fell in the middle. We found no statistically significant difference between white men and men of color on this issue.

One survey comment reflected the kinds of problems some women experience:

“Major sexist reviews that my male colleagues do not get, where my only feedback is ‘you need to find your more feminine or softer side. You need to act more like a woman.’ Meaning I need to be a 1950s secretary. Comments like women should only wear dresses with pantyhose to court and work. Pants are for men (insert my eye roll).”  
—White woman, in-house lawyer

The Workplace Experiences Survey also found that lawyers of color—especially men—believe that they receive less honest feedback than their colleagues. Indeed, male lawyers of color reported that they don’t receive constructive feedback at a level 19 percentage points higher than with white men (see Figure 27). Lawyers of color often report receiving glowing performance evaluations that pinpoint nothing constructive they should address. Then they are passed over for promotion, with no idea why and no opportunity to address drawbacks before they become fatal.



White women's responses were not statistically significantly different from white men's experiences, though women of color's responses were, indicating that not receiving honest feedback is mostly a racial issue.

## Promotions

The percentage of women equity partners has risen at a snail's pace in recent decades.<sup>90</sup> People of color also are disproportionately stuck in lower levels of the legal profession.<sup>91</sup>

Several studies have found that women's chances of being promoted to partner are significantly lower than men's, even when controlling for relevant factors such as experience, law school ranking, and law school performance.<sup>92</sup> One study found that the promotion rate for women was only a little more than *half* the promotion rate for men;<sup>93</sup> another found that men are 2 to 5 times more likely than women to make partner.<sup>94</sup>

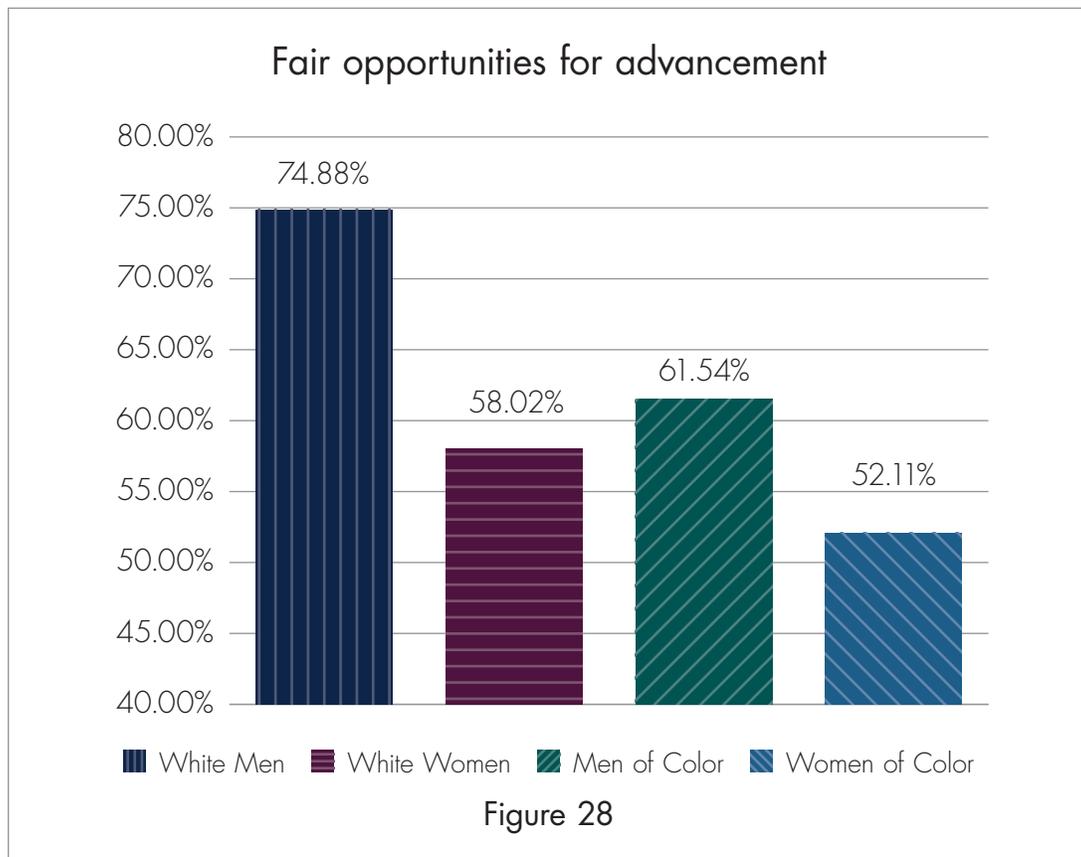
Lawyers of color also do not get promoted at the same rates as white men, although this issue has been studied less.<sup>95</sup>

The Workplace Experience Survey reflected the discrepancy in lawyers' upward mobility (see Figure 28). Again, the biggest differential was between white men and women of color: 75% of white men but only 52% of women of color believed they have been given the promotions they deserve, revealing a large 23 percentage

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75% of white men but only 52% of women of color believed they have been given the promotions they deserve, revealing a 23-percentage point gap.

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point gap. White women and men of color also reported considerably lower levels of agreement than white men that they got the advancement they deserved.

Asian and white women reported similar levels of bias. Black women, Latina women, and women of other races reported getting the opportunities for advancement they deserve at a lower level.

Many comments concerned promotions. Some women felt that the requirements for promotion kept changing:

"Although my collections routinely exceed the collections of over half of the equity shareholders in my Firm, I have twice been passed over for an equity position. The first time, I was told that the Board wanted to see one more multimillion dollar year. The second time, I was told that I had inherited the matters currently on my docket due to the death of a colleague. I was given no credit for a high-profile client I brought to the Firm or for years past when all of my docket was due to my own origination. Moreover, male income partners who inherit client relationships are routinely made equity partners. I find it amazing that my Firm expects me to act as lateral hiring partner for my office, serve as ombudsman to the associates in my office and on the Associate Compensation Committee, but still does not believe that my commitment of time to the Firm, combined with my financial contribution to the Firm warrant promoting me to an equity position. The Firm has less than 12% equity partners and appears to be moving backward from that number rather than forward."

—White woman, firm lawyer

Others reported what they saw as blatant discrimination:

"I was actually denied a promotion because the 'men in charge' didn't want a woman in that role in a previous job."

—White woman, in-house

"I was in house. Senior men in the organization were up front when the position above me was open that they wanted a man in the position. It was not clear to me whether they were telling me this gender preference because they wanted to discourage me from throwing my hat in the ring or because they felt comfortable with me and just wanted to express an opinion."

—Woman lawyer, race and workplace unknown

### Others commented on more subtle bias:

"The barriers to promotion for very senior women (like next board member position or divisional CEO) are huge but insidious. Because you are not a 'guy' you cannot hang with the guys or laugh at the same stuff. This immutable cultural barrier does prevent promotions. In many industries, HR and Marketing remain the place for the token promotable woman. Challenging men for space in their chosen field remains a huge problem at the most senior levels of the companies. Getting to SVP is easier; EVP tough; CEO—nearly impossible."

—*White woman, in-house lawyer*

"Primarily women in my firm are never placed in leadership roles and are generally not considered to be achievers."

—*White woman, firm lawyer*

### Many others reported Maternal Wall bias:

"The reality is that after you have children, you are treated differently and given less access to good cases, and therefore have less access to promotion."

—*White woman, firm lawyer*

"Male colleagues with fewer skill sets than I were promoted while I was not; when I went on maternity leave (and announced I would be returning), another attorney was hired to fill my job and a new position had to be found for me when I returned—which meant I had to transition after 15 years of litigation to transactional work."

—*White woman, firm lawyer*

## Compensation

The gender pay gap in the legal profession has been documented for decades.<sup>96</sup> A 2016 national survey of law firm partners found a 44% pay gap between female and male partners, down from a 47% pay gap found in their 2014 survey.<sup>97</sup> *Visible Invisibility* found that compensation for women of color attorneys was considerably less than other groups throughout their legal careers.<sup>98</sup>

The 2016 national survey points to origination credit as the basis for the pay gap: male partners reported 50% higher origination credit than women partners. However, to simply state that male partners earn more money because they bring in more business obscures the role of bias in the awarding of origination credit.

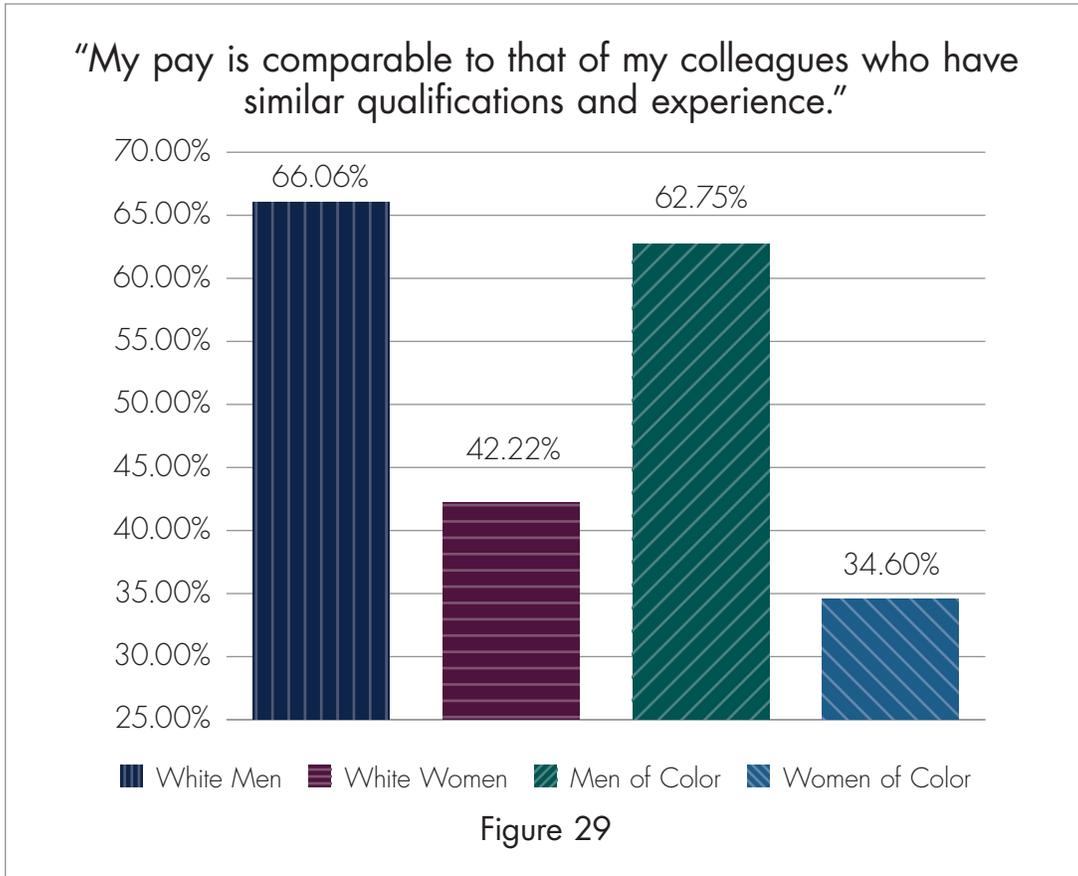
First, women may not get the credit for business they bring in: a 2010 survey of women attorneys found that 32% of white women income partners and 36% of women partners of color reported that they had been intimidated, threatened, or bullied out of origination credit in their careers.<sup>99</sup> The same survey found that more than 80% of women partners reported being denied their fair share of origination credit in the previous three years. Second, men may be given origination credit even when they didn't do the majority of the work.<sup>100</sup> Third, taking maternity leave and/or working part-time sometimes artificially lowers mothers' compensation for the year, if the months when they were out on leave are counted as "zero."<sup>101</sup> (If originations are averaged, say over three years, a woman who has two children three years apart may find her compensation negatively affected for six years.) Fourth, the lack of succession planning, coupled with "old boys' club" networks, sometimes means clients are passed down from male attorney to male attorney.<sup>102</sup> (For a fuller discussion on these issues, see "New Millennium, Same Glass Ceiling."<sup>103</sup>)

In addition, being excluded from networking and rainmaking opportunities, participating in the client pitch to add "diverse eye candy" but then not getting a fair share of the credit, not getting promoted to partner and especially equity partner at the same rates as male attorneys, and not being able to negotiate without backlash, all can impede women's ability to get their fair share of origination credit.<sup>104</sup> Some women report the abiding stereotype that they do not "need" origination credit because they have husbands who are the breadwinner, whereas most male attorneys are the breadwinners themselves. This anachronistic assumption came through in the comments.

"My female colleagues and I are all considered the bread winners of our families, but because we are women there is this misperception that our husbands are the bread winners and therefore that we don't need to be paid as much."

—White woman, firm lawyer

The Workplace Experiences Survey had two compensation questions. One asked whether attorneys felt that their pay is comparable to the pay of their colleagues who are in similar positions in terms of seniority and skill (see Figure 29). White men had the highest level of agreement with this question, and men of color reported similar levels of agreement.

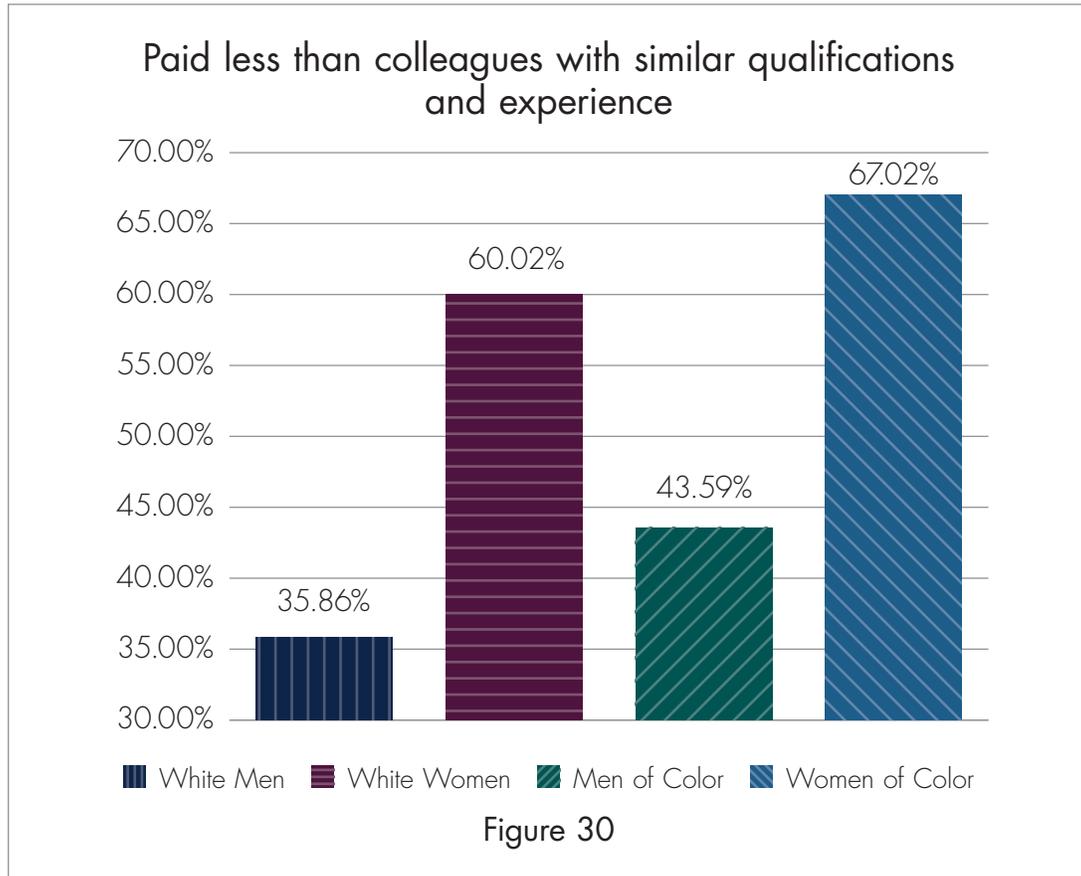


In one of the biggest findings of the study, women of color reported that their pay is comparable to their similarly qualified colleagues at a level 31 percentage points lower than white men; they were the group with the lowest overall agreement. This racial difference has rarely been noted or discussed.

White women also reported bias in compensation: their level of agreement that their pay is comparable to that of their colleagues was 24 percentage points lower than white men.

As a group, Black women, Latina women, and women of other races reported lower levels of agreement than any other group of women in regard to feeling their pay was on a par with that of comparable colleagues.

The second compensation question asked whether attorneys felt they were paid less than their colleagues with similar qualifications and experience (see Figure 30).



The Workplace Experiences Survey found that almost 70% of women of color reported that they were paid less than comparable colleagues. Only 36% of white men reported the same. This finding reveals another 31 percentage point gap between white men and women of color regarding compensation, a very large discrepancy between these two groups' experiences.

The 24 percentage point gap between white men and white women was also very large. Together, these findings clearly reveal that women of all races report that they are paid less than comparable colleagues at higher levels than men do.

The difference between men of color and white men was not statistically significant. White and Asian women reported similar levels of compensation bias, while other women of color reported the highest level of compensation bias.

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The Workplace Experiences Survey found that almost 70% of women of color reported that they were paid less than comparable colleagues. Only 36% of white men reported the same.

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One woman described the problem this way:

"The whole law firm structure was developed by men. The structure remains most functional for men's networking style, and for men who have wives who stay at home with their kids. It has not adapted well, yet, to women AND men who wish to participate in their children's lives. Nor has it, yet, adapted to seeing the value in people who do not market and behave like stereotypical rainmakers. Until the compensation systems adjust to these things, people will continue to leave law firms."

—White woman, workplace unknown

When we compared white women working in house to white women working in firms, we did not find any significant difference between their reported levels of bias in compensation.\* This was surprising, as so much attention has been placed on the partner gender pay gap and the in-house environment is thought to be a more equitable workplace without the same gender pay gap issues. Our findings indicate that women working in house face a similar rate of bias when it comes to their compensation. Comments provided on our survey illustrate the sense of outrage that is felt by both in-house and firm women about their pay:

"One man was recently given a promotion because HR discovered he was being paid a lot more than me, with the same job title. So instead of increasing my pay, they promoted him to a higher title! Women can't win in this environment."

—White woman, in house

"I received a demotion, which is typically what happens to women of color in my organization. That demotion was because my position was eliminated. My white male colleague, who was my counterpart, received a promotion the same week I was demoted. He received a \$30k pay increase . . . while I received a \$20k decrease, lowered bonus percentage, and less stock options."

—Woman lawyer, race and workplace unknown

"I have been told that my salary cannot be raised unless my male counterpart's is also raised. However, I have more experience and his salary is higher than mine."

—White woman, in-house lawyer

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\* We did not have a large enough sample size of women of color to compare in-house vs. firm women of color.

"Women are much less valued in this geographic area than men and are paid less than their counterparts and even those with less experience/competence."

—*White woman, firm lawyer*

Other women felt they were unfairly penalized due to part-time status:

"I can compare how I am treated with how my husband is treated and he gets a lot more flexibility than I do. I am also paid 80% (though my hours are supposed to reflect the reduced time—it DOES NOT) of what my colleagues are paid. I am at the office every day, working normal hours but am not compensated as such. Reduced hours for a woman just means reduced compensation and reduced billable expectation—it does not translate to the real world."

—*White woman, firm lawyer*

Another agreed, reporting both "schedule creep" (when a part-time schedule creeps back toward full-time) and the "flexibility stigma" (the assumption that part-time attorneys lack career commitment):<sup>105</sup>

"I believe I hit a wall with my advancement because of my reduced caseload status. The firm only respects reduced caseload attorneys if they work more hours than the reduced caseload requires. Because of my reduced caseload status (and now, I believe, my age) I am being paid less than junior people because I am not as 'hungry' as they are."

—*White woman, firm lawyer*

## Workplace processes conclusion

Regression analysis confirmed that women reported higher levels of bias than men on the workplace process questions, after controlling for several other variables (race, age, workplace type, firm/department size, caregiving responsibilities, and geographic location).

As discussed in detail above, Asian women sometimes reported more bias than white women on workplace process questions. In regression analyses, however, after controlling for other factors, being Asian did not emerge as a significant factor in determining people's answers to the workplace process questions.

Other women of color reported higher levels of bias for most workplace process questions. Regression analysis confirmed the racial disparity in workplace processes after controlling for other variables.

At the beginning of the report, we noted that women and people of color are having trouble advancing through the ranks in the legal profession. These findings on workplace processes provide clarity on why this is the case: women and people of color are facing more bias in each of the basic workplace processes we studied.

# In-House vs. Law Firm Experiences

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Does the bias climate in house differ from that found in law firms?

It does. Lawyers from different demographic groups reported different experiences depending on whether they worked in house or in law firms.

The big picture: white men were the only group to report more positive experiences in law firms than in house. Everyone else reported less bias in house than in law firms.

## White men

White male lawyers working in house reported slightly more bias than their law firm counterparts.

White male in-house lawyers and law firm lawyers reported comparable experiences on most of the four patterns of bias questions—but not on a few: white male lawyers who worked in law firms reported lower levels of bias than their in-house counterparts on the following:

- Being held to higher standards
- Having ideas stolen by other people
- Ability to show anger when justified
- Access to the glamour work
- Pressure to be a worker bee

On the workplace process questions, white men reported similar experiences regardless of whether they worked in house or in law firms, with three exceptions. White men in law firms reported lower levels of bias than their in-house counterparts in:

- Business development
- Promotions
- Mentorship

## White women

Overall, white women working in house reported less bias than their law firm counterparts.

The most important finding: white women working in house reported a lower level of bias on almost every Maternal Wall question, suggesting that Maternal Wall bias is much more prevalent in law firms than it is in house.

In contrast, white women working in law firms reported a lower level of Tightrope bias than women working in house. White women in law firms reported that they could behave assertively and be vocal about their accomplishments without pushback

at higher levels than white women in house. There is one exception: white women firm lawyers reported higher levels of bias on the two questions related to office housework.

White women working in house and in firms reported similar experiences in most workplace process questions, with three exceptions. In-house white women lawyers reported higher levels of bias than their firm counterparts in:

- Promotions
- Mentorship
- Sponsorship

Surprisingly, white women in house and in law firms reported similar levels of compensation bias. This finding indicates that more attention needs to be paid to the gender pay gap of in-house lawyers, who have been thought to be doing better than firm lawyers.

## Men of color

Men of color working in house reported lower levels of bias than those working in law firms.

In-house male lawyers of color reported that parenthood did not harm perceptions of their competence and commitment at higher levels than their law firm counterparts.

Men of color working in house also reported having difficulty getting support from administrative staff at a lower level than their law firm counterparts.

## Women of color

Women of color also reported different bias experiences working in house and in law firms.

In-house women of color overall reported lower levels of bias than their law firm counterparts. Women of color working in house reported that their ideas are respected at a higher level than their law firm counterparts. In-house women of color reported Tightrope bias at a lower level as compared with their law firm counterparts: they reported higher levels of agreement that they are seen as leaders and lower levels of agreement that they are stuck doing the office housework than their law firm women of color counterparts.

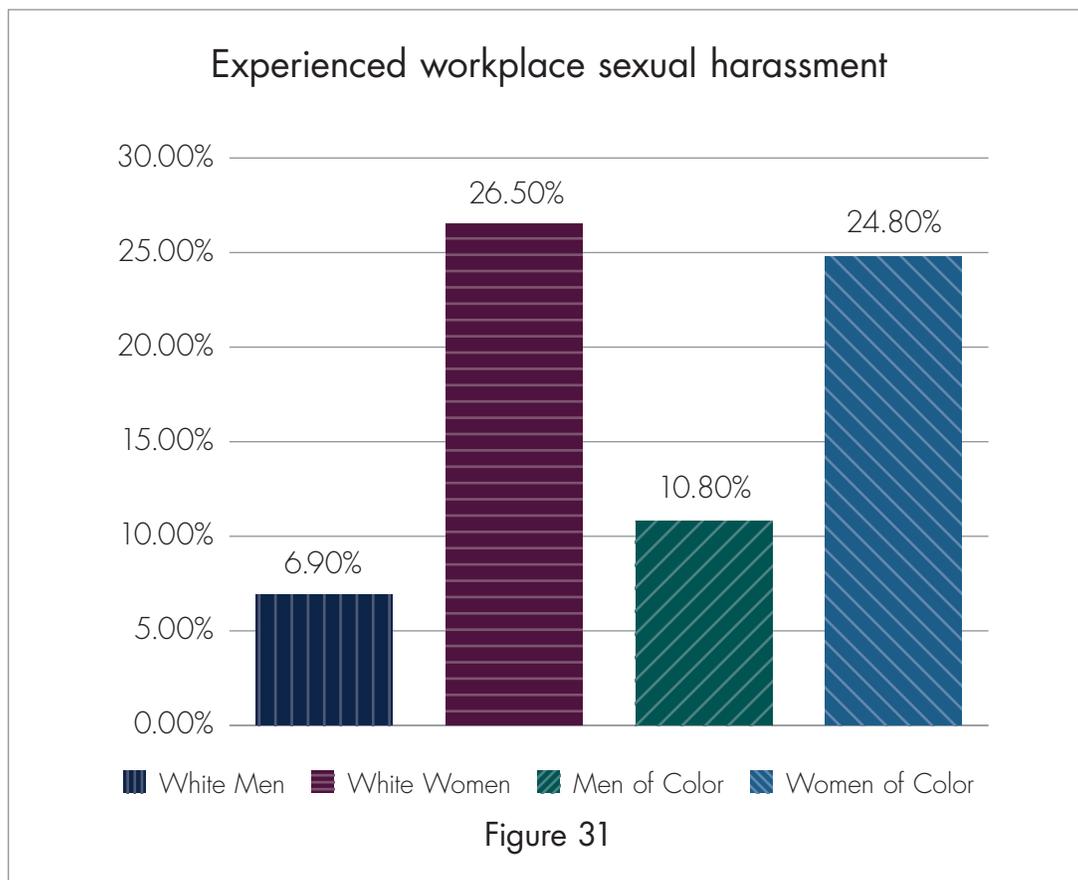
Maternal Wall bias also was reported at a lower level by in-house women of color than by women of color working in law firms. Women of color working in house reported lower levels of feeling that taking parental leave would hurt their careers or feeling pressure to work longer hours than necessary just to prove their commitment.

# Sexual Harassment

A final set of questions on the Workplace Experiences Survey asked respondents about their experiences with sexual harassment in the workplace. The sexual harassment questions varied in form from the other questions on the survey and were analyzed using a different metric.

About one-quarter of women reported that they had experienced workplace sexual harassment in the form of unwanted romantic or sexual attention and/or touching (see Figure 31). Twenty-seven percent of white women and 25% of women of color reported this compared with only 7% of white men. Men of color fell in the middle with 11% reporting encountering unwanted romantic or sexual attention/touching.

About one-quarter of women reported that they had experienced workplace sexual harassment.

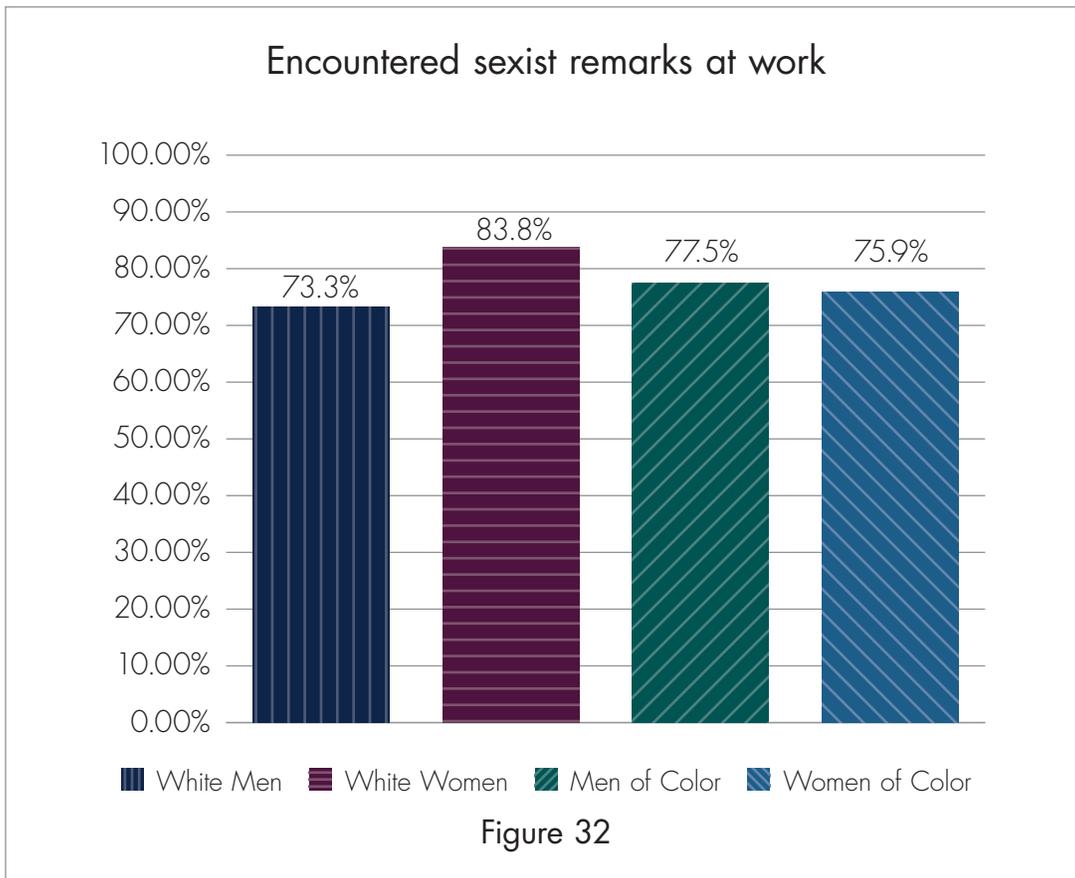


Sexist remarks appear to be widespread in the legal profession (see Figure 32). Over 70% of all lawyers reported encountering sexist remarks at the workplace. White men were the group that reported encountering this the least, at 73%, and white women were the group that reported encountering sexist remarks the most, at 84%. Men and women of color fell in the middle.

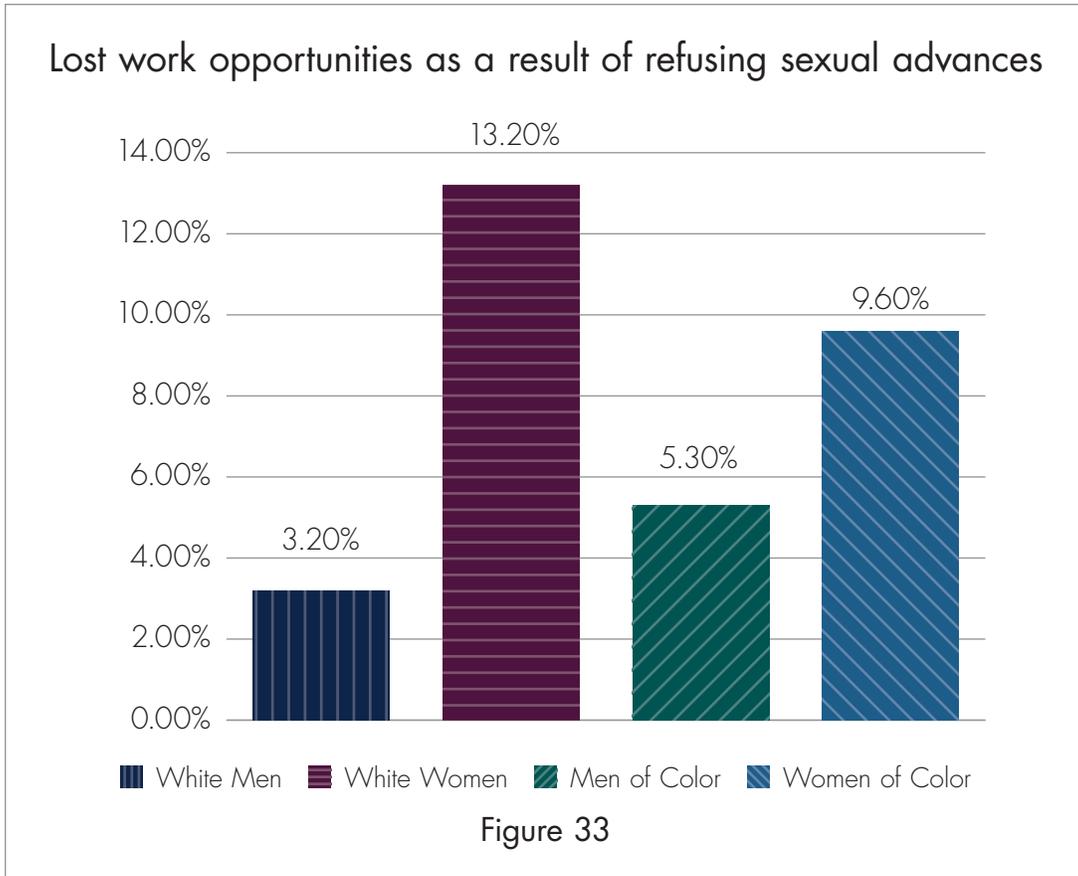
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Over 70% of all lawyers reported encountering sexist remarks at the workplace.

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The Workplace Experiences Survey also asked respondents if they had lost work opportunities because they rebuffed sexual advances at work (see Figure 33). Although the overall number of people who reported this is low, about one in eight white women and one in ten women of color reported this, compared with only 3% to 5% of men.



Finally, the survey asked if respondents had ever felt “bribed or threatened with workplace consequences for not engaging in sexual behavior.” Among white women, 4.5% reported encountering this, and, interestingly, 4.5% of men of color did too. In comparison, only 1.4% of white men and 1.9% of women of color reported encountering feeling bribed or threatened for not engaging in sexual behavior. This finding is somewhat counterintuitive and merits further research.

# Conclusion

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Despite decades of progress, women and people of color remain severely underrepresented in the top levels of the legal profession, are paid less than their colleagues, and leave the profession at higher rates.<sup>106</sup> For the legal profession to continue attracting top talent—and, more important, to *retain* top talent—employers need first to see what the problems are and, second, to adopt effective measures to address challenges.

The Workplace Experiences Survey is the first survey to use experimental social psychology as a springboard to attempt to comprehensively document the everyday mechanisms that lead to inequities in the legal profession. The survey found significant racial and gender bias for the Prove-It-Again and Tightrope patterns of bias. Substantial levels of Maternal Wall bias were accompanied by the sentiment from every group of lawyers that taking parental leave and/or working part-time would be detrimental to their careers. In addition, about a third of women lawyers and lawyers of color felt that there is only one slot for people like them, which can lead to conflict and competition between white women and women of color.

The Workplace Experiences Survey also found bias in every single workplace process. Women and people of color reported having a harder time getting hired, a harder time getting career-enhancing assignments, a harder time getting a mentor, a harder time getting access to networks that will help them develop their business, a harder time getting honest feedback on their performance evaluations, and a harder time getting the promotions that they deserve. Women report being paid less than their colleagues with comparable seniority and experience.

Women of color often reported the highest levels of bias of any group, especially for Prove-It-Again and for most workplace processes. Asian women and other women of color overall reported similar levels of bias on the questions regarding the four patterns of bias. On the workplace process questions, Black, Latina, and women of other races often reported more bias than Asian women. The differences between Asian women and other women of color are important as they present a fuller and more nuanced picture of the experience of women of color, but further research is needed to draw firm conclusions about these differences.

This report brings the problems regarding workplace diversity into focus, which brings us to the most important question, “What can we do about it?”

The usual tools for increasing diversity—such as bias trainings—typically don’t work.<sup>107</sup> If legal employers truly want to attract talent from the full labor pool and provide a level playing field that gives every lawyer an equal opportunity to succeed, they need to try something different.

This report suggests why bias trainings and women’s initiatives typically don’t work. If an employer lacks diversity, it is probably because subtle (and not-so-subtle) forms of bias are constantly playing out in everyday workplace interactions—in meetings, in assignments, in mentoring, in compensation, and so on. The solution is not to “fix the women” but to fix the business systems.

That's what bias interrupters do. In the following pages, you'll find Toolkits that law firms and in-house departments can use to interrupt bias. Bias interrupters are tweaks to your existing systems that interrupt bias in a data-driven way.

The bias interrupters model requires that organizations begin with metrics because “if you're not keeping score, you're only practicing.” This new model of organizational change sets a metric, puts in place bias interrupters, and then returns to the metric to see whether it has improved. If it hasn't, your organization will need to ratchet up to a stronger bias interrupter—and to keep trying until you meet your goal. This is the way businesses proceed toward any business goal.

If you are in a position in your organization to enact changes, we urge you to use the bias interrupters set forth below. If you are not in a position to effect change directly and think your organization could benefit from bias interrupters, you can find tips for how to persuade your organization to institute bias interrupters at [www.BiasInterrupters.org](http://www.BiasInterrupters.org), which also has additional open-source toolkits that are free.

Our report revealed that the legal profession has a lot of work to do to create an environment in which the top legal minds—regardless of their gender, race, or caregiver status—can thrive and contribute to the best of their ability. Bias interrupters can help.

# Scales and Regression Analysis

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As discussed throughout the report, we conducted regression analyses to examine the association between demographic variables and the self-reported experiences of bias while controlling for multiple variables. We found that women reported more Prove-It-Again, Tightrope, Maternal Wall, and Tug of War bias regardless of their race, age, workplace type, firm/department size, and geographic location of their offices. We also found that underrepresented groups (e.g., African Americans and Latinos) reported higher levels of Prove-It-Again and Tightrope bias regardless of their gender, age, and other variables. Regression analyses showed that women reported higher levels of bias in all workplace processes regardless of their racial background and other variables. Similarly, underrepresented groups reported higher levels of bias in all workplaces processes regardless of other variables.

We included multiple questions measuring each type of bias, so we created scales that combine several Likert scale questions. The scales allowed us to conduct regression analysis using one scale for each type of bias. The scales are the arithmetic means of questions that measure the same concept and fit together well statistically.

## Scales for the four types of bias and the workplace processes bias variables.<sup>108</sup>

<b>Variable</b>	<b>N (with no missing values)</b>	<b>Prop./ Mean</b>	<b>Std. Dev.</b>	<b>Min</b>	<b>Max</b>
Prove-it-Again! scale	2,360	3.354	1.232	1	6
Tightrope scale	2,360	3.523	1.004	1	6
Tug of War	2,134	2.717	1.480	1	6
Tug of War compete woman slot	1,315	2.640	1.463	1	6
Tug of War compete minority slot	429	2.727	1.548	1	6
Maternal Wall scale	2,362	3.578	1.207	1	6
Maternal Wall—colleagues don't question my commitment	1,107	3.835	1.686	1	6
Hiring	2,137	2.761	1.363	1	6
Assignment scale	2,263	2.976	1.336	1	6
Performance Evaluation	2,229	2.773	1.310	1	6
Sponsorship scale	2,264	3.311	1.232	1	6
Promotion	2,253	3.803	1.496	1	6
Compensation	2,242	3.590	1.602	1	6
Business Development	2,116	3.102	1.452	1	6

Scales are constructed on the basis of social psychology theories, previous research, factor analysis, and Cronbach's alpha using the survey data.

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Small Steps, Big Change

# Bias Interrupters Tools for Success

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Incremental steps can improve law firm and in-house diversity in ways that yield well-documented business benefits. Research shows that diverse workgroups perform better and are more committed, innovative, and loyal.<sup>1</sup> Gender-diverse workgroups have higher collective intelligence, which improves the performance of both the group and of the individuals in the group, and leads to better financial performance results.<sup>2</sup> Racially diverse workgroups consider a broader range of alternatives, make better decisions, and are better at solving problems.<sup>3</sup> Bias, if unchecked, affects many different groups: modest or introverted men, LGBTQ people, individuals with disabilities, professionals from nonprofessional backgrounds (class migrants), women, and people of color. We've distilled the huge literature on bias into simple steps that help you and your firm perform better.

We know now that workplaces that view themselves as being highly meritocratic often are *more* biased than other organizations.<sup>4</sup> Research also shows that the usual responses—one-shot diversity trainings, mentoring, and networking programs—typically don't work.<sup>5</sup>

**What holds more promise is a paradigm-changing approach to diversity: bias interrupters are tweaks to basic business systems that are data-driven and can produce measurable change. Bias interrupters change systems, not people.**

Printed here are two toolkits, one for law firms and one for in-house departments, with information for how to interrupt bias in the following business systems:

1. Hiring
2. Assignments
3. Performance Evaluations
4. Compensation
5. Sponsorship Best Practice Recommendation

For additional worksheets and information visit [BiasInterrupters.org](http://BiasInterrupters.org).

Our toolkits take a three-step approach:

1. **Use Metrics:** Businesses use metrics to assess their progress toward any strategic goal. Metrics can help you pinpoint where bias exists and assess the effectiveness of the measures you've taken. (Whether metrics are made public will vary from firm to firm and from metric to metric.)
2. **Implement Bias Interrupters:** Bias interrupters are small adjustments to your existing business systems. They should not require you to abandon your current systems.
3. **Repeat as Needed:** After implementing bias interrupters, return to your metrics. If they have not improved, you will need to ratchet up to stronger bias interrupters.

Small Steps, Big Change

# Bias Interrupters Tools for Law Firms

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# Interrupting Bias in Hiring

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## Tools for Law Firms

### *The Challenge*

When comparing identical resumes, “Jamal” needed eight additional years of experience to be considered as qualified as “Greg,” mothers were 79% less likely to be hired than an otherwise-identical candidate without children, and “Jennifer” was offered \$4,000 less in starting salary than “John.”<sup>6</sup> Unstructured job interviews do not predict job success,<sup>7</sup> and judging candidates on “culture fit” can screen out qualified diverse candidates.<sup>8</sup>

### *The Solution: A Three-Step Approach*

#### **1. Use Metrics**

Businesses use metrics to assess their progress toward any strategic goal. Metrics can help you pinpoint where bias exists and assess the effectiveness of the measures you’ve taken. (Whether metrics are made public will vary from firm to firm and from metric to metric.)

##### **For each metric, examine:**

- Do patterned differences exist between majority men, majority women, men of color, and women of color? (Include any other underrepresented group that your firm tracks, such as military veterans or LGBTQ people.)

##### **Important metrics to analyze:**

- Track the candidate pool through the entire hiring process: from initial contact, to resume review, to interviews, to hiring. Analyze where underrepresented groups are falling out of the hiring process.
- Track whether hiring qualifications are waived more often for some groups.
- Track interviewers’ reviews and/or recommendations to ensure they are not consistently rating majority candidates higher than others.

Keep metrics by (1) individual supervising attorney; (2) department; (3) country, if relevant; and (4) the firm as a whole.

#### **2. Implement Bias Interrupters**

All bias interrupters should apply both to written materials and in meetings, where relevant. Because every firm is different, not all interrupters will be relevant. Consider this a menu.

To understand the research and rationale behind the suggested bias interrupters, read the “Identifying Bias in Hiring Worksheet,” available online at [biasinterrupters.org](http://biasinterrupters.org), which summarizes hundreds of studies.

## *A. Empower and Appoint*

- **Empower people involved in the hiring process to spot and interrupt bias.** Use the “Identifying Bias in Hiring Worksheet” (available at [BiasInterrupters.org](http://BiasInterrupters.org)). Read and distribute it to anyone involved in hiring.
- **Appoint bias interrupters.** Provide HR professionals or team members with special training to spot bias and involve them at every step of the hiring process. Training is available at [BiasInterrupters.org](http://BiasInterrupters.org).

## *B. Assemble a Diverse Pool*

- **Limit referral hiring (“friends of friends”).** If your existing firm is not diverse, hiring from your current employees’ social networks will replicate the lack of diversity. If you use referrals, keep track of the flow of candidates from referrals. If referrals consistently provide majority candidates, consider limiting referrals or balance referral hiring with more targeted outreach to ensure a diverse candidate pool.
- **Tap diverse networks.** Reach out to diverse candidates where they are. Identify law job fairs, affinity networks, conferences, and training programs aimed at women and people of color and send recruiters.
- **Consider candidates from multitier schools.** Don’t limit your search to candidates from Ivy League and top-tier schools. This favors majority candidates from elite backgrounds and hurts people of color and professionals from non-professional backgrounds (class migrants)<sup>9</sup>. Studies show that top students from lower-ranked schools are often similarly successful.<sup>10</sup>
- **Get the word out.** If diverse candidates are not applying for your jobs, get the word out that your firm is a great place to work for women and people of color. One company offers public talks by women at their company and writes blog posts, white papers, and social media articles highlighting the women who work there.
- **Change the wording of your job postings.** Using masculine-coded words such as “leader” and “competitive” tends to reduce the number of women who apply.<sup>11</sup> Tech alternatives (see [Textio](#)<sup>12</sup> and [Unitive](#)<sup>13</sup>) can help you craft job postings that ensure you attract top talent without discouraging women.
- **Insist on a diverse pool.** If you use a search firm, tell them you expect a diverse pool, not just one or two diverse candidates. One study found the odds of hiring a woman were 79 times greater if there were at least two women in the finalist pool; the odds of hiring a person of color were 194 times greater.<sup>14</sup>

## *C. Resume Review*

- **Distribute the “Identifying Bias in Hiring Worksheet”** (available at [BiasInterrupters.org](http://BiasInterrupters.org)). Before resumes are reviewed, have reviewers read the worksheet so they are aware of the common forms of bias that can affect the hiring process.
- **Commit to what’s important—and require accountability.** Commit in writing to what qualifications are important, both in entry-level and lateral hiring. When qualifications are waived for a specific candidate, require an explanation of why they are no longer important—and keep track to see for whom requirements are waived.<sup>15</sup>

- **Ensure resumes are graded on the same scale.** Establish clear grading rubrics and ensure that everyone grades on the same scale. Consider having each resume reviewed by two different people and average the score.
- **Remove extracurricular activities from resumes.** Including extracurricular activities on resumes can artificially disadvantage class migrants. A recent study showed that law firms were less likely to hire a candidate whose interests included “country music” and “pick-up soccer” rather than “classical music” and “sailing”—even though the work and educational experience was exactly the same. Because most people aren’t as aware of class-based bias, communicate why you are removing extracurricular activities from resumes.
- **Avoid inferring family obligations.** Mothers are 79% less likely to be hired than identical candidates without children.<sup>16</sup> Train people not to make inferences about whether someone is committed to the job due to parental status and don’t count “gaps in a resume” as an automatic negative.
- **Try using “blind auditions.”** If women and candidates of color are dropping out of the pool at the resume review stage, consider removing demographic information from resumes before review. This allows candidates to be evaluated based solely on their qualifications.

#### *D. Interviews*

- **Use structured interviews.** Ask the same list of questions to every person who is interviewed. Ask questions that are directly relevant to the job for which the candidate is applying.<sup>17</sup>
- **Ask performance-based questions.** Performance-based questions, or behavioral interview questions (“Tell me about a time you had too many things to do and had to prioritize.”), are a strong predictor of how successful a candidate will be at the job.<sup>18</sup>
- **Try behavioral interviewing.**<sup>19</sup> Ask questions that reveal how candidates have dealt with prior work experiences. Research shows that structured behavioral interviews more accurately predict the future performance of a candidate than unstructured interviews.<sup>20</sup> Instead of asking “How do you deal with problems with your manager?” say “Describe for me a conflict you had at work with your manager.” When evaluating answers, a good model to follow is STAR<sup>21</sup>: the candidate should describe the Situation faced, the Task handled, the Action taken to deal with the situation, and the Result.
- **Do work-sample screening.** If applicable, ask candidates to provide a sample of the types of tasks they will perform on the job (e.g., ask candidates to write a legal memo for a fictitious client).
- **Develop a consistent rating scale and discount outliers.** Candidates’ answers (or work samples) should be rated on a consistent scale, with ratings for each factor backed up by evidence. Average the scores granted on each relevant criterion and discount outliers.<sup>22</sup>
- **If “culture fit” is a criterion for hiring, provide a specific work-relevant definition.** Culture fit can be important, but when it’s misused, it can disadvantage people of color, class migrants, and women.<sup>23</sup> Heuristics such as the “airport test” (Who would I like to get stuck with in an airport?) can be highly exclusionary and not work-relevant. Questions about sports and hobbies may feel

exclusionary to women and to class migrants who did not grow up, for example, playing golf or listening to classical music. Google's work-relevant definition of "culture fit" is a helpful starting point.<sup>24</sup>

- **"Gaps in a resume" should not mean automatic disqualification.** Give candidates an opportunity to explain gaps by asking about them directly during the interview stage. Women fare better in interviews when they are able to provide information up front rather than having to avoid the issue.<sup>25</sup>
- **Provide candidates and interviewers with a handout detailing expectations.** Develop an "Interview Protocol Sheet" that explains to everyone what's expected from candidates in an interview or use ours, available at [Bias Interrupters.org](http://BiasInterrupters.org). Distribute it to candidates and interviewers for review.
- **When hiring, don't ask candidates about prior salary.** Asking about prior salary when setting compensation for a new hire can perpetuate the gender pay gap.<sup>26</sup> (A growing legislative movement prohibits employers from asking prospective employees about their prior salaries.<sup>27</sup>)

### 3. Repeat as Needed

- **Return to your key metrics.** Did the bias interrupters produce change?
- **If you don't see change, you may need to implement stronger bias interrupters, or you may be targeting the wrong place in the hiring process.**
- **Use an iterative process until your metrics improve.**

# Interrupting Bias in Assignments

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## Tools for Law Firms

### *The Challenge*

Every workplace has high-profile assignments that are career enhancing (“glamour work”) and low-profile assignments that are beneficial to the organization but not the individual’s career. Research shows that women do more “office housework”<sup>28</sup> than men.<sup>29</sup> This includes literal housework (ordering lunch), administrative work (scheduling a time to meet), and emotion work (“she’s upset; comfort her”). Misallocation of the glamour work and the office housework is a key reason leadership across the legal profession is still male dominated. Professionals of color (both men and women) also report less access to desirable assignments than do white men.<sup>30</sup>

- **Glamour work.** More than 80% of white male lawyers but only 53% of women lawyers of color, 59% of white women lawyers, and 63% of male lawyers of color reported the same access to desirable assignments as their colleagues.<sup>31</sup>
- **Office housework.** Almost 50% of white women lawyers and 43% of women lawyers of color reported that at work they more often play administrative roles such as taking notes for a meeting compared to their colleagues. Only 26% of white male lawyers and 20% of male lawyers of color reported this.<sup>32</sup>

In law firms, when lawyers become “overburdened” with office housework, it reduces the amount of billable time that they can report, which can hurt their compensation and their career.<sup>33</sup>

Diversity at the top can only occur when diverse employees at all levels of the organization have access to assignments that let them take risks and develop new skills. If the glamour work and the office housework aren’t distributed evenly, you won’t be tapping into the full potential of your workforce. Most law firms that use an informal “hey, you!” assignment system end up distributing assignments based on factors other than experience and talent.

If women and people of color keep getting stuck with the same low-profile assignments, they will be more likely to be dissatisfied and to search for opportunities elsewhere.<sup>34</sup> The attrition rates for women and especially women of color in law firms are already extremely high, and research suggests that the cost to the firm of attrition per associate is up to \$400,000.<sup>35</sup> Law firms cannot afford to fail to address the inequality in assignments.

## *The Solution: A Three-Step Approach*

Fair allocation of the glamour work and the office housework are two separate problems. Some law firms will want to solve the office housework problem before tackling the glamour work; others will want to address both problems simultaneously. (A “Road Map for Implementation” is available at [BiasInterrupters.org](http://BiasInterrupters.org).)

### **1. Use Metrics**

#### *A. Identify and Track*

The first step is to find out if and where you have a problem.

- What is the office housework and glamour work in your organization?
- Who is doing what and for how long?
- Are there demographic patterns that indicate gender and/or racial bias is at play?

#### **To do this:**

1. Distribute the “Office Housework Survey” (available at [BiasInterrupters.org](http://BiasInterrupters.org)) to your employees to find out who is doing the office housework and how much of their time it takes up.
2. Convene relevant managers (and anyone else who distributes assignments) to identify the glamour work and the lower-profile work in the law firm. Use the “Assignment Typology Worksheet” to create a typology for assignments and the “Protocol” for more details (both available at [BiasInterrupters.org](http://BiasInterrupters.org)).
3. Input the information from the typology meeting into the “Manager Assignment Worksheet” and distribute this to managers (available online at [BiasInterrupters.org](http://BiasInterrupters.org)). Have managers fill out the worksheets and submit them, identifying to whom they assign the glamour work and the lower-profile work.

#### *B. Analyze Metrics*

Analyze survey results and worksheets for demographic patterns, dividing employees into (1) majority men, majority women, men of color, and women of color, (2) parents who have just returned from parental leave, (3) professionals working part-time or flexible schedules, and (4) any other underrepresented group that your organization tracks (veterans, LGBTQ people, individuals with disabilities, etc.).

- Who is doing the office housework?
- Who is doing the glamour work?
- Who is doing the low-profile work?
- Create and analyze metrics by individual supervising attorney.

### **2. Implement Bias Interrupters**

#### *A. Office Housework Interrupters*

- **Don’t ask for volunteers.** Women are more likely to volunteer because they are under subtle but powerful pressures to do so.<sup>36</sup>

- **Hold everyone equally accountable.** “I give it to women because they do it well and the men don’t” is a common sentiment. This dynamic reflects an environment in which men suffer few consequences for doing a poor job on office housework, but women who do a poor job are seen as “prima donnas” or “not team players.” Hold men and women equally accountable for carrying out all assignments properly.
- **Use admins.** If possible, assign office housework tasks to admins (e.g., planning birthday parties, scheduling meetings, ordering lunch).
- **Establish a rotation.** A rotation is helpful for many administrative tasks (e.g., taking notes, scheduling meetings). Rotating housework tasks such as ordering lunch and planning parties is an option if admins are unavailable.
- **Shadowing.** Another option for administrative tasks is to assign a more junior person to shadow someone more senior—and take notes.

### *B. Glamour Work Interrupters*

- **Avoid mixed messages.** If your law firm values mentoring and committee work (such as serving on the Diversity Initiative), make sure these things are valued when the time comes for promotions and raises. Sometimes law firms say they highly value this kind of work—but they don’t. Mixed messages of this kind will negatively affect women and people of color.
- **Conduct a roll-out meeting.** Gather relevant managing and supervising attorneys to introduce the bias interrupters initiative and set expectations. “Key Talking Points for the Roll-Out Meeting” are available at [BiasInterrupters.org](http://BiasInterrupters.org).
- **Provide a bounceback.** Identify individual supervising attorneys whose glamour work allocation is lopsided. Hold a meeting with that supervisor and bring the problem to his or her attention. Help the supervisor think through why he or she only assigns glamour work to certain people or certain types of people. Work with the supervisor to figure out (1) if the available pool for glamour work assignments is diverse but is not being tapped fully or (2) if only a few people have the requisite skills for glamour work assignments. Read the “Responses to Common Pushback” and “Identifying Bias in Assignments” worksheets (available at [BiasInterrupters.org](http://BiasInterrupters.org)) before the bounceback meetings to prepare. You may have to address low-profile work explicitly at the same time as you address high-profile assignments; this will vary by law firm.

#### **If a diverse pool has the requisite skills . . .**

- **Implement a rotation.** Have the supervisor set up a rotation to ensure fair access to plum assignments.
- **Formalize the pool.** Write down the list of people with the requisite skills and make it visible to the supervisor. Sometimes just being reminded of the pool can help.
- **Institute accountability.** Have the supervisor track his or her allocation of glamour work going forward to measure progress. Research shows that accountability matters.<sup>37</sup>

If the pool is not diverse . . .

- **Revisit the assumption that only one (or very few) employees can handle this assignment.** Is that true, or is the supervisor just more comfortable working with those few people?
- **Analyze how the pool was assembled.** Does the supervisor allocate the glamour work by relying on self-promotion or volunteers? If so, that will often disadvantage women and people of color. Shift to more objective measures to create the pool based on skills and qualifications.

If the above suggestions aren't relevant or don't solve your problem, then it's time to **expand the pool**:

- **Development plan.** Identify what skills or competencies an employee needs to be eligible for the high-profile assignments work and develop a plan to help the employee develop the requisite skills.
- **Succession planning.** Remember that having "bench strength" is important so your department won't be left scrambling if someone unexpectedly leaves the company.
- **Leverage existing HR policies.** If your organization uses a competency-based system or has a Talent Development Committee or equivalent, use that resource to help develop competencies so career-enhancing assignments can be allocated more fairly.
- **Shadowing.** Have a more junior person shadow a more experienced person during the high-profile assignment.
- **Mentoring.** Establish a mentoring program to help a broader range of junior people gain access to valued skills.

If you can't expand your pool, **reframe the assignment** so that more people could participate in it. Could you break up the assignment into discrete pieces so more people get the experiences they need?

If nothing else works, consider a **formal assignment system**. Appoint an assignments czar to oversee the distribution of assignments in your organization. See examples of what other law firms have done at [BiasInterrupters.org](http://BiasInterrupters.org).

### 3. Repeat as Needed

- **Return to your metrics.** Did the bias interrupters produce change?
- **If you still don't have a fair allocation of high- and low-profile work, you may need to implement stronger bias interrupters or consider moving to a formal assignment system.**
- **Use an iterative process until your metrics improve.**

# Interrupting Bias in Performance Evaluations

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## Tools for Law Firms

### *The Challenge*

In one study, law firm partners were asked to evaluate a memo by a third-year associate. Half the partners were told the associate was black; the other half were told the identical memo was written by a white associate. The partners found 41% more errors in the memo they believed was written by a black associate as compared with a white associate.<sup>38</sup> Overall rankings also differed by race. Partners graded the white author as having “potential” and being “generally good,” whereas they graded the black author as “average at best.”

### *The Solution: A Three-Step Approach*

#### **1. Use Metrics**

Businesses use metrics to assess their progress toward any strategic goal. Metrics can help you pinpoint where bias exists and assess the effectiveness of the measures you’ve taken. (Whether metrics are made public will vary from firm to firm and from metric to metric.)

#### **For each metric, examine:**

- Do patterned differences exist between majority men, majority women, men of color, and women of color? Include any other underrepresented group that your firm tracks, such as military veterans, LGBTQ people, or individuals with disabilities.
- Do patterned differences exist for parents after they return from leave or for lawyers who reduce their hours?
- Do patterned differences exist between full-time and part-time employees?

#### **Important metrics to analyze:**

- Do your performance evaluations show consistent disparities by demographic group?
- Do women’s ratings fall after they have children? Do employees’ ratings fall after they take parental leave or adopt flexible work arrangements?
- Do the same performance ratings result in different promotion or compensation rates for different groups?

Keep metrics by (1) supervising attorney; (2) department; (3) country, if relevant; and (4) the law firm as a whole.

## 2. Implement Bias Interrupters

All bias interrupters should apply both to written evaluations and in meetings, where relevant. Because every firm is different, not all interrupters will be relevant. Consider this a menu.

To understand the research and rationale behind the suggested bias interrupters, read the “Identifying Bias in Performance Evaluations Worksheet,” available online at [BiasInterrupters.org](http://BiasInterrupters.org).

### A. *Empower and Appoint*

- **Empower people involved in the evaluation process to spot and interrupt bias.** Use the “Identifying Bias in Performance Evaluations Worksheet,” available online at [BiasInterrupters.org](http://BiasInterrupters.org). Read and distribute.
- **Appoint bias interrupters.** Provide HR professionals or team members with special training to spot bias and involve them at every step of the performance evaluation process. Training is available at [BiasInterrupters.org](http://BiasInterrupters.org).

### B. *Tweak the Evaluation Form*

- **Begin with clear and specific performance criteria directly related to job requirements.** Try “He is able to write an effective summary judgment motion under strict deadlines” instead of “He writes well.”
- **Require evidence from the evaluation period that justifies the rating.** Try “In March, she argued X motion in front of Y judge on Z case, answered his questions effectively, and was successful in getting the optimal judgment” instead of “She’s quick on her feet.”
- **Consider performance and potential separately for each candidate.** Performance and potential should be appraised separately. Majority men tend to be judged on potential; others are judged on performance.

**Separate personality issues from skill sets for each candidate.** Personal style should be appraised separately from skills because a narrower range of behavior often is accepted from women and people of color. For example, women may be labeled “difficult” for doing things that are accepted in majority men.

### C. *Tweak the Evaluation Process*

- **Level the playing field.** Ensure that all candidates know how to promote themselves effectively and send the message that they are expected to do so. Distribute the “Writing an Effective Self-Evaluation Worksheet,” available online at [BiasInterrupters.org](http://BiasInterrupters.org).
- **Offer alternatives to self-promotion.** Encourage or require supervisors to set up more formal systems for sharing successes, such as a monthly e-mail that lists employees’ accomplishments.
- **Provide a bounceback.** Supervisors whose performance evaluations show persistent bias should receive a bounceback (i.e., someone should talk through the evidence with them).
- **Have bias interrupters play an active role in calibration meetings.** In many law firms and legal departments, the Executive Committee or another body meets

## What's a bounceback?

An example: in one organization, when a supervisor's ratings of an underrepresented group deviate dramatically from the mean, the evaluations are returned to the supervisor with the message: either you have an undiagnosed performance problem that requires a Performance Improvement Plan (PIP), or you need to take another look at your evaluations as a group. The organization found that a few people were put on PIPs, but over time, supervisors' ratings of underrepresented groups converged with those of majority men. A subsequent survey found that employees of all demographic groups rated their performance evaluations as equally fair (whereas bias was reported in hiring—and every other business system).

to produce a target distribution of ratings or to cross-calibrate rankings. Have participants read the “Identifying Bias in Performance Evaluations Worksheet” on bias before they meet (available at [BiasInterrupters.org](http://BiasInterrupters.org)). Have a trained bias interrupter in the room.

- **Don't eliminate your performance appraisal system.** Eliminating formal performance evaluation systems and replacing them with feedback on the fly creates conditions for bias to flourish.

## 3. Repeat as Needed

- **Return to your key metrics.** Did the bias interrupters produce change?
- **If you don't see change,** you may need to implement stronger bias interrupters, or you may be targeting the wrong place in the performance evaluation process.
- **Use an iterative process** until your metrics improve.

# Interrupting Bias in Partner Compensation

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## Tools for Law Firms

### *The Challenge*

The gender pay gap in law firms has been extensively documented for decades. A 2016 report by Major, Lindsey, and Africa found a 44% pay gap between male and female law firm partners.<sup>39</sup> The report also found a 50% difference in origination credit, which many use to explain the pay gap: men earn more money because they bring in more business. Studies show the picture is much more complicated.

- One study found that even when women partners originated similar levels of business as men, they still earned less.<sup>40</sup>
- Another study found that 32% of white women income partners and 36% of women partners of color reported that they had been intimidated, threatened, or bullied out of origination credit.<sup>41</sup>
- The same study found that more than 80% of women partners reported being denied their fair share of origination credit in the previous three years.<sup>42</sup>
- Doesn't everyone think their compensation is unfair? Not to the same degree: a recent survey of lawyers found that male lawyers were about 20% more likely than white women lawyers and 30% more likely than women lawyers of color to say that their pay was comparable to their colleagues of similar experience.<sup>43</sup>

### *The Solution: A Three-Step Approach*

#### **1. Use Metrics**

Businesses use metrics to assess their progress toward any strategic goal. Metrics can help you pinpoint where bias exists and assess the effectiveness of the measures you've taken. (Whether metrics are made public will vary from firm to firm and from metric to metric.)

#### **For each metric, examine:**

- Do patterned differences exist between majority men, majority women, men of color, and women partners of color? (Include any other underrepresented group that your firm tracks, such as military veterans or LGBTQ people.)
- Are partners disadvantaged for taking parental leave? Are parents or others with caregiving responsibilities excluded from future opportunities?
- Do part-time lawyers receive less than proportionate pay for proportionate work? Are they excluded from future opportunities?

### Important metrics to analyze:

- **Compare compensation with a variety of lenses and look for patterns.** Lenses include relationship enhancement, hours and working time revenues, and so forth. Do separate analyses for equity and income partners.
- **Succession.** Analyze who inherits compensation credit and client relationships and how and when the credit moves.
- **Origination and other important forms of credit.** Analyze who gets origination and other important forms of credit, how often it is split, and who does (and does not) split it. If your firm does not provide credit for relationship enhancement, analyze how that rule affects different demographic groups—and consider changing it.
- **Comp adjustments.** Analyze how quickly compensation falls, and by what percentage during a lean period and how quickly compensation rises during times of growth. (When partners lose key clients, majority men often are given more of a runway to recover than other groups.)
- **De-equitization.** Analyze who gets de-equitized.
- **Pitch credit.** Analyze who has opportunities to go on pitches, who plays a speaking role, and who receives origination and other forms of credit from pitches.
- **Lateral partners.** Analyze whether laterals are paid more in relation to their metrics. This is a major factor in defeating diversity efforts at some firms.

Keep metrics by (1) individual supervising lawyer; (2) department; (3) country, if relevant; and (4) the firm as a whole.

## 2. Implement Bias Interrupters

To understand the research and rationale behind the suggested bias interrupters, read the “Identifying Bias in Partner Compensation Worksheet,” available online at [BiasInterrupters.org](http://BiasInterrupters.org).

### *A. Find Out What Drives Compensation—and Be Transparent about What You Find*

- **Commission an analysis.** Although firms may say they value a broad range of factors, many experts agree that origination and billable hours account for almost all variance in compensation.<sup>44</sup> Hire a law firm compensation consultant or statistician to find out what factors determine compensation at your firm.
- **Be transparent about what drives compensation.** This is a vital first step to empowering women and people of color to refuse work that does not enhance their compensation and focus on work that positions them to receive higher compensation. Studies show that reducing ambiguity reduces gender bias in negotiations—and law firm compensation often involves negotiation among partners.<sup>45</sup> If only those “in the know” understand what’s really valued, that will benefit a small in group that typically reflects the demography of your existing equity partnership.
- **Value everything that’s valuable.** Give credit for nonbillable work that is vital to sustaining the long-term health of the firm—including relationship enhancement credit, credit for lawyers who actually do the client’s work, and talent manage-

ment. If the firm says it values mentoring and greater diversity but does not in fact do so, this will disadvantage women and lawyers of color.

### ***B. Establish Clear, Public Rules***

- **Establish clear rules governing granting and splitting origination and other valuable forms of credit.** Research suggests that men are more likely to split origination credit with men than with women and that women may get less origination credit than men even when they do a similar amount of work to bring in the client.<sup>46</sup> Set clear, public rules addressing how origination credit should be split by publishing and publicizing a memo that details how partners should split credit under common scenarios.
- **Establish a formal system of succession planning.** If your firm allows origination credit to be inherited, institute a formal succession planning process. Otherwise, in-group favoritism means that your current pattern of origination credit will be replicated over and over again, with negative consequences for diversity.
- **Pitch credit.** Women attorneys and attorneys of color often report being used as “eye candy”—brought to pitches but then not given a fair share of credit or work that results. Establish rules to ensure this does not occur. The best practice is that if someone does the work for the pitch, he or she should be recognized with credit that accurately reflects his or her role in doing and winning the work.
- **Parental leave.** Counting billables and other metrics as “zero” for the months women (or men) are on parental leave is a violation of the Family and Medical Leave Act, where applicable, and is unfair even where it is not illegal. Instead, annualize based on the average of the months the attorney was at work, allowing for a ramp-up and ramp-down period.
- **Part-time partners.** Compensation for part-time partners should be proportional. Specifics on how to enact proportional compensation depends on which compensation system a law firm uses. See the “Best Practices for Part-Time Partner Compensation” paper for details, available at [BiasInterrupters.org](http://BiasInterrupters.org).

### ***C. Establish Procedures to Ensure the Perception and Reality of Fairness***

- **Institute a low-risk way partners can receive help in disputes over credit.** Set up a way to settle disputes over origination and other forms of credit that lawyers can use without raising eyebrows.
- **Provide templates for partner comp memos—and prohibit pushback.** Some firms provide opportunities for partners and associates to make their case to the compensation committee by writing a compensation memo. If your firm does this, distribute the worksheet (online at [BiasInterrupters.org](http://BiasInterrupters.org)) on how to write an effective compensation memo and set rules and norms to ensure that women and minorities are not penalized for self-promotion. If not, give partners the opportunity to provide evidence about their work: research shows that women’s successes tend to be discounted and their mistakes remembered longer than men’s.
- **Institute quality control over how compensation is communicated to partners.** Design a structured system for communicating with partners to explain what factors went into determining their compensation.

- **When hiring, don't ask candidates about prior salary.** Asking about prior salary when setting compensation for a new hire can perpetuate the gender pay gap.<sup>47</sup> (A growing legislative movement prohibits employers from asking prospective employees about their prior salaries.<sup>48</sup>)
- **Have a bias interrupter at meetings where compensation is set.** This is a person who has been trained to spot the kinds of bias that commonly arise.
- **Training.** Make sure that your compensation committee, and anyone else involved in setting compensation, knows how implicit bias commonly plays out in law firm partner compensation and how to interrupt that bias. Read and distribute the “Identifying Bias in Partner Compensation Worksheet” (available at [BiasInterrupters.org](http://BiasInterrupters.org)).

### 3. Repeat as Needed

- **Return to your key metrics.** Did the bias interrupters produce change?
- **If you don't see change,** you may need to implement stronger bias interrupters, or you may be targeting the wrong place in the compensation process.
- **Use an iterative process** until your metrics improve.

Small Steps, Big Change

# Bias Interrupters Tools for In-House Departments

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# Interrupting Bias in Hiring

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## Tools for In-House Departments

### *The Challenge:*

When comparing identical resumes, “Jamal” needed eight additional years of experience to be considered as qualified as “Greg,” mothers were 79% less likely to be hired than an otherwise-identical candidate without children, and “Jennifer” was offered \$4,000 less in starting salary than “John.”<sup>49</sup> Unstructured job interviews do not predict job success,<sup>50</sup> and judging candidates on “culture fit” can screen out qualified diverse candidates.<sup>51</sup>

### *The Solution: A Three-Step Approach*

#### **1. Use Metrics**

Businesses use metrics to assess their progress toward any strategic goal. Metrics can help you pinpoint where bias exists and assess the effectiveness of the measures you’ve taken.

For in-house departments, some metrics may be possible to track; others may require HR or can only be tracked company-wide. Depending on the structure and size of your in-house department, identify what’s feasible.

Whether metrics are made public will vary from company to company and from metric to metric.

#### **For each metric, examine:**

- Do patterned differences exist between majority men, majority women, men of color, and women of color? (Include any other underrepresented group that your department/company tracks, such as veterans, LGBTQ people, etc.)

#### **Important metrics to analyze:**

- The goal is to track the candidate pool through the entire hiring process—from initial contact, to resume review, to interviews, to hiring—and then to analyze where underrepresented groups are falling out of the hiring process. How much you can track will depend on how your company’s systems are set up, as will the extent to which you will need help from HR.
- Track whether hiring qualifications are waived more often for some groups. You may be able to do this only for those parts of the hiring process that are done at a departmental level, such as final-round interviews.
- Track interviewers’ reviews and recommendations to look for demographic patterns. Again, your department’s ability to do this will depend on what is handled at a departmental level, or your HR department may be willing to do this tracking.

Keep in-house metrics by (1) individual supervisor; (2) department, if your in-house department is large enough to have its own departments; and (3) country, if relevant.

## 2. Implement Bias Interrupters

All bias interrupters should apply both to written materials and in meetings, where relevant.

Because in-house departments are all different and vary in size and structure, not all interrupters will be relevant. Depending on how much of the hiring process is done by the in-house department versus HR, some of the interrupters may be more feasible than others. Consider this a menu.

To understand the research and rationale behind the suggested bias interrupters, read the “Identifying Bias in Hiring Worksheet,” available online at [BiasInterrupters.org](http://BiasInterrupters.org), which summarizes hundreds of studies.

### A. Empower and Appoint

- **Empower people involved in the hiring process to spot and interrupt bias.** Use the “Identifying Bias in Hiring Worksheet,” available online at [BiasInterrupters.org](http://BiasInterrupters.org), and distribute this to anyone involved in hiring.
- **Appoint bias interrupters.** Provide HR professionals or team members with special training to spot bias and involve them at every step of the hiring process. Training is available at [BiasInterrupters.org](http://BiasInterrupters.org).

### B. Tips to Help You Assemble a Diverse Pool

- **If your department hires by referral, keep track of the candidate flow from referrals.** Hiring from current employees’ social networks may well replicate lack of diversity if your department is not diverse. If your analysis finds that referrals consistently provide majority candidates, consider limiting referrals or balance referral hiring with more targeted outreach to ensure a diverse candidate pool.
- **Recruit where diverse candidates are.** If your department handles recruiting, make sure to reach out to diverse candidates where they are. Identify law job fairs, affinity networks, conferences, and training programs aimed at women and people of color and send recruiters. If your department does not do recruiting, consider asking the people in charge to do more targeted recruitment.
- **If recruitment happens mostly at law schools, consider candidates from multi-tier schools.** Don’t limit your search to candidates from Ivy League and top-tier schools. This practice favors majority candidates from elite backgrounds and hurts people of color and professionals from nonprofessional backgrounds (class migrants).<sup>52</sup> If another department handles recruiting, let them know that your department would like to consider candidates from a broader range of law schools.
- **If your department writes its own job postings, make sure you are not using language that has been shown to decrease the number of women applicants** (words such as *competitive* or *ambitious*). If HR is in charge of the job postings, suggest that they review job posts in the same way. Tech companies such as Textio and Unitive can help.

- **Insist on a diverse pool.** If HR creates a pool for your department, tell them that you expect the pool to be diverse. One study found the odds of hiring a woman were 79 times greater if there were at least two women in the finalist pool; the odds of hiring a person of color were 194 times greater.<sup>53</sup> If HR does not present a diverse pool, try to figure out where the lack of diversity is coming from. Is HR weeding out the diverse candidates, or are the jobs not attracting diverse candidates?

### *C. Interrupting Bias While Reviewing Resumes*

If your in-house department conducts the initial resume screening, use the following bias interrupters. If HR does the initial screening, encourage them to implement the following tips to ensure that your department receives the most qualified candidates.

- **Distribute the “Identifying Bias in Hiring Worksheet” before resumes are reviewed** (available at [BiasInterrupters.org](http://BiasInterrupters.org)) so reviewers are aware of the common forms of bias that can affect the hiring process.
- **If candidates’ resumes are reviewed by your department, commit to what qualifications are important—and require accountability.** When qualifications are waived for a specific candidate, require an explanation of why the qualification at issue is no longer important—and keep track to see for whom requirements are waived.<sup>54</sup> If HR reviews the resumes, give HR a clear list of the qualifications your department is seeking.
- **Establish clear grading rubrics and ensure that all resumes are graded on the same scale.** If possible, have each resume reviewed by two different people and average the scores. If HR reviews resumes, encourage them to review resumes based on the rubric that you provide to them.
- **Remove extracurricular activities from resumes.** Including extracurricular activities on resumes can favor elite majority candidates.<sup>55</sup> Remove extracurriculars from resumes before you review them or ask HR to do this.
- **Watch out for Maternal Wall bias.** Mothers are 79% less likely to be hired than an identical candidate without children.<sup>56</sup> Train people who review resumes not to make inferences about whether someone is committed to the job due to parental status. Instruct them not to count “gaps in a resume” as an automatic negative. If HR reviews resumes, ask them to do the same.
- **Try using “blind auditions.”** If women and candidates of color are dropping out of the pool at the resume review stage, consider removing demographic information from resumes before review—or ask HR to do it.

### *D. Controlling Bias in the Interview Process*

- **Ask the same questions to every person you interview.** Come up with a set list of questions you will ask each candidate and ask them in the same order to each person. Ask questions that are directly relevant to the job for which the candidate is applying.<sup>57</sup>
- **Ask performance-based, work-relevant questions.** Performance-based questions, or behavioral interview questions (“Tell me about a time you had too many things to do and had to prioritize.”), are a strong predictor of how successful a

- candidate will be on the job.<sup>58</sup> Ask questions that are directly relevant to situations that arise in your department.
- **Require a work sample.** If applicable, ask candidates to demonstrate the skills they will need on the job (e.g., ask candidates to write an advisory letter to the sales team about a new product.)
  - **Standardize the interview evaluation process.** Develop a consistent rating scale for candidates' answers and work samples. Each rating should be backed up with evidence. Average the scores granted on each relevant criterion and discount outliers.<sup>59</sup>
  - **Try behavioral interviewing.**<sup>60</sup> Ask questions that reveal how candidates have dealt with prior work experiences. Research shows that structured behavioral interviews can more accurately predict the future performance of a candidate than unstructured interviews.<sup>61</sup> Instead of asking “How do you deal with problems with your manager?” say “Describe for me a conflict you had at work with your manager.” When evaluating answers, a good model to follow is STAR<sup>62</sup>: the candidate should describe the Situation faced, the Task handled, the Action taken to deal with the situation, and the Result.
  - **If you use culture fit, do so carefully.** Using culture fit as a hiring criterion can thwart diversity efforts.<sup>63</sup> Culture fit (“Would I like to get stuck in an airport with this candidate?”) can be a powerful force for reproducing the current makeup of the organization when it's misused.<sup>64</sup> Questions about sports and hobbies may feel exclusionary to women and to class migrants who did not grow up playing golf or listening to classical music. If culture fit is a criterion for hiring, provide a specific work-relevant definition. Google's work-relevant definition of culture fit is a helpful starting point.<sup>65</sup>
  - **Ask directly about “gaps in a resume.”** Women fare better in interviews when they are able to provide information up front rather than having to avoid the issue.<sup>66</sup> Instruct your interviewing team to give, in a neutral and nonjudgmental fashion, candidates the opportunity to explain gaps in their resumes.
  - **Be transparent to applicants about what you're seeking.** Provide candidates and interviewers with a handout that explains to everyone what's expected from candidates in an interview. Distribute it to candidates and interviewers for review so everyone is on the same page about what your in-house department is seeking. An example “Interview Protocol Sheet” is available at [BiasInterrupters.org](http://BiasInterrupters.org).
  - **Don't ask candidates about prior salary.** Asking about prior salary when setting compensation for a new hire can perpetuate the gender pay gap.<sup>67</sup> (A growing legislative movement prohibits employers from asking prospective employees about their prior salaries.<sup>68</sup>)

### 3. Repeat as Needed

- **Return to your key metrics.** Did the bias interrupters produce change?
- **If you don't see change,** you may need to implement stronger bias interrupters, or you may be targeting the wrong place in the hiring process.
- **Use an iterative process** until your metrics improve.

# Interrupting Bias in Assignments

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## Tools for In-House Departments

### *The Challenge*

Diversity at the top can only occur when diverse employees at all levels of the organization have access to assignments that let them take risks and develop new skills. A level playing field requires that both the glamour work (career-enhancing assignments) and the office housework (the less high-profile and back-office work) are distributed fairly. If your department uses an informal “hey, you!” assignment system to distribute assignments, you may end up inadvertently distributing assignments in an inequitable fashion.

If women and people of color keep getting stuck with the same low-profile assignments, they will be more likely to be dissatisfied and to search for opportunities elsewhere.<sup>69</sup>

### *The Solution: A Three-Step Approach*

Fair allocation of the glamour work and the office housework are two separate problems. Some in-house departments will want to solve the office housework problem before tackling the glamour work; others will want to address both problems simultaneously. This will depend on the size of your in-house department and how work is currently assigned.

## 1. Use Metrics

### *A. Identify and Track*

For each metric, examine:

- What is the office housework and glamour work in your department?
- Who is doing what and for how long?
- Are there demographic patterns that indicate gender and/or racial bias at play?

Important metrics to analyze:

1. Distribute an office housework survey to members of your department to find out who is doing the office housework and how much of their time it requires. Create your own survey or use ours, available at [BiasInterrupters.org](http://BiasInterrupters.org).
2. Convene relevant managers (and anyone else who distributes assignments) to identify what is the glamour work and what is the lower-profile work in the department. Worksheets and protocols to help you are available online at [BiasInterrupters.org](http://BiasInterrupters.org).

3. Once you have identified what the glamour work is in your department, ask managers to report which employees have been doing the glamour work. Worksheets are also available at [BiasInterrupters.org](http://BiasInterrupters.org).

### ***B. Analyze Metrics***

Analyze office housework survey results and glamour worksheets for demographic patterns, dividing employees into (1) majority men, majority women, men of color, and women of color, (2) parents who have just returned from parental leave, (3) professionals working part-time or flexible schedules, and (4) any other underrepresented group that your organization tracks (e.g., veterans, LGBTQ people, individuals with disabilities). (This will also depend on the size of your in-house department. If there are only one or two people in a category, the metric won't be scientifically viable.)

- Who is doing the office housework?
- Who is doing the glamour work?
- Who is doing the low-profile work?
- Create and analyze metrics by individual supervisor.

## **2. Implement Bias Interrupters**

Because every in-house department is different and varies so much in size and structure, not all interrupters will be relevant. Depending on how much of the hiring process is done by the in-house department versus HR, some of the interrupters may be more feasible than others. Consider this a menu.

### ***A. Office Housework Interrupters***

- **Don't ask for volunteers.** Women are more likely to volunteer because they are under subtle but powerful pressures to do so.<sup>70</sup>
- **Hold everyone equally accountable.** "I give it to women because they do it well—men don't." This dynamic reflects an environment in which men suffer few consequences for doing a poor job on less glamorous assignments and women who do the same are faulted as "not being team players."
- **Use admins.** Assign office housework tasks (e.g., planning birthday parties, scheduling meetings, ordering lunch) to admins if your department has enough admin support to do so.
- **Establish a rotation.** A rotation is helpful for many administrative tasks (e.g., taking notes, scheduling meetings). Rotating housework tasks (e.g., ordering lunch and planning parties) is also an option if admins are unavailable, making it a good option for in-house departments.
- **Shadowing.** Another option in larger departments is to assign a more junior person to shadow someone more senior—and to do administrative tasks such as taking notes.

### ***B. Glamour Work Interrupters***

- **Value what's valuable.** If your department values such things as mentoring and committee work (such as serving on the Diversity Initiative), make sure these things are valued when the time comes for promotions and raises. Sometimes

companies say they highly value this kind of work—but they don't. Mixed messages of this kind will negatively affect women and people of color. If your department doesn't have complete control over promotions and raises, work with relevant departments to ensure that communicated values are being rewarded appropriately. When members of your in-house department take on diversity work, make sure they have suitable staff support.

- **Announce your goals of equitable assignments.** Gather your team (or the members of your team who distribute assignments) to introduce the bias interrupters initiative and set expectations. Key talking points for the roll-out meeting are available online at [BiasInterrupters.org](http://BiasInterrupters.org).
- **Provide a bounceback.** If your metrics reveal that some members of your department distribute assignments inequitably, hold a bounceback meeting. Help the person in question think through why he or she assigns glamour work to certain people or certain types of people. Work with the person to figure out whether (1) the available pool for glamour work assignments is diverse but is not being tapped fully or whether (2) only a few people have the requisite skills for glamour work assignments. Use the “Responses to Common Pushback” and “Identifying Bias in Assignments” worksheets (available at [www.BiasInterrupters.org](http://www.BiasInterrupters.org)) to prepare for bounceback meetings.

#### If a diverse pool has the requisite skills . . .

- **Implement a rotation.** Set up a system where plum assignments are rotated between qualified employees.
- **Formalize the pool.** Write down the list of people with the requisite skills and make it visible to whomever distributes assignments. Suggest or require anyone handing out plum assignments to review the list of qualified legal professionals before making a decision. Sometimes just being reminded of the pool can help.
- **Institute accountability.** Require people handing out assignments to keep track of who gets plum assignments. Research shows that accountability matters.<sup>71</sup>

#### If the pool is not diverse . . .

- **Revisit your assumptions.** Can only one (or very few) employees handle this type of assignment, or is it just that you feel more comfortable working with those few people?
- **Revisit how the pool was assembled.** When access to career-enhancing assignments depends on “go-getters” who ask for them, women, people of color, and class migrants may be disadvantaged because self-promotion is less acceptable to them or less accepted when they do it.

If these suggestions aren't relevant or don't solve your problem, then it's time to **expand the pool**. Small in-house departments may have to find creative ways to do this.

- **Development plan.** For the attorneys or other legal professionals who aren't yet able to handle the plum assignments, what skills would they need to be eligible? Identify those skills and institute a development plan.

- **Succession planning.** Remember that having “bench strength” is important so that your department won’t be left scrambling if someone unexpectedly leaves the company.
- **Leverage existing HR policies.** If your company has a Talent Development Committee or professional development resources, use this resource to help your legal professionals develop the skills they need to handle plum assignments.
- **Shadowing.** Have a more junior person shadow a more experienced person during a high-profile assignment.
- **Mentoring.** Establish a mentoring program to help a broader range of junior people gain access to valued skills.

**If you can’t expand your pool, reframe the assignment.** Can you break up the assignment into discrete pieces so more people can participate and get the experiences they need?

**If nothing else works,** consider a formal assignment system.

### **3. Repeat as Needed**

- **Return to your metrics.** Did the bias interrupters produce change?
- **If you still don’t have a fair allocation of high- and low-profile work,** you may need to implement stronger bias interrupters or consider moving to a formal assignment system.
- **Use an iterative process** until your metrics improve.

# Interrupting Bias in Performance Evaluations

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## Tools for In-House Departments

### *The Challenge*

Bias in performance evaluations has been well documented for decades.<sup>72</sup>

In one study, law firm partners were asked to evaluate a memo by a third-year associate. Half the partners were told the associate was black; the other half were told the identical memo was written by a white associate. The partners found 41% more errors in the memo they believed was written by a black associate as compared with a white associate.<sup>73</sup> Overall rankings also differed by race. Partners graded the white author as having “potential” and being “generally good,” whereas they graded the black author as “average at best.”

The problem isn’t limited to law firms. One informal study in tech revealed that 66% of women’s performance reviews but only 1% of men’s reviews contained negative personality criticism.<sup>74</sup> Bias in the evaluation process stretches across industries.

### *The Solution: A Three-Step Approach*

#### **1. Use Metrics**

For in-house departments, some metrics may be possible to track; others may require HR or can only be tracked company-wide. Depending on the structure and size of your department, identify which metrics you are able to track.

#### **For each metric, examine:**

- Do patterned differences exist between majority men, majority women, men of color, and women of color? Include any other underrepresented group that your company tracks, such as veterans, LGBTQ people, or individuals with disabilities.
- Do patterned differences exist for parents after they return from leave or for employees who reduce their hours?
- Do patterned differences exist between full-time and part-time lawyers and other legal professionals?

#### **Important metrics to analyze:**

- Do your performance evaluations show consistent disparities by demographic group?
- Do women’s ratings fall after they have children? Do ratings fall after professionals take parental leave or adopt flexible work arrangements?

- Do the same performance ratings result in different promotion or compensation rates for different groups?

Keep in-house metrics by (1) individual supervisor; (2) department, if your in-house department is large enough to have its own departments; and (3) country, if relevant.

## 2. Implement Bias Interrupters

All bias interrupters should apply both to written materials and in meetings, where relevant.

Because in-house departments vary so much in size and structure, not all interrupters will be relevant to every company. Also, some interrupters will not be feasible, depending on how much of the hiring process is done by the in-house department versus HR. Consider this as a menu.

To understand the research and rationale behind the suggested bias interrupters, read the “Identifying Bias in Performance Evaluations Worksheet,” available online at [BiasInterrupters.org](http://BiasInterrupters.org), which summarizes hundreds of studies.

### A. Empower and Appoint

- **Empower people involved in the evaluation process to spot and interrupt bias.** Use the “Identifying Bias in Performance Evaluations Worksheet,” available at [BiasInterrupters.org](http://BiasInterrupters.org), and distribute it to those involved in the evaluation process.
- **Appoint bias interrupters.** Provide HR professionals or team members with special training to spot bias and involve them at every step of the performance evaluation process. Training is available at [BiasInterrupters.org](http://BiasInterrupters.org).

### B. Tips for Tweaking the Evaluation Form

Many in-house departments do not have control over their performance evaluation forms, so some of these suggestions will not be feasible.

- **Begin with clear and specific performance criteria directly related to job requirements.** Try “He is able to write clear memos to leadership that accurately portray the legal situations at hand” instead of “He writes well.”
- **Instruct reviewers to provide evidence to justify their rating and hold them accountable.** Global ratings, with no specifics to back them up, are a recipe for bias and do not provide constructive advice to the employee being reviewed.
- **Ensure that the evidence is from the evaluation period.** The evaluation form should make it clear that a mistake an employee made two years ago isn’t acceptable evidence for a poor rating today.
- **Separate discussions of potential and performance.** There is a tendency for majority men to be judged on potential and others to be judged on performance.
- **Separate personality issues from skill sets.** A narrower range of behavior often is accepted from women and people of color than from majority men.

### *C. Tips for Tweaking the Evaluation Process*

- **Help everyone effectively advocate for themselves.** Distribute the “Writing an Effective Self-Evaluation,” available online at [BiasInterrupters.org](http://BiasInterrupters.org).
- **If the evaluation process requires self-promotion, offer alternatives.** Set up more formal systems for sharing successes within your in-house department, such as a monthly e-mail that lists employees’ accomplishments.
- **Provide a bounceback.** If possible, ask HR for an analysis (or do your own) to ensure that individual supervisors’ reviews do not show bias toward or against any particular group. If they do, hold a meeting with that supervisor to help the person in question think through why certain types of people are getting lower performance evaluations. Work with the supervisor to figure out whether (1) the individuals in question are having performance problems and should be put on Performance Improvement Plans or whether (2) the supervisor should reexamine how employees are being evaluated.
- **Have bias interrupters play an active role.** If your in-house department holds calibration meetings, make sure there is a bias interrupter in the room to spot and correct any instances of bias. If a bias interrupter can’t be in the room, have participants read the “Identifying Bias in Performance Evaluations Worksheet” before they meet, available online at [BiasInterrupters.org](http://BiasInterrupters.org).
- **Don’t eliminate your performance appraisal system.** To the extent that you have a say in the HR operations in your company, encourage your company not to eliminate formal performance appraisal systems. Informal, on the fly performance evaluation systems are becoming more popular, but they have a tendency to reproduce patterns of bias.

### **3. Repeat as Needed**

- **Return to your key metrics.** Did the bias interrupters produce change?
- **If you don’t see change,** you may need to implement stronger bias interrupters, or you may be targeting the wrong place in the performance evaluation process.
- **Use an iterative process** until your metrics improve.

# Interrupting Bias in Compensation

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## Tools for In-House Departments

### *The Challenge*

The in-house gender pay gap has not been well studied, but a 2017 report from the Association of Corporate Counsel described a “dramatic” gender pay disparity based on a survey taken by 1,800 in-house counsel. The report found that there is a higher proportion of men in six of seven salary bands above \$199,000—yet only 8% of male respondents believed that a pay gap existed.<sup>75</sup>

Interrupting bias in compensation for in-house departments can be tricky because decisions and policies around compensation typically are made at the company level, but there are steps your department can take to begin to address the problem.

### *The Solution*

The following recommendations can be implemented at the departmental level to reduce bias in compensation.

- **Communicate your organization’s compensation strategy.** If only those “in the know” understand what’s really valued, that will only benefit a small in group.
- **When hiring, don’t ask candidates about prior salary.** Asking about prior salary when setting compensation for a new hire can perpetuate the gender pay gap.<sup>76</sup> (A growing legislative movement prohibits employers from asking prospective employees about their prior salaries.<sup>77</sup>)
- **Read and distribute the “Identifying Bias in Compensation Worksheet” to anyone involved in compensation decisions in your department** (available online at [BiasInterrupters.org](http://BiasInterrupters.org)).
- **Obtain surveys and benchmarking data at regular intervals.** Assess whether compensation in your in-house department is competitive with the relevant market. SHRM and similar organizations provide guidance to help you choose reputable compensation surveys and benchmarking data. Typically these data are behind a pay wall.
- **Encourage HR to implement pay equity audits under the direction of the legal department or outside lawyers to maximize the chance that the data collected is not discoverable under attorney–client privilege.**
- **When pay disparity is discovered, work with HR or the equivalent department to address the disparity within a reasonable period of time.**
- **Institute a low-risk way people can get help in disputes over compensation.** Set up a way to settle disputes over compensation that lawyers and legal professionals can use without raising eyebrows.

# Best Practice: Sponsorship

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## Based on Ricardo Anzaldua's MetLife Sponsorship Program

These Best Practice recommendations are based on conversations with Ricardo Anzaldua, GC of MetLife, who implemented a similar program in his department.

**Identify top talent.** Create a system that controls for unconscious bias to identify top talent (including nondiverse talent) to defeat arguments that the program is designed to unfairly advantage or disadvantage particular groups. To identify top talent early, MetLife used existing talent-identifying tools and introduced survey techniques to control for unconscious bias. Make sure that your system:

- Draws input from many different sources (not just managers; also include clients, peers, subordinates, etc.)
- Seeks assessments of both performance and potential from varying perspectives

**Pair each top-talent candidate with a trained senior-level sponsor who is held accountable.**

- Tie effective sponsorship with manager performance evaluations, compensation, and ability to be promoted.
- To ensure that sponsorship does not come to be regarded as a risk of being considered a poor performer with little reward, either (1) enlist *all* officer-level managers to be sponsors or (2) create upside rewards available only to effective sponsors. (Note: enlisting all managers to be sponsors is simpler and helps get buy-in to the program.)
- Create and inculcate leadership competencies for managers that they can also use to advance.
- All top talent should be paired with sponsors, but pair diverse top-talent candidates with senior management.
- Make sure each protégé has a *mentor* (preferably not the sponsor).

**Develop goals and milestones for protégés.**

- Each sponsor-protégé pair creates a mutually agreed-upon career goal that can be accomplished in three to five years.
- Each sponsor creates a development plan that includes milestones along the way (opportunities and experiences needed to accomplish the career goal). Milestones may include presentations, managing/leading a team, communication training, leading a significant project (e.g., transaction, litigation, regulatory examination), and executive presence coaching.

**Create action learning teams (ALTs).**

- Create small teams of protégés and sponsors (pair sponsors with different groups of protégés).
- Give ALTs senior-management-level problems and task them with formulating, in three to six months, written proposals to solve the issues, including how to involve non-legal resources.
- Bring in SMEs to facilitate the more technical aspects of specific problems.
- At various points in the process, ALTs should brief senior management on the status of their work.

**Bake sponsorship and ALTs into existing talent development systems, performance evaluations systems, and HR processes.**

# Endnotes

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For complete citations, see the bibliography at [BiasInterrupters.org/toolkits/orgtools/](http://BiasInterrupters.org/toolkits/orgtools/)

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# About the ABA Commission on Women in the Profession

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As a national voice for women lawyers, the ABA Commission on Women in the Profession forges a new and better profession that ensures that women have equal opportunities for professional growth and advancement commensurate with their male counterparts. It was created in 1987 to assess the status of women in the legal profession and to identify barriers to their advancement. Hillary Rodham Clinton, the first chair of the commission, issued a groundbreaking report in 1988 showing that women lawyers were not advancing at a satisfactory rate.

Now entering its fourth decade, the commission not only reports the challenges that women lawyers face, it also brings about positive change in the legal workplace through such efforts as its Grit Project, Women of Color Research Initiative, Bias Interrupters Project, and the Margaret Brent Women Lawyers of Achievement Awards. Drawing upon the expertise and diverse backgrounds of its 12 members, who are appointed by the ABA president, the commission develops programs, policies, and publications to advance and assist women lawyers in public and private practice, the judiciary, and academia.

For more information, visit [www.americanbar.org/women](http://www.americanbar.org/women).

# About the Minority Corporate Counsel Association (MCCA)

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The preeminent voice on diversity and inclusion issues in the legal profession, MCCA is committed to advancing the hiring, retention and promotion of diverse lawyers in law departments and law firms by providing research, best practices, professional development and training, and pipeline initiatives.

MCCA's groundbreaking research and innovative training and professional development programs highlight best practices and identify the most significant diversity and inclusion challenges facing the legal community. MCCA takes an inclusive approach to the definition of "diversity" including race and ethnicity, gender, sexual orientation, disability status and generational differences.

Since MCCA's founding 20 years ago, it has been recognized and honored by the Association of Corporate Counsel, the National LGBT Bar Association, the National Minority Business Council, Inc. and the U.S. Equal Employment Opportunity Commission, among others. MCCA's vision, "To make the next generation of legal leaders as diverse as the world we live in," is what drives the organization and our passionate and committed partners.

For more information, visit [www.mcca.com](http://www.mcca.com).

