OSB Professional Liability Fund

OPEN SESSION MINUTES
OREGON STATE BAR
PROFESSIONAL LIABILITY FUND
BOARD OF DIRECTORS

June 11, 2021
Zoom Videoconference

Chair Megan Livermore called the regular meeting of the Board of Directors to order at 9:06 a.m. via Zoom videoconference. Present in addition to Ms. Livermore were Directors Holly Mitchell, Gina Johnnie, Harshi Waters, Michael Batlan, Oren Haker, Steve Hill, Akeem Williams, and Chris Karlin. BOG liaison David Wade and OSB CEO Helen Hierschbiel attended open session. In addition, PLF staff members Carol Bernick (interim CEO), Madeleine Campbell, Betty Lou Morrow, Jeff Crawford, Matt Borrillo, Emilee Preble, Cindy Hill, Tanya Hanson, Heather Bowman, Maureen DeFrank, Pam Stendahl, Douglas Querin, Kyra Hazilla, Bryan Welch, and Rachel Edwards attended all or part of the meeting. Mark Higgins (PLF consultant with RVK) and Chuck Faerber (actuary with Rudd & Wisdom) attended open session.

This meeting was noticed and conducted in compliance with the Oregon Public Meetings Law, ORS 192.610, et seq. and a quorum was verified.

1. <u>CHAIR REPORT (Ms. Livermore)</u>

Approval of Open Session Minutes.

(A)i. <u>Draft Open Session Minutes (04/16/21)</u>:

Ms. Johnnie moved and Mr. Williams seconded that the Draft open session minutes of April 16, 2021 be approved as written. Motion passed unanimously 9-0.

Approval of Executive Session Minutes in Open Session.

(A)ii. Executive Session Minutes (4/16/21):

Ms. Johnnie moved and Mr. Williams seconded that the April 16, 2021 executive session minutes be approved as written. Motion passed unanimously 9-0.

(A)iii. Executive Session Minutes (5/12/21):

Ms. Johnnie moved and Mr. Batlan seconded that the minutes be approved as written. Motion passed 8-0 (Mr. Williams abstained).

(B) Committee Minutes:

i. January 22, 2021 Finance and Investments Committee Minutes

There was no discussion and no action was required.

(C) Board Member Congratulations:

Ms. Livermore gave Mr. Karlin early happy birthday wishes. His birthday is July 24.

Ms. Livermore thanked the CEO Search Committee members (Gina Johnnie, Oren Haker, Steve Hill, Kyra Hazilla, Hong Dao, Carol Bernick, and BOG member Kamron Graham) for their hard work, especially Ms. Johnnie as Chair of the committee.

Ms. Livermore thanked Ms. Bernick for stepping in and serving as the interim CEO for the past six months. She is truly grateful for keeping us in good stead while figuring things out.

(D) COVID Vaccinations/In-person Meetings:

Ms. Livermore reported that we are planning to meet in person in Ashland in August and discussed with the Board appropriate safety protocols for doing so.

(E) BarBooks:

Ms. Livermore said we will be looking at the BarBooks issue again and will convene a joint BOG/BOD committee. The OSB was invited to provide a funding proposal.

2. CEO REPORT (Ms. Bernick)

(A) General Report:

Ms. Bernick thanked the Board and the PLF staff for allowing her the opportunity to serve as interim CEO and wishes everyone the very best.

Ms. Bernick led a discussion regarding finding a replacement board member to fulfill Ms. Livermore's term (ending December 31, 2021).

Ms. Johnnie moved that the Board nominate Julia Manela to fulfill Ms. Livermore's term. Ms. Waters seconded the motion. Motion passed unanimously 9-0.

Ms. Livermore is to contact Ms. Manela to gauge her interest.

Due to Ms. Livermore stepping down as Chair, Ms. Johnnie will serve as Chair from July 1, 2021 through December 31, 2022.

3. GENERAL COUNSEL REPORT (Ms. Campbell):

(A) Licensed Paraprofessional Committee Update:

Ms. Campbell said the work of the committee is ongoing and is very detailed. They are being very careful with licensing requirements. If the PLF covers this program, it will require statutory changes. The PLF needs to figure out the underwriting with regard to risks in specific areas of law in which paraprofessionals may be allowed to practice. The committee is looking for a balance to provide coverage needed and have a broad enough range of practice to serve clients who otherwise could not get help.

Mr. Crawford asked if there had been any discussion yet about the PLF extending coverage and what the assessment would be. Those details are unknown at this time.

(B) Alternative to the Bar Exam Task Force Update:

Ms. Campbell reported that there is going to be a recommendation that there be an experimental program based on a New Hampshire skills-based program for the last two years of law school. The committee is also considering an apprenticeship model as an alternative to the bar exam.

4. CLAIMS REPORT (Mr. Borrillo)

(A) General Claims Report (Open Session):

Mr. Borrillo reported that claims are running smoothly. The annual BOD/claims attorney meeting was held this morning. They discussed preparing for post-pandemic challenges. We are trying to anticipate some of the challenges we might see, to keep things moving smoothly.

We continue to receive positive evaluations and claims continue to be lower than normal. The reduction in claims was replaced by an abundance of additional work in managing COVID challenges (HB 4212) and many office closures.

5. FINANCIAL REPORTS (Ms. Morrow)

(A) March 31, 2021 Draft Financial Statements:

Ms. Morrow reported that the April 30, 2021 financial statements are available, so she decided to report on those financial statements, as opposed to March 31. The April 30, 2021 balance sheet demonstrates the PLF is in a significantly stronger position than April of 2020. The PLF has not yet received the audited PERS actuary estimates. Therefore, no entries can be made to the PLF year-end statements. However, based on unaudited data that has been received, Ms. Morrow expects the pension liability increase to be $1.2 million (as opposed to the projected $1 million). Offset asset accounts will reduce the liability entry with the overall effect being approximately an $800,000 reduction to in year surplus. Ms. Morrow speculates that when everything is audited and we have the final 2020 financial statements, the net position will be approximately $28 million. Investment returns year to date for 2021 are about 4%. As Mr. Borrillo stated, the annualized claims count is approximately 730. While the frequency of claims is less than budgeted, the actuarial determination of the cost of new claims is $2,000 more than budgeted. In spite of these budget differences, the PLF is under budget in the cost of new claims.

Ms. Morrow reported that the Excess Program is doing amazing things. The program currently has a $206,000 surplus. This is the largest in-year surplus in a number of years. Ms. Morrow anticipates that if investment returns remain stable, there is a very good chance the program will end the year in a surplus position.

(B) Update on ISI Database Software:

Ms. Morrow gave an update on the ISI database software negotiations. Ms. Campbell has engaged outside counsel in Seattle to assist with contract negotiations with ISI. It is reported negotiations continue with no major stumbling blocks thus far. However, there is much work left to be done in the negotiation process.

Ms. Morrow said that Mr. Sabala (the PLF's System Administrator) sent an email last week to Ms. Bernick and Ms. Morrow expressing concerns about ransomware attacks. Mr. Sabala has reached out to DaVinci (external IT consultancy firm) for advice around best practices to safeguard the PLF against such invasions. Ms. Morrow reminded the Board DaVinci did a security audit of the PLF IT infrastructure in 2017. Typically, we wait five years for the next audit. However, due to the prevalence of ransomware attacks we will accelerate that review to take place this summer or early fall. Ms. Livermore thanked Ms. Morrow and Mr. Sabala for their concerns in the ransomware arena. If we can stay ahead of it, that is certainly helpful.

6. RISK MANAGEMENT SERVICES (Mr. Crawford)

(A) Risk Management Services Update:

Mr. Crawford reported that program access since the last board meeting has remained steady with one exception. There was a large surge in April and May regarding access to our online CLEs (5,900 compared to 2,112 in prior months). He attributes most of that to the changes to MCLE requirements.

Learning the Ropes

Learning the Ropes will be held in November of this year. Our presentation last year was held virtually and it was very successful. This year, we are working on a hybrid model (both in-person and available online).

Shredding Events

Mr. Crawford reported that we have revived the shredding events this year for Oregon lawyers. We have held some in eastern and southern Oregon and have had some in Tigard. We are planning more for the summer.

Staff Changes

Ms. Blackford retired earlier this month. She was a long time Practice Management Attorney (PMA) and is a great loss to the PLF. She made many contributions to the PLF's risk management and practice management over the years. We wish her well in her retirement. We have begun the process of hiring a new PMA.

Mr. Crawford announced we have hired Jennifer Harrington as an OAAP Attorney Counselor. Ms. Harrington is a therapist and counselor and was an attorney in private practice.

Interdepartmental Data-Drive Program Planning

Mr. Crawford reported that we are trying to harness claim data and are putting together topical aids by the PMAs and the Communications team. We are also putting together CLEs targeting specific areas of law, including a debtor-creditor one next week.

Ms. Edwards reported that she and Mr. Crawford, Mr. Borrillo, and Mr. Welch have been meeting regularly over the past few months to collaborate on claims and risk management.

Ms. Livermore asked what kind of statistics they are seeing in outlying areas. Ms. Edwards suggested possibly marketing our services in those areas. Mr. Crawford said we are trying to be geographically inclusive.

Mr. Crawford reiterated that later this year, he would prepare statistics regarding lawyer demographics to get a sense of whether we are serving all populations well.

Mr. Welch gave an OAAP report and said that we have a contact management database that was built in-house using Universe. It continues to be a useful tool and works well to keep confidential records, assisting them to track and follow-up with clients, provide reminders, and helps gather program utilization statistics.

They have had an opportunity to use the program for some time now and Mr. Ouellette is doing a great job of maintaining the program.

Mr. Wade asked if we anticipate reentry problems for lawyers who have worked at home and will now be required to return to the office. Mr. Welch said that they do expect that from some lawyers. This has been a topic at some CLEs, there are definitely concerns, and people are reaching out. Ms. Hazilla said we are receiving increasing requests for presentations on this exact issue.

Ms. Edwards said there has been a parallel on the PMA side. They gave a presentation on tips for creating a hybrid model. Many firms are grappling with that. They are trying to keep up with the topics, cloud programs, etc.

7. COMMITTEE REPORTS AND ASSIGNMENTS

(A) Finance and Investments Committee:

Ms. Morrow reported that the major topic at the May 24 Finance Committee was setting the assessment level for 2022. Ms. Morrow framed some of the issues, both qualitatively and quantitatively.

We have three choices: Do nothing, increase the assessment, or decrease the assessment. The data provided suggests leaving the assessment at the existing level. With unstable economic indicators, and the PLF's reliance on their portfolio to fund operations, a reduction in the assessment for 2022 may result in a large increase to the assessment in two or three years. Ms. Morrow noted, however, she is not tone deaf to the qualitative components of this decision. Particularly, in light of the mandated, captive structure of the PLF.

Ms. Morrow introduced Mark Higgins of RVK and Chuck Faerber of Rudd and Wisdom. They have a wealth of knowledge about the history of the PLF from a portfolio performance perspective and a primary claims actuarial development respectively.

Mr. Higgins discussed the history behind the PLF assessment since 2016 and how investment returns have been impacted during that time. He addressed four slides: (1) history behind the PLF assessment since 2016; (2) how investments have impacted the net position during this time period; (3) interaction between operating results and net position; and (4) potential future scenarios.

Mr. Faerber reported that historically, there was a period where the PLF's claim frequency was solidly in the 12% range. In 2020, the bottom dropped out of the claims count and frequency was approximately 9%. Mr. Faerber believes this is a unique situation borne solely of COVID. Mr. Faerber feels that Ms. Morrow's assumptions are completely reasonable to model the PLF's financial position in determining the appropriate assessment level. Mr. Faerber said that as we consider moving forward on assessment adjustments, he would request that we give him a chance to do this summer's assessment study. Mr. Faerber stated COVID is not over yet and we have no idea what 2021 will bring from a claims perspective. Mr. Faerber stated he would like to see this year finish and get well into 2022 before making any rate adjustments. He understands that the PLF is in an excellent financial situation and does not want to be overcharging membership, but would urge caution and see how the pandemic plays out financially before making any decisions regarding the assessment.

Ms. Morrow discussed the assessment study that Mr. Faerber referred to. As of June 30, Ms. Morrow provides data to the actuaries and based on that data they provide a range of assessment levels with the mid-point typically being the number the PLF will use. An option Ms. Morrow raised is to provide on time assessment relief due to COVID. This could take the form of a $200 or $300 discount to the assessment. We lost 3.3% of covered parties from 2020 to 2021. We should look at helping those who are remaining and possibly bring some back that have left practice. The question was raised if the PLF has an obligation to return some of the investment returns the PLF has benefitted from over the past two years. It was pointed out the assessment can be increased at any time if the PLF financial position would dictate such an action. Ms. Morrow responded she does not feel it is indicative of good financial stewardship to decrease the assessment and then institute a major increase to the assessment within just a few years. This could also make the PLF look unstable and it is an ongoing goal to provide a stable assessment level to the covered parties. There are multiple reasons, quantitatively and qualitatively, that the assessment level demands our serious attention.

Ms. Morrow asked if the Finance Committee members, Mr. Haker, Mr. Karlin, and Mr. Batlan, had any input with regard to the 2022 budget. Mr. Haker said he wants a fulsome discussion to think about this before having to make a decision about the budget.

Ms. Livermore said that whatever we do with the assessment, we need to explain clearly the potentials and why it is happening, that there are many factors to consider. She asked if we get much feedback from the annual report each year. Ms. Morrow said she could only speak of the feedback she has received. She can count on one-hand comments that directly speak to the assessment being too high. Mostly, the feedback she receives pertain to late fees and requests to have them waived. At the PLF 40th anniversary party, a person was very direct that we are sitting on too much money as far as surplus. That is the only time she has received a comment related to the net position.

Mr. Faerber said that professional liability coverage can be volatile. In 1999, the PLF had amassed retained earnings a little over $9 million. Between investment losses and claims over the next 7 to 8 years, that amount was reduced to a $4.9 million deficit (a $14 million-$15 million swing). The PLF existed with a deficit over the next three to five years. It took time to return to the black. This is one of the reasons that we need to be cautious. Finances can change quickly. He reminded the Board that one of the PLF's fiduciary duties is to be sure there is enough money to pay the claims. Ms. Livermore said that fiduciary duty gets people's attention.

Mr. Crawford asked if a discussion has taken place about a one-time reduction. Ms. Morrow said that we have discussed a one-time refund or reduction to the assessment with clear messaging it is a one-time only adjustment. But, input has been shared that could develop expectations for ongoing decreases. It could also be perceived as a dividend as opposed to a one-time discount. This could begin to sound too much like commercial insurance and raise red flags about the PLF's exemption from the Insurance Code of Oregon. Ms. Morrow again said that what she hears most is complaints about late fees and there is no way to end late fees. Late fees encourage on-time payments, which ensures covered parties do not go into suspension.

Mr. Batlan said, "Plan for the worst and hope for the best." The uncertainty of the stock market and uncertainty of claims are all projections. At this point, he thinks we should keep it where it is. If you start piecemealing it out, people will wonder what the standard is and it becomes very difficult. This is the first year of a new federal administration and the impacts are not fully known yet, so there is a lot of uncertainty. He suggests holding tight until next year at this time and make a determination at that point.

Ms. Livermore asked if we are getting pressure from the outside to reduce the assessment, or is it a problem of our creation. Ms. Morrow said she is not receiving comments and has not been told by accounting staff that they are receiving complaints or comments related to the assessment level. Mr. Karlin said that if we want to think about changing the rate, we should focus on the claims history and the number of covered parties. It is a bit rocky to reduce the rate because of good investments earnings. He would rather focus on those two issues before making a decision. The other piece is the cost of coverage the PLF provides, compared to other states. Is it noticeably lower or higher? Ms. Morrow said it is higher, but the offerings of the PLF are significantly different from NABRICO carriers. We have higher claims because we do not decline any covered parties. In other companies, loss prevention is low on their list of priorities. The PLF believes in robust services because we are a mandatory program.

Ms. Campbell noted that it is extremely difficult to compare rates in other states to rates in Oregon because other insurers do not have to cover all lawyers. They can assess risk, have deductibles, add endorsements to policies, etc. The PLF has one coverage for everyone, so comparing cannot be done.

Ms. Bernick added to the discussion of why you cannot make comparisons and said that we are not advocating any position. She agrees that we have a fiduciary obligation to cover claims, but we also have a fiduciary obligation to ensure that we are charging the right assessment to do those things without having excess money. It may be that for all the reasons discussed, we are meeting that fiduciary duty. We are not for profit. We do not have shareholders. It is different. She felt the need to make that point.

Mr. Faerber said he is not advocating that the PLF accumulate an absurd amount of money and hang onto it forever. His point is that we are in a very different situation due to the pandemic and suggests riding it out. A year or two from now, if we still have $28 million to $30 million in surplus, he would then suggest reducing the assessment until the net position gets to a point where it begins to feel uncomfortable, then begin to raise it again.

Mr. Borrillo said that from a claims perspective, there is much unpredictability of what we will see. It could be that in claims, we could see a large increase in terms of numbers and severity. There are not a lot of talks about the assessment and wanting to lower it. We receive comments on the value covered parties receive for what they pay. He does not see a dire need to lower it and would like to focus on providing a higher expense allowance. Ms. Morrow said that she analyzed the financial impact of increasing our expense allowance by $25,000 and we could do it without a huge financial impact because so few claims go to limits. We have a burning limit so only those claims at limits would take full advantage of the increase from $50,000 to $75,000. It could however be perceived that people who have claims are getting the reward as opposed to those who do not have claims. A reduction in the assessment though is spread equally among all covered parties whether they have claims or not. Ms. Campbell said that rates are increasing with our defense panel members and having a $50,000 expense allowance is not keeping up with the times in terms of defense expenses incurred.

Mr. Haker said that in terms of getting through COVID and looking at the effects, it could be longer than a year or two and questions how comfortable we are with sitting on a lot of cash for three or four years. We just do not know when we will break away from the effects of COVID.

Ms. Livermore said she feels there is a balance to go with the more conservative approach of not reducing the assessment. It seems to be the most reasonable way to move forward and make sure we are not undermining ourselves when the backlash hits. Mr. Haker asked what the right amount of money is to sit on. He does not want to sit on too much or too little, but does not like the idea of sitting on more cash than we need. How do we project out and play out different scenarios over the next three to five years (obviously, the further we project out, the worst the projections are). He would like us to figure out a way to do an analysis if it has not already been done. Ms. Morrow agreed. Mr. Haker asked how much we are over since the last discussion. Mr. Morrow said that we are projecting a net position of $28 million and we need about $23 million. This is based on exposure. Therefore, we would end with $5 million too much. Mr. Haker asked how we move that money out of the PLF but do so with a similar understanding of when taxes are reduced, taxpayers should put the money aside because taxes will go up – but people do not do that.

Ms. Livermore asked Ms. Morrow to send the slides presented by Mr. Higgins to everyone. She feels they are very persuasive in showing that money can go away very quickly. In terms of doing business, it could be a complete flip.

Mr. Wade looked at Ms. Morrow's analysis and she has made conservative assumptions, even at the end of the day, with those, he supports reducing the assessment to $3,100. This is temporary and will return to a normal rate of return and higher claims. We have to prepare for that. He feels Ms. Morrow's assumptions are conservative enough. The only one that might be overly conservative is the reduction of covered parties of ¾ of a percent year after year. There was definitely a COVID effect, a 2008 effect, and a shrinkage in law schools, but that is rebounding. Anecdotally, he is hearing people are getting jobs now. He agrees with Mr. Karlin that the assessment should vary with claims. If lawyers are costing us more money, the assessment increases, but if not, he agrees with Mr. Haker that he does not think we should sit on a pile of money for captive mandatory covered parties. We have a fiduciary duty not to overcharge them. Mr. Wade also feels the net position goal of $23 million is very generous compared to PLF history. He cannot remember that many years with a $23 million net position goal. Mr. Wade said that anyone who has had a claim against them and been defended by the PLF will never complain about the assessment because the service is spectacular and the goodwill is spectacular. However, for those who do not have a claim, sitting on a large pile of money creates its own risks.

Ms. Livermore appreciates Mr. Haker's and Mr. Wade's thoughts and agrees they are entirely reasonable. She also agrees that in a few years, having to have a huge increase down the road seems worse than sitting on what we have for a while. We need to be reasonable with what we are doing.

Ms. Livermore asked if Ms. Morrow needs anything from the Board at this time. Ms. Morrow said she would do two budgets, one with $3,100 assessment and one with $3,300 assessment.

(B) CEO Search Committee Update:

Ms. Johnnie said that there is nothing new to report, other than Ms. Livermore's CEO position. She thanked all committee members who began on the committee and those who ended on the committee. Mr. Haker said that he wanted to acknowledge the great job by Ms. Johnnie in leading this committee.

8. LIAISONS' REPORT (BOG):

Mr. Wade said the BOG is up to speed on things that are happening. They spent a lot of energy (as mentioned earlier by Ms. Campbell) on the alternatives to the bar exam. This was driven by equity in large part plus modernization. The admissions system is based on a 1935 model that is absorbing a lot of their energy. The Leadership Institute is trying to get going on providing guidance and critical mass (for lawyers three to nine years out of law school), and a community for the incoming leaders of law firms and the PLF and the Bar. The BOG has been involved in the paraprofessional issues. The Diversity Action Plan is about to go the BOG. It is extremely detailed and very action orientated instead of aspirational. The BOG is open to comments from the PLF Board. They have already received many comments. It will be presented at the July 30 BOG meeting.

Mr. Wade said that OLIO is coming up in August. They would prefer to present live but he is not sure how it will take place (most likely, it will be remote). It is an outstanding program for first year law students, learning from second year law students. It forms a community so they know people (this includes out of state people). OLIO is unique to Oregon and very successful.

Ms. Hierschbiel encouraged anyone who wants to recommend someone for one of the OSB awards to let her know before the June 29 deadline. They are always looking for nominations and she encouraged people to send in their recommendations. Celebrate Oregon Lawyers will be virtual this year.

Ms. Hierschbiel discussed the pro bono panels. The OSB has a COVID-19 panel for individuals who have legal issues that arise out of the pandemic. The majority of those issues have been landlord-tenant matters. There are close to 100 volunteer lawyers on that panel (dealing with evictions and others issues arising out of COVID-19).

Ms. Hierschbiel thanked the PLF for providing coverage for these pro bono programs when they are not already covered. For the handful who are not already covered, she appreciates the PLF working with them to provide coverage in these areas.

Operationally, the OSB continues to work primarily from home, but are encouraging staff to go in more and they are starting to do that. They are hoping for a regular schedule by September 1, assuming things move in that direction. In terms of in-person meetings, the BOG will begin meeting in person but for now, they are encouraging sections and committees to continue to meet remotely.

Ms. Hierschbiel plans to attend the PLF board meeting in Ashland and is excited to see everyone in person. She is hopeful the liaisons to the BOG will attend the Baker City meeting in person. Mr. Wade agreed and encouraged the liaisons to attend. Mr. Wade also said he plans to attend the PLF board meeting in Ashland.

9. <u>UNFINISHED AND NEW BUSINESS</u>:

There was no unfinished or new business to discuss.

10. <u>EXECUTIVE SESSION</u>

See separate executive session agenda. Executive Session materials require a password.

Ms. Livermore called the meeting into executive session at approximately 11:48 a.m., pursuant to ORS 192.660(2)(f) and (h) to discuss claim matters and other executive session issues. See separate executive session minutes.

11. <u>ADJOURNMENT</u>

The meeting adjourned at approximately 11:36 a.m.

These minutes were approved by the PLF Board of Directors at its August 20, 2021 board meeting.