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SPECIAL SECTION

THE OREGON STATE BAR - PLF

ETHICAL ATROCITY OR COMEDY ??

A Rebuttal to the False, Misleading and Deceptive Information Contained in the So-Called "OSB PLF Task Force Report" and Analysis of the Reasons Why the Oregon State Bar is the Least Trustworthy State Bar in the Nation

By Evan Gutman CPA, JD (2002)

". . . in 1948 . . . I was invited to Portland to address the Oregon State Bar Association, which put me up at the Benson Hotel. When I checked out of the hotel, I was told that the bill had been taken care of by the association.

. . . Lindsay C. Warren, the Comptroller General of the United States . . . told me he had learned that I had been a guest of the Oregon Bar Association at the Benson Hotel in Portland, and that the association had not paid the bill but had routed it to a shipbuilding company that had a contract with the U.S. Navy. The contractor had in fact paid the hotel bill.

. . . I phoned the Benson Hotel to get the amount of the bill and immediately sent off a check in payment. I also wrote a letter excoriating the president of the Oregon Bar for doing anything that would link a member of the Court with such a highly unethical practice. . . ."

Autobiography of U.S. Supreme Court Justice William O. Douglas, *Go East, Young Man*, (p. 447)

"*The Bar's private interests in the very field in which it regulates - professional malpractice insurance - coupled with the lack of public accountability . . . reveals that the Bar presents a poor candidate for exemption from the active supervision requirement.*

. . .

Conspicuously absent from the majority's discussion is any acknowledgment of the potential for abuse when a state delegates regulatory authority to an organization, such as the Bar, which brings its own set of economic interests to bear on the regulated field. . . .

. . .

. . . . The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.

. . .

*. . .it would be a case of **fox-watching-the-henhouse** to conclude that these two Boards could provide meaningful supervision over the Fund."*

Hass v. Oregon State Bar, 883 F.2d 1453 (9th Cir. 1989)
Dissenting Opinion, Justice Ferguson

"Remember how much more important it is to feed and cloth your family than it is to help a client with her particular problem"

Oregon State Bar, CLE Publication, Attorney Fees and Costs,
By Paul Saucy, Circa 1991-1994

*"While the "judgment acquisition" strategy **does not violate any laws** or legal ethics rules, it is still just plain wrong. . . .*

. . .

The State Bar has violated your trust. We are sorry."

Letter of Apology, President and President-elect Oregon State Bar, November, 1999

*"Whether the judgment acquisition strategy is legal in Oregon is **uncertain**. . . ."*

OSB PLF Task Force Report, IV(J); June 28, 2000

FINAL CONCLUSION REACHED IN THIS PAPER :

Of all fifty states in this Nation, none of which have ever been so foolish as to adopt a program such as the PLF, and specifically as a result of the PLF, Oregon currently has the least trustworthy State Bar in the country. Since the PLF causes judicial rulings to be based on the best economic interests of the Oregon State Bar, rather than the facts, law and evidence, there is a strong probability that currently in the State of Oregon there are massive numbers of innocent people who were wrongly convicted and imprisoned for crimes they did not commit. Similarly, there is a strong probability that currently in the State of Oregon there are massive numbers of guilty people who had criminal charges against them dismissed due to the PLF. As a result of the PLF, there is a minimal probability that the judgments reached in any civil, domestic or criminal matter in Oregon are reflective of the facts, law or evidence. Such is not the case in any other state of this nation. As correctly indicated in the Oregon State Bar's letter of November, 1999 the Oregon State Bar has violated the public's trust.

The Oregon State Bar – PLF
Ethical Atrocity or Ethical Comedy ?

In the entire nation, my research indicates that Oregon has the only State Bar with a mandatory policy requiring its' members to purchase malpractice coverage directly from the State Bar, through it's PLF (Professional Liability Fund). The same State Bar that is supposed to discipline its member attorneys for breaches of the ethical rules of conduct. It was created on July 22, 1977 by the State Bar Board of Governors and has for the last twenty years been the source of heated controversy and debate. The purpose of this article is to demonstrate that as a result of the PLF's existence, litigants in the overwhelming majority of both civil and criminal cases in Oregon, have an unconstitutionally and inordinately diminished likelihood of receiving fair adjudications or competent representation by Oregon attorneys.

The harm caused to the public interest by the PLF will be explained in detail. I will also review the history of the PLF including the numerous challenges made to it since its' inception and over the subsequent years. Principles of logic coupled with the most basic principles of human nature will reveal how the devious nature of the PLF illegitimizes the process of adjudication in Oregon. I will demonstrate how as a result of the foregoing the true and hidden purpose of the PLF was to enhance the power of the Bar over its' attorneys in order to allow the Bar to control litigation outcomes at the expense of the general public.

When the foregoing is proven, it will lead to the conclusion that in the long run, the PLF has in actuality been the Oregon Bar's Achilles Heel. Designed to be their greatest strength, it will ultimately prove to be their greatest weakness, for it diminishes the Bar's credibility. The reason is that the PLF concept is so unethically sound, that it will consistently be intellectually attacked by those aware of its' nature. The PLF will quite simply never escape constant intellectual bombardment, and controversial publicity. It will always be a source of resentment amongst Oregon legislators, the media, litigants, members of the general public and even OSB attorneys.

Eventually, the PLF will fall as a result. Since the Oregon State Bar (OSB hereafter) has relied so heavily on the PLF for over twenty years, when the PLF falls, the Oregon State Bar's power and respect will be greatly diminished. This article is organized as follows :

I(a). # GENERAL SUMMARY

In the mid 1970s a vast reform in the legal profession nationwide took place. Rules pertaining to the unauthorized practice of law were liberalized in many areas including divorce kits and self-help legal materials. Quite simply, the public was fed up with the profession, wanted change and got it. The reform was predicated in large part on the general dissatisfaction with the quality of legal services being rendered and the related cost. By liberalizing the legal profession and allowing litigants to have access to a greater amount of legal materials, the effect on the Oregon State Bar (and other Bars also) was a loss of power. This is because access to the Courts was more available to the general public.

Improving access for the general public had a corresponding related decrease in the "control of access" by the Bar. In addition, power was lost to the extent that lawyers who previously received fees for performing services, now faced having certain services performed by litigants on their own. Loss of fees, equals loss of money, equals loss of power. The key states that gave rise to this era of legal reform were Oregon, Florida, New York and Michigan. Why was Oregon such a key player in this era of legal reform? Perhaps because of the referendum process in Oregon which gives a greater degree of power and control to average citizens than in most states. In any event, the fact is that Oregon was the second state in the country (after New York) to expressly allow the sale of divorce kits, thereby liberalizing the practice of law and access of the Courts to the public.

In addition to liberalizing the definition of the "practice of law" at this time, the Oregon public was also demanding access to ethical complaints filed against attorneys. In 1975, the Oregon Legislature enacted its' public records inspection law that appeared to subject disciplinary files of the Oregon State Bar (OSB, hereafter) to public inspection. OSB vehemently opposed making the complaints public and the issue was finally decided by the Oregon Supreme Court in ***Sadler v. Oregon State Bar*** , 275 Or. 279, 550 P.2d 1218 (1976).

The dispute in Sadler began when journalist, Russell Sadler requested to inspect disciplinary files of Jason Lee who had recently defeated incumbent Oregon Court of Appeals judge, Jacob Tanzer in a bitterly contested election. Sadler petitioned the Attorney General to order the Bar to disclose the records. The Attorney General filed a request for an injunction in the Marion County Circuit Court compelling the Bar to permit inspection. It was denied and the Attorney General appealed. The case contributed to establishing the Marion County Court as a protectorate of the Bar , at the expense of the general public. It also initiated a long period of friction between that Court and the Attorney General's office. The Oregon Supreme Court faced with monumental negative publicity on the case, ultimately held that the attorney disciplinary files were public. Consequently, Oregon became one of only a handful of states that allowed public access to attorney ethical complaints. Oregon attorneys were now vulnerable.

Malpractice suits against Oregon attorneys at this time were soaring, and aggrieved litigants positions were significantly buttressed by the ***Sadler*** case. Litigants now had access to evidence concerning a lawyer's conduct that was previously unavailable. Such evidence provided aggrieved litigants with power to use against Oregon lawyers committing malpractice, because litigants could now combine resources. They could learn the identities of other litigants aggrieved by a particular attorney and consolidate their forces against the attorney. They could then all simultaneously present evidence of unethical acts committed by that attorney, thereby gaining a cumulative effect.

Basic human nature and logic dictate that people in litigation can be expected to use information available in a manner that helps their case most. As a result, Oregon attorneys were vulnerable to malpractice claims in a manner never before experienced and therefore had a motive to negate the impact of making attorney disciplinary complaints public. Oregon Attorneys were ripe for the taking. And they were pissed!

I.(b) DESCRIPTION OF THE PLF - The Zealous and Nonzealous Attorney

PLF stands for "Professional Liability Fund." It is a program enacted by OSB which requires all practicing Oregon attorneys to purchase malpractice (insurance) coverage directly from the State Bar. No option to decline is available to the attorney and a substantial premium is charged for the coverage. Any attorney who fails to pay the required premium has their professional license to practice immediately suspended. Obviously therefore, the attorneys generally pay.

The coverage provided is lesser in scope than normally provided under standard malpractice insurance policies offered by commercial companies. Since the Oregon attorney's premium dollars are required to be paid to OSB, very few elect to obtain additional coverage from other companies. Coverage purchased from other companies generally covers a wider scope of misconduct and would thereby offer an aggrieved litigant a greater chance to recover insurance dollars.

Although coverage by the PLF is "de minimis" and negligible in scope, it is virtually identical in nature to malpractice insurance coverage provided by commercial carriers. The primary distinction is the blatant and atrocious conflict of interest that exists by imposing a mandatory policy of purchasing the coverage from the Bar. Notwithstanding that the coverage is virtually identical in nature to malpractice insurance, OSB stubbornly refuses to recognize the PLF and its' coverage as being "insurance." By doing so, OSB succeeds in evading the law pertaining to insurance companies. In essence, any commercial carrier that wants to sell malpractice insurance to Oregon attorneys is subject to a wide spectrum of regulations that do not apply to the PLF. Presumably, those regulations were designed to protect and foster the public interest.

In fact, the PLF arrogates itself to be so bold as to assert that even though a mandatory policy of purchasing the insurance is imposed on Oregon attorneys, with the stipulation that they lose their professional license if they don't purchase it, the PLF contract with the attorneys does not deprive the attorney with the opportunity to bargain. The phrase "contract of adhesion" is normally used to identify a contract where the weaker party generally has no ability to bargain, and no realistic choice as to the contract terms. In essence, where one party is so much stronger than the other, that they have the ability to take advantage of the other party. OSB states as follows :

> "Traditionally, insurance contracts have been subject to court interpretation construing all ambiguities against the author of the form. However, not all insurance contracts are treated as contracts of adhesion. . . . The developers of the Plan have received substantial input directly from the membership. It is accordingly inappropriate to treat this Plan as a contract of adhesion."
>
> (Section 6 - PLF - 1997 Claims Made Plan)

Throughout this article I will use the phrases "Zealous" and "Nonzealous" to describe Oregon attorneys. What I mean by these terms is as follows. A Nonzealous attorney is one that supports the economic, anticompetitive interests of the Oregon State Bar, even at the expense of the public and the litigants. Such attorneys will be amenable to waiving procedural objections and betraying their clients, even if in doing so they are not in compliance with the law, ethical rules of conduct, or notions of justice.

A Zealous attorney is one that exemplifies the cherished notions of justice, fighting on behalf of their client, and promoting the adversarial legal process even at the expense of the State Bar's economic interests. Obviously, the Zealous attorneys are typically better and are characterized by the fervent passion for justice, while the Nonzealous attorneys who support State Bar economic interests are typically bumbling and stumbling with respect to legal knowledge. They become successful attorneys by becoming card carrying members of what has become pervasively known amongst the public as the "Good Ol' Boy Network" or "Club."

The concept of the Zealous and Nonzealous attorney has manifested itself in Oregon via a controversial "Statement of Professionalism." Ostensibly designed to promote "professionalism" amongst attorneys, it is in truth a mandate for selling out clients in order to promote the economic interests of the legal profession. The concept is to promote Nonzealous conduct by Oregon attorneys. If the Bar can convince the public that these notions of professionalism are in the interest of improving the legal profession for their benefit, the Bar can solidify its control and power over attorneys, litigation outcomes and the litigants.

As a general rule, when considering the legitimacy of judicial notions, use of the term "informally" has a negative connotation. It manifests a willingness to do things outside the scope of validly enacted rules. The following excerpts from the Statement of Professionalism are particularly disturbing in the manner they promote the concept of the Nonzealous attorney at the expense of the public and the litigants :

> "1.11 We will avoid unjust and improper criticism and personal attacks on opponents, judges, and others . . . ."
>
> "1.16 We will honor the client's right to our candid view of opposing counsel only to the extent that those views are relevant . . . not for the purpose of disparaging other counsel."
>
> "2.5 . . . if possible, before a responsive pleading is due, we will try to initiate **informal** discussions with opposing counsel . . . . We will try to reach agreement for scheduling of future motions, discovery, pretrial conferences, and other matters . . . .
>
> "2.6 . . . We will try to schedule depositions **informally** by mutual agreement . . . before resorting to formal notice procedures.
>
> "3.3 We will avoid quarrels over matters of form or style . . . ."
>
> "4.5 We resolve to employ all the organizational resources necessary to assure that the legal profession is effectively regulated from within."

The Oregon Supreme Court then issued an "Order" in support of the purported "Statement of Professionalism" that is nothing short of incredible. It demonstrates why litigants constantly feel they are being sold out by their attorney in favor of the "good ol'boy network" and "Club." The Oregon Supreme Court "Order" states:

> "The Supreme Court of Oregon is committed to the highest standards of professionalism and expects those standards to be observed by lawyers in this state. . . . Secondarily, compliance depends upon **reinforcement by peer pressure** and public opinion, and finally, when necessary, by enforcement by the courts through their powers and rules already in existence."

Reinforcement by "peer pressure?" That's crap. The Oregon Supreme Court has stated in no uncertain terms that lawyers are to "play ball," with opposing counsel. They <u>want</u> Nonzealous attorneys, and therefore they will penalize Zealous counsel. The PLF contributes by solidifying the Bar's stranglehold on Oregon lawyers.

Control the attorney, and you control the litigation outcome. Control litigation outcomes and you control the general public. The PLF works as follows. OSB leverages the attorney by threatening the attorney's license unless the attorney forks over dollars for malpractice coverage. They therefore gain control of that attorney to an extent greater than in any other State. They then have an increased

ability to make Nonzealous attorneys virtually immune to a successful malpractice claim. The attorney having lost control of his independence, must remain supportive of State Bar economic interests, and other Nonzealous attorneys. The attorney's loss of independence diminishes his incentives to zealously represent litigants.

II. OSB's STATEMENT of the PLF's INTENDED PURPOSE

There are essentially two statements of the PLF's purposes and mission. One was designed to get the enacting legislation passed, and the second is the real one. It can be fairly assumed that if OSB proposed to the public that the PLF was enacted for the purposes of making Oregon Attorneys virtually immune to a malpractice claim and enhancing the power of the State Bar over its' attorneys and litigation outcomes, without regard to the negative impact on the quality of representation received by litigant, the PLF would not have had much of a chance from the start.

OSB therefore needed an initial Statement of Purpose that accomplished two effects. First, it had to hide the true intended purpose and second, it had to have an appealing sound to the public. What they came up with is stated in the Section 6 History Section of the 1997 Claims Made Plan Document and reads as follows:

> "The object of this program was to provide mandatory coverage at minimum cost to attorneys **while assuring the public** that each attorney in private practice would have certain minimum levels of protection. The determination of the scope of the protection afforded by the PLF was to be determined by the Board of Governors."

In the next section, I will explain why the PLF constitutes a "**Net Harm**" to the public interest rather than furnishing a "**minimum level of protection**". Before doing so however, I point out something interesting that I came across. On February 2, 1999 I visited the American Bar Association's web site. It contained an article on Law Practice Management by State Bars. Included in it was a survey of some existing programs, including that of the Oregon State Bar. The ABA section on the Oregon State Bar contained a "STATEMENT OF MISSION" about the PLF. It read as follows :

> "**STATEMENT OF MISSION:** The mission of the Professional Liability Fund **is to manage for the Oregon State Bar**, the legal malpractice liability program at the least possible assessment consistent with sound financial condition, superior claims handling, efficient administration, and effective loss prevention."

Where's the part about "assuring the public that each attorney in private practice would have certain minimum levels of protection?" It doesn't even appear in the ABA's Statement of Mission about the PLF. In fact, the public interest is not even mentioned or alluded to. I later learned that apparently, subsequent to 1997, the Oregon Bar deleted any reference to the public interest.

The purpose of the PLF has always been for the Oregon State Bar, not the public. The State Bar only feigns concern about the public interest when it needs to get enacting legislation for its benefit passed, or when it is under political attack from the media or general public.

III. ANALYSIS of the "NET" MONUMENTAL HARM to the PUBLIC INTEREST CAUSE by the PLF

OSB asserts the PLF affords the public with "certain minimum levels of protection." I contest the assertion and instead submit that the PLF harms the public interest when considering all factors. The phrase "certain minimum levels of protection" when applied to the public interest, encompasses two elements which are as follows :

1. The extent to which a litigant who is the victim of malpractice by their attorney will be able to recoup amounts as a result of the PLF's coverage for that attorney.

2. The extent to which all other factors associated with the PLF will protect or harm litigants.

OSB in using the phrase "certain minimum levels of protection" conveniently chooses to recognize only (1) above. To determine the overall effect however, (1) above must be "netted" against (2) above to determine whether when all factors involved are considered, the public is protected or harmed. To consider (1) above and disregard the impact of (2) would be equivalent to walking up to a person and saying, "I'm going to protect you." At which point, you give him an umbrella to protect him from raindrops falling, and then immediately proceed to kick him in the leg, and then punch him in the arm. Undoubtedly, you have given him a "de minimis" amount of protection with the umbrella, but the overall effect is a "net harm" when combined with the kick and the punch. The umbrella would be (1) above. The kick and the punch would be (2) above.

I do concede that (1) above considered by itself in a wholly isolated vacuum, provides a "de minimis and virtually negligible amount of protection." Obviously though, consideration in a vacuum can not be considered appropriate. (1) above which is de minimis in nature, is so vastly overwhelmed by other factors incorporated in (2) that the equation when considered in full results not only in "no protection," but rather a "negative protection" (i.e. a "harm"). OSB has in essence given the public a "kick." And it wasn't in the leg.

The "**Harm**" to the public interest manifested in (2) above includes, but is not necessarily limited to the following factors, each of which will be explained in detail :

1. Oregon lawyers are aware if they represent victimized litigants in malpractice suits they will cost OSB money.

2. Oregon lawyers have an incentive to ignore procedural defects since if they successfully contest defective pleadings, opposing counsel may be sued for malpractice thereby costing OSB money.

3. Competent Pro Se litigants who have no incentive to get along with opposing counsel represent an economic threat to OSB. As a result, Pro Ses are unjustly branded as enemies of the Oregon Bar, thereby depriving them of fair and impartial trials in virtually every instance in Oregon.

4. The result of the PLF is attorney discipline for zealous and competent representation, and an absence of discipline for unethical conduct.

5. Judges have economic incentives to rule against Zealous attorneys, and to rule in favor of Nonzealous attorneys. The probability of Zealous attorneys being sued for malpractice or subjected to discipline is thereby unjustly increased.

6. Judges have an incentive to exclude evidence and deny motions of victimized litigants suing an attorney for malpractice, in order to increase the probability they lose.

7. Attorneys who are Nonzealous even at the expense of litigants, may reap the rewards by representing the PLF.

8. Conduct covered by the PLF is virtually negligible. Since Oregon attorneys are required to purchase coverage from OSB, very few elect to purchase additional coverage from commercial companies. To the extent, they would have purchased coverage from commercial entities with wider scopes of coverage, the victimized litigant has a lower probability of recovery.

9. Pursuant to DR 1-202, (Disciplinary Rule) an Oregon attorney possessing knowledge of misconduct of another attorney is required to report such to the appropriate professional authority. But PLF attorneys are exempt from the rule.

10. Zealous counsel is not provided to litigants in Oregon. Judicial decisions are based on financial incentives rather than the law, facts or evidence.

ANALYSIS :

1. OREGON LAWYERS ARE AWARE IF THEY REPRESENT VICTIMIZED LITIGANTS IN MALPRACTICE IN SUITS THEY WILL COST OSB MONEY

Historically, in this nation in all states, it has been very difficult to get any attorney to sue another attorney for malpractice. It takes a spirit-minded, independent attorney to accept such a case. By suing other attorneys, they in essence alienate themselves from the profession. They are treated in many respects as outcasts, although they perform a needed and valuable public service. In the absence of a PLF, the prospects for an aggrieved litigant to find an attorney to just take their case for malpractice against their old lawyer, are already bleak. The PLF harshly exacerbates, an already dismal environment for the individual who is the victim of lawyer incompetence or misconduct.

If an Oregon lawyer represents a litigant suing another Oregon lawyer for malpractice, his representation not only results in alienating himself from the legal profession in a manner similar to other states, but he additionally must face the "reinforcement by peer pressure" that may surmount against him for exposing his own State Bar money to financial liability. Whether the malpractice claim fails or succeeds, the PLF will have to pay to defend itself. OSB Lawyer #1 represents Client suing Lawyer #2 who is covered by the PLF. PLF must spend money to hire counsel to defend. Lawyer #1 by agreeing to represent Client has in essence cost OSB money whether he wins or loses. Basic human nature dictates that when you cost a person or entity money, they will not be "Friendly" towards you. Often they will seek to get even.

Lawyer #1 is at risk of retaliation from OSB in the future for trying to help the litigant victimized by an Oregon attorney. OSB licenses Lawyer #1 and therefore has the perfect means available for getting even at its' disposal. Potential Lawyer #1s are aware of this. As a result, Lawyer #1s are virtually nonexistent in Oregon and aggrieved litigants are helplessly unable to find counsel in attorney malpractice suits.

2. OREGON LAWYERS HAVE AN INCENTIVE TO IGNORE PROCEDURAL DEFECTS SINCE IF THEY SUCCESSFULLY CONTEST DEFECTIVE PLEADINGS, OPPOSING COUNSEL MAY BE SUED FOR MALPRACTICE THEREBY COSTING OSB MONEY

If an attorney misses a filing deadline, fails to object, allows the statute of limitations to lapse, fails to plead an essential element of a case, mis-cites a case or commits any other of a myriad of errors, it can constitute malpractice. Normally, this would result in the commercial carrier of malpractice insurance being potentially liable. In Oregon, it will result in OSB being potentially liable through the PLF. What this means is that an Oregon lawyer places the PLF at risk of being held liable, each time they object to the motions or pleadings of opposing counsel.

A basic premise of human nature is that most people will do what is best for themselves and their family. Such being the case, the Oregon lawyer in looking out for himself and his family, has an incentive to ignore valid procedural arguments that could be advanced for a client. This is particularly true when the client is not aware of the intricacies of legal procedure and won't even know the argument could have been advanced. The ultimate result is that an attitude is adopted amongst Oregon lawyers to the effect of :

> "If you don't point out my errors, I won't point out yours. Then we'll both make the Bar happy regardless of how the case comes out."

Those who buck the unwritten understanding, are deemed to be "Bar Unfriendly" and subject to the disciplinary consequences of such a label.

3. COMPETENT PRO SE LITIGANTS WHO HAVE NO INCENTIVE TO GET ALONG WITH OPPOSING COUNSEL REPRESENT AN ECONOMIC THREAT TO OSB. AS A RESULT, PRO SEs ARE ESSENTIALLY BRANDED AS ENEMIES OF THE OREGON BAR, THEREBY DEPRIVING THEM OF FAIR AND IMPARTIAL TRIALS IN VIRTUALLY EVERY INSTANCE IN OREGON

I have thus far pointed out some of the reasons why the PLF creates an environment that is not conducive to the adversarial process that is necessary for effective representation during litigation. Instead, it creates a "get along" and "don't rock the boat" attitude amongst Oregon lawyers that compromises the best interests of the litigants and causes valid procedural arguments to often not be made.

Now, there's a wrench thrown into the finely tuned piece of machinery known as the PLF. Pro Se litigants (litigants who represent themself). First, I digress a bit. Pro Ses in all states are detested by attorneys and Judges. Their is an old saying that :

"A man who represents himself has a fool for attorney."

The saying should more appropriately be phrased as follows :

> "A man who represents himself, no matter how competently and diligently, will generally be treated as a fool by Judges and attorneys who perceive that by representing himself the man is depriving the profession of legal fees. Consequently, all steps must be taken by Judges and attorneys to ensure that the Pro Se loses, even when he is right. In this manner, he will appear to be a fool, fewer people will conduct themselves Pro Se and the lawyers will make more money."

Having now stated my general viewpoint, I further assert the following. Even if my above stated viewpoint is incorrect regarding Pro Ses, and assuming arguendo that they are indeed truly fools, they still have representation better than provided by licensed Oregon attorneys.

Pro Se litigants pose a unique problem for OSB. Already detested as in other states, they represent an additional economic threat to the PLF. Unlike the Oregon lawyer who has adopted the "get along" attitude, the skillful Pro Se will raise every single valid procedural objection against opposing counsel. The Pro Se will not waive deadlines, and will be waiting at the courthouse door before it opens in order to obtain a default judgment. When successful in doing so, opposing counsel is exposed to a malpractice claim, and the PLF is at risk of having to spend money to defend the claim. The result is that Pro Se litigants are intensely despised by attorneys and Judges in Oregon, in a manner uncomparable to any other state. They wear the badge of the Pro Se which works against them to begin with, because they deprive the legal profession of fees by representing themself. They then function as a potential double whammy regarding malpractice claims that may have to be defended at State Bar expense.

The final result in Oregon is that when one party in a litigation is Pro Se, miniscule issues of procedure that can be used against a Pro Se litigant, by a Bar Friendly attorney, are given an unreasonably heightened degree of importance by the Judges, if the Pro Se is lacking in legal knowledge. In such instances, procedure takes precedence over substance, so that the Pro Se may be unfairly taken advantage of. Conversely, if the Pro Se is legally skilled, issues of procedure become wholly and absolutely disregarded even at the expense of doing insult to justice. In fact, the Pro Se's mere raising of such arguments in a proper and respectful manner, functions to antagonize the irrational, hyper-emotional sensitivities of the trial judge.

4. THE RESULT OF THE PLF IS DISCIPLINE FOR ZEALOUS REPRESENTATION AND AN ABSENCE OF DISCIPLINE FOR UNETHICAL CONDUCT.

Excluded from coverage under the PLF are unethical acts committed by an attorney. (1997 Claims Made Plan, p.325). This means that if a client suffers a loss due to the unethical acts of his own attorney, the client will not be able to recover from the PLF. It is well known that malpractice and ethical misconduct often go hand in hand. It is a relatively rare instance when malpractice is not accompanied by a breach of some ethical rule. In particular, the ethical rules ostensibly and purportedly require an attorney to "zealously" represent the interests of his client. Failing to do so is often a chief cause for an attorney malpractice lawsuit.

The result of the foregoing provision, is quite simply and blatantly that OSB can relieve itself of monetary liability simply by disciplining the attorney. Once again basic human nature dictates that people will generally do what is to their best financial benefit. OSB will thus determine what is to its' "best financial benefit" in dealing with an attorney accused of ethical misconduct by weighing two competing factors which are as follows :

1. The amount of money that will be saved by the PLF if the attorney is disciplined.

2. The extent to which the particular attorney in question, is of value to the Bar as determined by the extent to which he is friendly and supportive of the Bar.

Based on the analysis, financial considerations will dominate the Bar Disciplinary committee's determination as to whether the accused attorney should be disciplined. A blind eye will be turned with respect to unethical acts committed by attorneys who contribute and are supportive of OSB, while attorneys who have committed no unethical act will often be disciplined. The public is further harmed to the extent that attorneys who commit malpractice, would have purchased other commercial insurance that covered the commission of unethical acts, if not required to purchase PLF coverage, under threat of losing their law license.

5. JUDGES HAVE ECONOMIC INCENTIVES TO RULE AGAINST ZEALOUS ATTORNEYS, AND TO RULE IN FAVOR OF NONZEALOUS ATTORNEYS. THE PROBABILITY OF ZEALOUS ATTORNEYS BEING SUED FOR MALPRACTICE OR SUBJECTED TO DISCIPLINE IS THEREBY UNJUSTLY INCREASED.

Following the same line of reasoning in (4) above, the trial process itself is affected. When an attorney fails to assert a procedural matter, it can constitute malpractice. If an attorney has a pleading dismissed due to a procedural defect, it can constitute malpractice. The impact is that the rulings of the trial judge likely determine whether a party's counsel becomes liable for malpractice. If the Judge renders a ruling in a manner that exposes counsel to malpractice, he may in fact be costing the Bar money.

Basic human nature dictates that people do not like when others take action that costs them money. The political support of Bar members is critical to a Judge sustaining his position in office. The Judge therefore has an incentive to render rulings in a manner that will not cost the Bar money, in order to gain political support from Bar members.

This incentive dictates that the Judge should overrule valid procedural objections raised against a Nonzealous attorney, and sustain objections raised against a Zealous attorney**. In the event a Nonzealous attorney raises an objection against another Nonzealous attorney, a somewhat unique situation exists. The issue can actually be decided on its merits.** Otherwise, it takes a truly exceptional and strong Judge to buck his Bar, since it may be at the expense of his position. Naturally, if you're a Pro Se raising valid procedural objections against a Nonzealous attorney you don't have a

snowballs chance in hell of having it sustained. Such a situation does not exist in any other state. In other states, while the Judge may be swayed by varying concerns, he does not need to address whether denying or granting a motion will result in a malpractice claim that will expose his Bar financially.

6. JUDGES HAVE AN INCENTIVE TO EXCLUDE EVIDENCE AND DENY MOTIONS OF VICTIMIZED LITIGANTS SUING AN ATTORNEY FOR MALPRACTICE, IN ORDER TO INCREASE THE PROBABILITY THAT THEY LOSE

As stated above, the Judge in order to maintain his position requires the support of OSB members. The Judge therefore has a personal incentive to conduct himself in a manner that will foster such support. Support is fostered when he does not expose his Bar financially. Such being the case, a Judge adjudicating an attorney malpractice claim, has an incentive to render his rulings based on how they will affect OSB. Stated succinctly, malpractice claims must lose or OSB will often pay the price. Once again, such a situation does not exist when the malpractice coverage is provided by commercial insurers.

7. ATTORNEYS WHO ARE NONZEALOUS, EVEN AT THE EXPENSE OF LITIGANTS, MAY REAP THE REWARDS BY REPRESENTING THE PLF.

When the PLF does cover a claim they have to hire somebody. Naturally, they will hire an attorney who supports the economic interests of the Oregon Bar, since the PLF is a division of the Bar. Be friendly and supportive of your local Bar and maybe you'll earn some legal fees. Being friendly and supportive of your Bar includes most particularly supporting the PLF. Don't file procedural objections because that could cost OSB money. Don't accuse opposing counsel of misconduct if they are supportive of State Bar economic interests because that could also cost OSB money. If your client instructs you to do so, tell your client they are being unreasonable and irrational, even though in fact it is the Oregon attorney who is really being irrational.

8. CONDUCT COVERED BY THE PLF IS VIRTUALLY NEGLIGIBLE. SINCE OREGON ATTORNEYS ARE REQUIRED TO PURCHASE COVERAGE FROM OSB, VERY FEW ELECT TO PURCHASE ADDITIONAL COVERAGE FROM COMMERCIAL INSURANCE COMPANIES. TO THE EXTENT, THEY WOULD HAVE PURCHASED COVERAGE FROM COMMERCIAL ENTITIES WITH WIDER SCOPES OF COVERAGE, THE AGGRIEVED LITIGANT HAS A LOWER PROBABILITY OF RECOVERY

The actual coverage provided to an Oregon attorney is "de minimis" in nature. Logic dictates that an attorney has a limited amount of dollars available for the purchase of malpractice insurance. Once those dollars are required to be expended on purchasing a PLF policy, they are unavailable for alternative modes of coverage that would be more comprehensive in scope. The public is harmed to the extent that Oregon attorneys would have purchased malpractice insurance from commercial companies with scopes of coverage wider than the PLF. Aggrieved litigants suffer to the extent they are unable to recover insurance dollars due to an exclusion from coverage of the PLF, if such an item would have been covered by a commercial insurance policy purchased by the attorney. In this regard, I would note that I am quite in favor of a policy requiring practicing attorneys to purchase malpractice insurance. Such a policy if implemented properly can help, rather than harm the public. The harm occurs when the insurance must be purchased from the Bar. A moderate amount of harm occurs when even an optional policy is available from the Bar. The Bar simply should not be in the business of providing malpractice insurance to the same members it is supposed to discipline.

9. PURSUANT TO DR 1-202 AN OREGON ATTORNEY POSSESSING KNOWLEDGE OF MISCONDUCT OF ANOTHER ATTORNEY IS REQUIRED TO REPORT SUCH TO THE APPROPRIATE PROFESSIONAL AUTHORITY. BUT PLF ATTORNEYS ARE EXEMPT FROM THE RULE

The obvious result is a diminution in the overall character of the Bar itself, as evidenced by a clear and apparent hypocrisy dominated by monetary interests. There could not possibly be anything more hypocritical. OSB has arrogated itself to being so bold as to exempt the specific class of attorneys that is responsible for fostering their financial interest, from one of the most important ethical rules of conduct.

10. ZEALOUS COUNSEL IS NOT PROVIDED TO LITIGANTS IN OREGON. JUDICIAL DECISIONS ARE BASED ON FINANCIAL INCENTIVES RATHER THAN THE LAW, FACTS AND EVIDENCE

Largely as a result of the 9 foregoing "HARMS," it indicates how the basic value of justice has been compromised in Oregon in a manner applicable to no other state in the nation. The practice of law has enough problems nationwide, that it should at least not have to deal with a blatantly hypocritical program designed to foster the interests of the licensing agency at the expense of zealous representation to the public.

IV. A HISTORY of CONTROVERSY with the PLF and OSB DISCIPLINE

Since its' inception the PLF has been a source of tremendous controversy. This controversy extends well beyond even the legitimacy of the PLF itself as indicated by the following line of cases. The first case reveals the extent to which OSB will go to fortify its' subjugation of attorneys, and how the process of ethical discipline is affected and utilized to advance the Bar's monetary interest.

A. STATE ex rel Robeson v. OREGON STATE BAR, 291 Or. 505 (1981)

Oregon attorney, Vincent Robeson was suspended from the practice of law on May 18, 1981 for failure to pay his PLF assessment. Mr. Robeson seeking reinstatement to the Bar and showing an admirable degree of spunk in my opinion, then obtained in Federal District Court a preliminary injunction against the State Bar's Board of Governors. The Bar just had to absolutely love that. Enter the "get even" with a Zealous attorney factor. The Federal injunction ordered the Bar to temporarily reinstate him and also ordered Robeson to petition the Oregon Supreme Court. The injunction stated expressly as follows :

> "IT IS HEREBY ORDERED that the Board of Bar Governors temporarily reinstate plaintiff. Plaintiff is ordered to petition for permanent reinstatement in the Oregon Supreme Court as a condition precedent to this temporary reinstatement. All further matters in this court shall be stayed pending resolution of the plaintiff's petition in the Supreme Court."

Robeson then filed the required petition with the Oregon Supreme Court. In his petition, Robeson attacked the validity of statutory suspension for nonpayment of the PLF assessment on the ground that it was a usurpation of the State Supreme Court's authority to regulate the admission of attorneys. The PLF suspension factor as described previously is the key element to the Bar's control over the attorneys. Without it, PLF is nothing and Oregon attorneys would not be relegated to subservience.

Secondly, Robeson asserted that the rules of procedure for reinstatement unlawfully delegated power reserved to the courts to the Oregon State Bar. Thirdly, Robeson attacked the Bar on the grounds they were in violation of the 14th amendment due process clause. Robeson had raised the stakes. It was now not only a question of the PLF's validity, but also of the State Bar's very existence.

OSB naturally believed this troublemaker had to be neutralized. **They took an incredibly risky step from a public relations and political standpoint to accomplish such.** Bar counsel submitted to the State Supreme Court a letter that stated in part as follows :

> "On June 19, 1981, Mr. Robeson submitted his reinstatement application to the Bar office. The Board of Governors . . . held a conference call meeting on the very day Mr. Robeson's application was submitted . . . . During the course of the discussion over Mr. Robeson's application, it was brought to the attention of the Board of Governors that a formal disciplinary proceeding was then pending against Mr. Robeson (No. 79-22) and that the **trial board appointed in that disciplinary matter had rendered its decision that very day**. In light of the trial board findings that Mr. Robeson had violated a number of disciplinary rules, it was the decision of the Board of Governors to table consideration of Mr. Robeson's application."

Wow!! An attorney who is making waves is disciplined on the exact same day his reinstatement application is being considered. Must have just been a complete coincidence. Based in part on the fact that disciplinary action had now been taken against Mr. Robeson for matters wholly "unrelated" to the PLF assessment, Robeson's petition for reinstatement was then denied by the State Supreme Court. In its' opinion the Court stated as follows in regards to the PLF :

"We have no doubt that the due process clause does not foreclose making the practice of a profession contingent on maintaining adequate arrangements for making good financial losses caused to clients . . ."

The obvious problem with the statement is that the PLF provides only "de minimis" coverage in relation to commercial insurers and deprives litigants both of fair trials and zealous representation. It is not intended as an "arrangement for making good financial losses caused to clients." It is intended as a vehicle to subjugate the attorneys and the interests of the clients, to those of the State Bar.

B. OSB BAR BULLETIN - OCTOBER 1983

The monthly magazine of the Oregon Bar is the Bar Bulletin. In October, 1983 the Oregon Bar Bulletin on pages 17 and 19, published the following, ostensibly diametrically opposed submissions from two different Oregon attorneys

"I have grave concerns about the performance of the Professional Responsibility Board. Lawyers who, in my opinion are clearly in violation of the canons and disciplinary rules, are being allowed to continue to practice law in the state, either because of the PRB's inaction or inattention paid by the PRB to complaints filed."

"I am becoming more and more distressed by some of the disciplinary decisions I see in the Bulletin each month. Some seem very picky to say the least. I have talked to several attorneys about the current state of affairs recently and all seem to share the views I hold: namely,

. . .

3) I am paying dues to an organization whose ever-increasing attitude appears to be to want to take my "ticket" on one pretext or another."

The above opinions written by two different members of the Oregon Bar appear at first glance to be diametrically opposed. However, the two viewpoints can easily be reconciled to accomplish a true understanding of the disciplinary process. Stated simply, both of the opinions are correct, but both are missing the one essential linking element.

The first statement asserts that attorneys committing ethical violations are not being disciplined. The second asserts that attorneys are being unjustly disciplined for minor and picky items. They can be reconciled and linked as follows.

The Nonzealous attorney falls into the first category, and the Zealous attorney falls into the second category. Support the Bar and you can get away with committing ethical violations. Contest the power, authority or legitimacy of the Bar and you are placed in the second category, where every minute or petty error you make, is a point of discipline. The same issue of the Bar Bulletin contained the following submissions by Oregon State Bar attorneys on the PLF :

"Re : PLF
I object to the increase in assessments for 1983. Why should I, a lawyer one year out of law school, subsidize the lawyers who practice securities law. . . . Also, I don't want $ 200,000 of insurance - why am I forced to pay for it ? "

"The Oregon State Bar needs to adopt a policy of attempting to decrease the number of lawyers in this state. In Eugene where I practice, unnecessary legal work being done is the exception rather than the rule - not only is the economics bad but also the ethics - no

way can it improve with over 500 lawyers in Lane County, when 200 would, in my opinion, be too many."

"The Oregon State Bar has virtually no concern for the struggling young low-income attorneys, most sole practitioners. Dues structure, malpractice costs and the high referral service dues are just examples of the bar's assumption that all attorneys are wealthy. . . ."

C. BALDEREE v. OREGON STATE BAR, 301 Or. 155 (1986)

In *Balderee*, the Petitioner had been an Oregon attorney not engaged in the practice of law since 1978. He had been working for a title company and signed forms during the period 1978-1982 stating he was not engaged in the practice of law which exempted him from the PLF requirement. In December, 1982 the PLF Board of Directors attempting to further solidify its' stranglehold on the legal profession sent a letter advising that in future years attorneys requesting exemption would be required to sign an agreement to indemnify the PLF for any amounts the PLF might be required to pay resulting from a claim against the attorney for legal malpractice. This agreement was incorporated within the request for exemption form. In 1983, 1984 and 1985 Balderee signed the exemption request, but crossed out the text referring to the indemnity.

In December, 1985 the PLF informed Balderee they would not accept his request for exemption because he refused to sign the indemnity agreement. Balderee refused to sign it and also refused to pay the PLF assessment. In February, 1986 he received a "final notice" advising that failure to pay the assessment would result in suspension. He then instituted suit against the Bar in the State Supreme Court. Balderee's contention was that the enabling statute for the PLF, ORS 9.080(2) only allowed the Board of Governors to require assessments from those attorneys who were engaged in the private practice of law. The State Supreme Court disagreed with Balderee and concurred with the Bar. The Court relied on the portion of the statute that read as follows providing that the Board:

"shall be empowered . . . to do whatever is necessary and convenient to implement this provision"

The terms "necessary and convenient" were then held to include the indemnity provision. Who knows what else such a vague and ambiguous phrase could include? "Necessary and convenient" could mean whatever the Bar wants it to.

D. OSB BAR BULLETIN - January, 1986

The January, 1986 issue of the Bar Bulletin included a PLF Update section. The CEO of the PLF at that time, Les Rawls, was apparently visiting local bar associations throughout Oregon. The article indicated how poorly the PLF was viewed by many Oregon attorneys. It states as follows :

"Unfortunately, our appearances sometimes seem to be limited to responding to your questions about our activities and dispelling wild rumors which appear to have a frequent incubation in the bar."

The Update disclosed that a revision to the PLF was being made with respect to the Special Underwriting Assessment. Essentially, the change was predicated on the assertion that a few practicing lawyers were causing an inordinate drain on the funds of other "clean" lawyers. The term "clean" is actually in quotes in the article itself. It can be fairly defined as synonymous with my use of the term "Nonzealous." Pursuant to the change, it was alleged that those lawyers causing the inordinate drain

(i.e. the Zealous lawyers) would contribute more to what is termed as the "pot." My favorite part of the update hits at the core of the problem and deals with the relationship of the PLF to the Bar's Board of Governors. It states as follows in reference to the lamely alleged wall of separation between the disciplinary process and PLF:

> "When the PLF was first established, a conscious decision was made to locate the organization in separate offices from the bar in order to establish confidence among attorneys that a malpractice claim would not automatically result in initiation of disciplinary proceedings. In fact, the PLF maintains the strictest confidentiality for all malpractice claims, and does not share information with or refer matters to the bar for disciplinary proceedings."

In reference to the phrase "does not share information," try telling that to Mr. Robeson. The article continues as follows:

> "In addition, from its inception the PLF and its board of directors were generally permitted to run PLF affairs **without guidance** or interference from the bar's board of governors other than approval of the annual assessment. In this regard, the PLF was intended to operate as efficiently as if it were a private **insurance** company. Over the years, the PLF board has been blessed with the talent of . . . top executives from the **insurance** industry."

How wonderful that the PLF is generally permitted to run "without guidance." Why restrict this to the PLF? Have the entire Oregon Bar run "without guidance." Could be a Sherman Antitrust Act issue here (that's coming up in the next case). And what's this about running "as if were a private insurance company?" I thought it wasn't an insurance policy. Oh wait, that's just for purposes of evading the insurance regulations. Now read the discussion in the next case. It's an absolute beauty.

E. **HASS v. OREGON STATE BAR**, 883 F.2d 1453 (9TH Cir. 1989)

In this case, Oregon attorney Fred Hass, in February, 1987, a member in good standing of the Bar brought suit in federal court against the Bar contending that the PLF violated the Sherman Antitrust Act and the interstate commerce clause. He alleged that in mandating attorney participation in the PLF, OSB had unlawfully monopolized the market for malpractice insurance. It is important to note that he did not challenge the Bar's requirement of carrying malpractice insurance, only the requirement that such insurance be purchased directly from the PLF.

The Federal District Court Judge (himself required to be a member of the Oregon State Bar), refused to adjudicate Hass' Sherman Act claim. The District Judge ruled that the Bar's insurance requirement (note continuous use of the term "insurance," although OSB specifically disclaims that the policy is an insurance policy), was immune from challenge under the Sherman Act due to what is know as the "state action exemption." Hass appealed and the Federal Appeals Court examined the case including the state action exemption issue.

STATE ACTION EXEMPTION :

The basic thrust of state action exemption as held by the United States Supreme Court in *Parker v. Brown,* 317 U.S. 341 (1943), is that the Sherman Act which generally precludes monopolies does not apply to states acting in their "sovereign capacity." The exemption is known as "Parker immunity." The phrase "sovereign capacity" essentially means when the state acts through its legislature, or its Supreme Court performing duties in a legislative capacity. The Federal Court of Appeals in reviewing the case therefore first needed to determine whether the PLF constituted activity of a state acting in its' sovereign capacity. This would be the first step to determine if the state action exemption precluded a

Sherman Act challenge. The Court determined that the PLF was promulgated by the State Bar, rather than directly by the Oregon legislature or the Oregon Supreme Court. It indicated that since the Bar was merely an instrumentality of the state judiciary, the PLF did not constitute an act of the state in its' sovereign capacity. A correct conclusion in my belief. This portion of the holding was a win for Hass, because as stated above, the Sherman Act generally does not apply to states acting in their "sovereign capacity."

The Court then went on to examine the fact that although the PLF was not "directly" an activity of the state legislature or State Supreme Court, it was carried out pursuant to state authorization. In such an instance, the activity itself must be analyzed to ensure that any anticompetitive conduct was contemplated by the State. It is noteworthy that the Court acknowledges the activity is anticompetitive. The Court at this point appears to have established two points which are as follows :

1. The PLF is not activity of the state acting in its' sovereign capacity
2. The PLF is anticompetitive in nature.

If the anticompetitive nature of the PLF is determined to be contemplated by the State, then Parker immunity will still apply and the PLF is exempt from attack under the Sherman Act. The US Supreme Court formulated a two part test to determine whether ***Parker*** immunity applies to non-sovereign entities (the PLF) engaged in anticompetitive conduct pursuant to state authorization. The test is as follows :

1. First, it must be determined whether the conduct is undertaken pursuant to a clearly articulated and affirmatively expressed state policy to be anticompetitive in nature.
2. Second, it must be determined whether the activity is "actively supervised" by the State itself.

Failure to meet both of the foregoing criteria will collapse the Bar's ***Parker*** immunity claim, and then Hass would be able to attack the PLF under the Sherman Act. The opinion analyzes each of the two prongs as follows.

(1) Above : IS THERE A CLEARLY ARTICULATED and AFFIRMATIVELY EXPRESSED STATE POLICY

To determine the articulated state policy, the Court examines the PLF legislation itself. The issue is whether the legislation contemplated the anticompetitive nature of the PLF. The Court notes that a state agency however (such as OSB) is not free to simply "do as it pleases" simply because the state has left to the agency the task of selecting the course of action best suited to accomplishing legislative policy. It relies on *Central Iowa Refuse Systems v. Des Moines Metro Solid Waste Agency*, 715 F.2d 419 (8th Cir. 1983) in support of this premise. At this point you can probably see how gray and ambiguous (and confusing to say the least) the line is that the PLF is treading. The Bar's claim of ***Parker*** immunity from Sherman Antitrust liability, is hanging on a thread of hair. The Court examines the express language of the legislation itself which states the Bar is authorized to :

"own, organize and sponsor any insurance organization"

(NOTE: there's that word "insurance" again, but remember its' not an insurance policy the Bar claims.)

The legislation also states the Bar could act :

"by itself or in conjunction with other bar organizations"

The legislation also states the Bar is granted authority to:

"do whatever is necessary and convenient to implement this provision"

Hass correctly points out that the statute makes no reference to the requirement that the attorney purchase insurance from the Bar**. That mandatory requirement is the heart and soul of the anticompetitive nature. Since the legislation does not include it, I do not see how it could be deemed as intended by the legislation.** The only phrase above cited by the Court that could give rise to an expressed anticompetitive intent is the one :

"do whatever is necessary and convenient"

To the extent this phrase is relied on by the Court, logic dictates it is precluded by the Court's diametrically opposed assertion that an agency is not free to "do as it pleases." Basic rationality mandates the two phrases are mutually exclusive. If they can't "do as they please" then how can they be allowed to do, "whatever is necessary and convenient?" Facetiously speaking, perhaps the Court felt they could only "do as they please," if it was "necessary and convenient." Notwithstanding this critical point, the majority (there is a most compelling Dissent that I will discuss) incorrectly concludes that even in the absence of mentioning a mandatory requirement, the anticompetitive nature was contemplated by the legislation and the first prong is satisfied. It must now determine whether the PLF is "actively supervised" by the State itself.

(2) Above : IS THE CHALLENGED CONDUCT ACTIVELY SUPERVISED BY THE STATE

Before examining the Court's analysis of this requirement, I refresh your memory as to what PLF CEO, Les Rawls stated in the January, 1986 issue of the Bar Bulletin which was as follows:

> "In addition, from its inception the PLF and its board of directors were generally permitted to run PLF affairs **without guidance or interference** from the bar's board of governors other than approval of the annual assessment. In this regard, the PLF was intended to operate as efficiently as if it were a private insurance company."

The foregoing would seem to indicate pretty clearly that the PLF is not actively supervised by the State, and therefore Parker immunity's two part test has not been satisfied and the PLF is subject to challenge under the Sherman Act. The Ninth Circuit however, dodges the issue. The Court first correctly notes that the "active supervision" requirement of the state action exemption stems from the recognition that where a private party engages in anticompetitive activity, there is a real danger they are acting to further their own interests, rather than governmental interests of the State. The Court then however, indicates that where there is no danger the party is pursuing interests other than those of the State, there is no reason for the party to satisfy the "active supervision" requirement. Stated quite simply, the Ninth Circuit dropped the second part of the test entirely, and made it a one prong test for application to the Oregon State Bar. It then attempts to justify its' holding that there is no danger the Bar is pursuing interests other than the State by relying on the portion of the Oregon statute that reads :

> "at all times directs its power to the advancement of the science of jurisprudence and the improvement of the administration of justice." Or.Rev.Stat. 9.080(1)

It's kind of like having a statute that says something is red, makes it red, even if it's really blue. Pathetic. The Court goes on to indicate the records of the Bar are open for public inspection (although

not PLF records), and its' accounts are subject to periodic audits by the State Auditor. The Court also states that the Bar with respect to the PLF is an agent of the Legislature, rather than the Supreme Court. This is in itself quite amazing, since the Bar itself is clearly part of the Judiciary Branch. The opinion on the Sherman Act closes with the following :

> "we hold that the Bar, as an agency of the State of Oregon, need not satisfy the "active supervision" requirement to qualify for protection under the state action exemption".

A most interesting and disturbing footnote is then included which I believe illegitimizes the opinion. Footnote 4 of the opinion reads :

> "Our holding is based on the characteristics of the Oregon State Bar and the particular statutory scheme at issue in the present case. We do not hold that all state bars are protected under the state action exemption to the federal antitrust laws."

The Footnote is disturbing because the "particular statutory scheme" of the Oregon State Bar (i.e. the PLF), is less worthy of state action exemption than any other particular statutory scheme I can possibly imagine. The Court in essence applies the exemption to the worst possible fact set and then hypocritically indicates it does not necessarily apply to other State Bars. No other State Bar has done anything as egregious as the PLF. Consequently, logic dictates that if you exempt the "worst," you should at least exempt those that are better. I note this for purposes only of delineating the Court's inconsistency, not supporting a claim of state action exemption. The Court next examines Hass' challenge to the PLF under the Interstate Commerce Clause.

INTERSTATE COMMERCE CLAUSE VIOLATION BY PLF

First, a review of some basic law related to the Commerce Clause, and how it relates to the statute providing for the Bar to implement the PLF. The Commerce Clause of the US Constitution states :

"Congress shall have Power . . . To regulate Commerce . . . among the several States"

The US Supreme Court has interpreted the clause as restricting certain state regulation. *Hughes v. Oklahoma,* 441 U.S. 322, 326 (1979). In general terms and subject to exceptions, a state statute "burdens interstate commerce" and is therefore unconstitutional when it places businesses from other states at a disadvantage with similar types of businesses located within a particular state. For instance, as an easy hypothetical, a state law requiring everyone in California to buy milk from companies based in California would burden interstate commerce and therefore be unlawful, because it would preclude companies in other states from participating in the California market. The California companies would get all the business. The crux of Hass' interstate commerce clause attack, is that since Oregon attorneys must buy their malpractice insurance from the PLF, insurance companies located in other states are essentially precluded from participating in the malpractice market within Oregon. More specifically, a state statute triggers scrutiny under the commerce clause in either of two situations which are :

1. When the state statute affirmatively discriminates either on its face or in practical effect against transactions in interstate commerce. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).
2. When the state statute regulates evenhandedly but incidentally burdens interstate transactions. *Maine v. Taylor,* 477 U.S. 131, 138 (1986).

State actions falling into the first category are generally subject to a higher degree of scrutiny than those in the second category. This is because the first category is generally characterized by situations that more blatantly and openly burden interstate commerce. The Ninth Circuit holds that the mandatory requirement of purchasing coverage from the PLF falls into category (2) which subjects it to a lower degree of scrutiny. The Court quotes the PLF resolution which reads :

> "that such professional liability coverage (as is required by the resolution) for active members in the private practice of law, . . . shall be obtained through the . . .Professional Liability Fund"

The Court reasons that the PLF does not discriminate against out-of-state insurance companies because it burdens insurance companies in Oregon and outside of Oregon exactly the same. The concept is that all are effectively prevented from competing with the Bar to provide primary malpractice coverage. Essentially, if you treat all the companies unfairly, then you're not discriminating.

THE DISSENT – HASS v. OREGON STATE BAR

Three appellate judges rendered opinions in *Hass*. The majority consisted of Justices Goodwin and Alarcon. The Dissent was written by Justice Ferguson. It is probably one of the best Dissents that I have ever read in any court opinion. Justice Ferguson absolutely knew precisely what the PLF is all about. Specifically, his disagreement focuses on the majority's incorrect holding that the PLF need not satisfy the active supervision requirement of Parker immunity. Remember, even the majority determined the PLF was not activity of the state in its' sovereign capacity and that it was anticompetitive in nature. The decisive issue remaining was whether the anticompetitive activity had to be actively supervised.

The US Supreme Court has determined in similar situations the activity should at least be actively supervised by the State itself. While a state remains free to delegate regulatory authority to nonsovereign entities, "closer analysis is required" to ensure that such organizations receive state action immunity only when their anticompetitive actions further a demonstrated state commitment to supplant competition with regulation. *Hoover v. Ronwin,* 466 US 558, 568 (1984). The Ninth Circuit however, held that such was not necessary for the PLF.

The Dissent in *Hass* correctly points out that the "active supervision" requirement for *Parker* immunity was specifically established by the US Supreme Court to determine whether anticompetitive conduct of nonsovereigns should be shielded from federal antitrust liability. Justice Ferguson notes that the majority "glosses" over the lack of "active supervision," which fails to address the nature of the Oregon State Bar. He notes that doing so undermines the principles of federalism which are embodied in *Parker* immunity. *Hass* at 883 F.2d 1453, 1464 (9th Cir. 1989).

Ferguson beautifully delineates that at the heart of the "active supervision" requirement is a presumption that governmental bodies should regulate in the public interest. Such a presumption would not apply to private parties. When a state agency functions in a nonsovereign capacity it is essentially functioning like a private party. He notes that in such a situation, there is a real danger regulatory decisions are made to further the agency's own interests rather than the governmental interests of the State. *Hass* at 1465. The "active supervision' requirement ensures that those exercising private delegations of regulatory authority do not forsake the public goals of a state's economic policy in favor of their own private agendas. *Hass* at 1465. Absent supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests. Id.

What Ferguson is saying in no uncertain terms is that without "active supervision" by the State, there is a very real danger the PLF is designed to further the economic interests of attorneys. In support of this assertion he then examines the nature of the Oregon State Bar itself. The Dissent states :

> "The majority's conclusion that the Bar need not satisfy the active supervision requirements blurs, if not eliminates, this logical distinction between public and private economic regulation. While the majority appears content to paint the Bar as a state agency or other form of public body "akin to a municipality for purposes of the state action exemption," it offers only a partially completed portrait. The Bar's private interests in the very field in which it regulates - professional malpractice insurance - coupled with the lack of public accountability for its Fund-related activities, reveals that the Bar presents a poor candidate for exemption from the active supervision requirement." *Hass*, at 1465.

In Footnote 1 of the Dissent, Ferguson notes that the majority can not even decide on what type of institution the Bar in Oregon is. He writes :

> "Apparently the majority cannot decide on the institutional pedigree of the Bar under Oregon law as it alternatively characterizes the Bar as "an instrumentality of the judicial department of the State of Oregon," "a public body. . .," "a state agency," and "an agent of the legislature for the purposes of administering <the Fund>." The majority's inability to concretely define the organizational nature of the Bar highlights its hybrid nature, and thus, serves to underscore the need for closer review of the majority's portrayal of the character of the Bar." *Hass,* at 1465.

The Dissent hits on the precise focal point of the case when it states :

> "Conspicuously absent from the majority's discussion is any acknowledgment of the potential for abuse when a state delegates regulatory authority to an organization, such as the Bar, which brings its own set of economic interests to bear on the regulated field. . . .
> . . .
> Perhaps in recognition of this economic reality, the Supreme Court has never authorized a state bar to exercise independent authority over regulation of the legal profession. . . . The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members."

The US Supreme Court in 1975 in *Goldfarb v. Virginia State Bar*, 421 US 773, 791 (1975) determined that the fact the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practice for the benefit of its members. *Goldfarb* and *Hoover* taken together reinforce the proposition that when independent regulatory authority is delegated to a state bar (such as in the case of the PLF), particular care must be taken to ensure the public authority is not being used to further private economic agendas. Haas at 1466. The Dissent is correct and the majority was wrong.

The Dissent then goes on to point out that since the majority concluded the active supervision requirement of Parker immunity did not need to be met, it did not explore whether the PLF was actively supervised. Ferguson says that only a brief review of the statutory scheme is necessary and states :

> ". . . no state actor supervises the Bar's operation of the Fund. ORS 9.080 provides no avenues for the Oregon state legislature or supreme court, . . . to "have and exercise power to review <the Bar's> particular anticompetitive acts. . . and disapprove those that fail to accord with state policy." *Hass* at 1467-1468.

The only two entities with direct authority over the PLF are the State Bar's Board of Governors and the PLF Board of Directors. Ferguson with literate beauty states that this is like the case of the **"fox-watching-the-henhouse."** *Hass* at 1468. It does not provide meaningful supervision. He

concludes this section by stating Parker's state action immunity doctrine should not protect the PLF from federal antitrust laws.

One final issue discussed in the Dissent in ***Haas*** concerns the issue of regulating insurance. As stated previously, the Oregon Bar has claimed the PLF coverage does not constitute insurance. This is to avoid having it regulated like insurance. The Dissent discusses how the Bar asserts the suit should be dismissed because the PLF falls within the McCarran-Ferguson Act's exemption to the Sherman and Clayton Antitrust Act. Under this Act, a practice is exempt from federal anti-trust laws if it is :

1. the business of insurance
2. regulated by state law
3. does not involve coercion, intimidation or boycott

It is absolutely incredible to me that the Bar would assert this exemption since the McCarran-Ferguson Act is directed primarily at the business of insurance and the Bar asserts that the PLF does not constitute insurance for purposes of regulation. The Dissent states :

> "While the Oregon Insurance Code is precisely the type of state regulatory scheme that would satisfy the Act's regulation requirement, the Fund, as note above, is expressly exempt from all requirements of the Insurance Code." ***Hass*** at 1469.

The Bar responds that the enacting legislation of the PLF, namely ORS 9.080 constitutes state regulation within the meaning of the Act. The Dissent demolishes this assertion by emphasizing that mere statutory authorization of an anticompetitive practice does not constitute regulation. In addition, during the US Senate debate on the Act, Senators McCarran and O'Mahoney repeatedly emphasized that only state legislation regulating insurance, not simply permissive state legislation would satisfy the criteria. The Oregon Bar's assertion in this area was wholly lame.

The final criteria of the exemption indicates the practice does not involve coercion, intimidation or boycott. The Bar suspends the law license of any attorney who does not pay the PLF coverage assessment. The Dissent squarely places this policy in the arena of coercion, stating :

> "The plain meaning of the term "coercion" is clearly implicated where, as here, an individual's ability to pursue her livelihood is conditioned upon her willingness to deal with one particular insurer, to the exclusion of all other potential insurers."

F. THE IMPACT OF PATRICK V. BURGET, 586 U.S. 94 (May 16, 1988)

The Ninth Circuit Court of Appeals decision in ***Hass v. Oregon State Bar***, 883 F.2d 1453 (1989) was argued on July 12, 1988 and decided on August 30, 1989. On May 16, 1988 the U.S. Supreme Court appeared to send a strong message to the Ninth Circuit that they should be declaring the PLF unconstitutional and that it was not protected by the state action doctrine. The opinion not at all coincidentally dealt with an Oregon issue (pertaining to physicians) and was right on target for the ***Hass*** issue dealing with Oregon lawyers.

Ultimately, the Ninth Circuit failed to heed what appeared to be the key mandate of the decision in ***Patrick v. Burget***, 486 U.S. 94 (1988) where the great Justice Thurgood Marshall wrote the lead opinion for the Court. In ***Patrick***, the Court Reversed the Ninth Circuit on the issue of the state action doctrine with respect to the "active supervision" prong of ***Parker*** immunity. The U.S. Supreme Court held as follows:

"Held : The state action doctrine does not protect Oregon physicians from federal antitrust liability for their activities on hospital peer review committees. The "active supervision" prong of the test used to determine whether private parties may claim state action immunity requires that state officials have and exercise power to review such parties' particular anticompetitive acts and disapprove those that fail to accord with state policy. This requirement is not satisfied here, since there has been no showing that the State . . . or the state judiciary reviews -- or even could review -- . . . to correct abuses."

Haas, itself was never heard by the U.S. Supreme Court which denied certiorari in 1990.

G. ERWIN v. OREGON STATE BAR AND ITS BOARD OF GOVERNORS

Trial Court Case #95-04-241 Court of Appeals Case # A92236 (1997)

In *Erwin* the Plaintiff, Oregon attorney Warde H. Erwin, a member of the Oregon State Bar since 1939 (yes, you read that correctly since 1939) filed a Motion for Declaratory Judgment against the Bar's PLF. This man had been a member of the Oregon Bar continuously for a period of 58 years. He had seen pretty much all the changes that occurred within the Bar and he didn't like the PLF. That alone in my view, tells you a lot. Mathematics indicate that he had to be in his 70s or 80s when he instituted this litigation. A period of time in one's life when you wouldn't think a person would be much interested in changing the system. He obviously however, felt strong enough about the diabolical nature of the PLF to do so. When a man in his 70s or 80s speaks, people should listen.

Erwin directly challenged the provision that required suspension of one's law license for failure to pay the PLF assessment. He directly attacked the fact that the Board of Governors had not established a professional liability insurance agency as the enacting legislation allowed, but had instead established the PLF which it characterized as a "claims-made indemnity fund." Specifically, Erwin alleged the PLF held in reserve assets totaling many millions of dollars contrary to the provisions of the enacting legislation. He alleged that the assessments collected were used for numerous activities unauthorized by the enacting legislation.

The Board of Governors moved to dismiss the claims and the trial court judge in Clackamas County, Judge Raymond R. Bagley granted the motion and further striked the third and fifth count (which are not delineated in the appellate opinion so I don't know what they were) as sham and frivolous. Erwin appealed.

The appellate opinion rendered by Justices Riggs, Leeson and Landau addressed primarily procedural issues concerning dismissal and the definition of sham and frivolous allegations, as they pertain to a Motion for Declaratory Judgment. The State appellate court affirmed dismissal of all counts of Erwin's complaint except for the third, fourth and sixth stating :

"We first note that, upon careful review of the complaint, the dismissal of all counts but three--the third, fourth and sixth--must be affirmed. In each case, plaintiff failed to allege more than an abstract interest in the validity of the challenged laws, and we therefore affirm the dismissal of those counts without further discussion."

In Count 3, Erwin alleged that the automatic suspension provision for nonpayment of PLF assessments was unconstitutional because it deprived a nonpaying member of due process of law. The Court of Appeals determined the count as a matter of procedure was sufficiently well pleaded to survive dismissal. The matter was then remanded back to the trial court for further proceedings to determine

the legitimacy of substantive issues in the claim. In Count 4, Erwin alleged that the suspension provision constituted a taking of property without just compensation in violation of the Oregon and United States Constitutions. Similar to the above, the Court of Appeals reversed the trial court's dismissal and remanded back for further proceedings. In Count 6, Erwin alleged the PLF monies were being used for activities not authorized by the enacting legislation. As above, the Court of Appeals reversed the trial court's dismissal and remanded back for further proceedings. The appellate opinion was primarily directed at the procedural sufficiency of the complaint, rather than addressing the substantive issues. Nevertheless, it must be construed as a win for an elderly attorney fighting against the self-serving economic interests of the PLF and Oregon Bar Board of Governors. Albeit a small win. I have not come across anything regarding further proceedings in this case.

H. THE WESTVIEW INVESTORS SCANDAL

On November 14, 1999, the victimization of two Nonattorney citizens (Pearce and Woodfield) by the Oregon State Bar PLF was publicized on a wide-scale basis by Oregon's main newspaper, The Oregonian. Jeff Manning wrote an article titled, "Malpractice fund scheme backfires." The article described the following story and sequence of events. In July, 1995 according to The Oregonian, a group of 90 attorneys was brought together to discuss how best to dodge the heat of attorney malpractice lawsuits. Later during the weekend, the PLF's executive director, Kirk Hall, had dinner with Oregon attorney John Davenport. Their prey would be Pearce and Woodfield who were already in the process of suing their former attorney for malpractice. Pearce and Woodfield had previously declared bankruptcy, but it was overturned by the Ninth Circuit Court of Appeals. The appellate opinion contained a stinging criticism of their former attorney. The result was that Pearce and Woodfield were left liable for the debts they were seeking to discharge through the bankruptcy.

The PLF's goal was to acquire one of the unpaid debts, so that any amounts Pearce and Woodfield recovered from their malpractice claim, would then have to be paid right back to the PLF in satisfaction of the acquired debt. The PLF had already hired two other attorneys to defend against the malpractice claim. Davenport's job was to set up a shell company, which he ultimately called Westview Investors Inc.. Westview purchased with $ 85,000 of PLF funds, one of the large outstanding judgments against Pearce and Woodfield. Davenport then pursued collection of the debt by attempting to have the Multnomah County Sheriff seize the legal rights to any proceeds from the malpractice claim.

The fact that Davenport and Westview were actually functioning on behalf of the PLF, which was simultaneously purporting to attempt to settle the malpractice claim, was never disclosed. Davenport's firm even went so far as to threaten to seek arrest warrants against Pearce and Woodfield. In July, 1996, Mike Greene, one of the attorneys representing Pearce and Woodfield decided it was time to learn more about the mysterious Westview Investors, Inc.. They requested a bankruptcy court 2004 exam, which gives the attorney of a bankrupt debtor the opportunity to interview creditors under oath. They interviewed PLF attorney Davenport. The following transpired :

"Greene : Are you telling me you don't know if you have ever been an officer ?

Davenport : There was a suggestion at one time, which I haven't confirmed, that I may have been listed originally as an officer.

Greene : Do you remember which officer ?

Davenport : No.

Greene : Have you ever been a shareholder of Westview Investors Inc. ?

Davenport : Without looking at the records, I don't know that I can answer that question.

Greene : Are you saying to me you don't know, as we sit here, whether you have been a director ?

Davenport : . . . Yes, I would say that I do not have a current recollection of that.

Greene : Where is the office of Westview Investors ?

Davenport : The principal place of business ?

Greene : OK.

Davenport : I don't know. I don't know what office means."

PLF executives grew alarmed when they learned of Davenport's evasions. They hired Portland attorney Susan Eggum to work with him to prepare a list of corrections to the testimony. Along with the corrections was a copy of the $ 85,000 transfer from the PLF to Westview. Once its' role was discovered, the PLF scrambled to settle the case and eventually agreed to pay more than $ 1.5 million. Mike Greene, outraged at the PLF's tactics began to prepare an ethics complaint against virtually everyone involved in the case. Davenport was suspended from practice for six months, but it was determined that the PLF was in the clear.

Oregon State Bar investigator David Berger stated "It was offensive, but it wasn't illegal." Two days after the first newspaper article on this case, on November 16, 1999 Oregonian columnist Steve Duin published an article titled, "Ethical, legal and just plain reprehensible." Duin's article read in part as follows :

> "Call it the ultimate lowering of the Oregon State Bar.
>
> And roll out all the old lawyer jokes. We need some comic relief after discovering just how low the Bar will go.
>
> . . .
>
> It is also dirty pool. "Damnedest thing I've ever seen," said Circuit Court Judge Harl Haas, who presided over the malpractice case. "This conduct by the Fund makes private insurance companies look like Mother Teresa.
>
> "When the Legislature passed the liability fund legislation, the Bar went down and testified this was consumer-protection legislation, that we were going to see to it that the victims of malpractice had a remedy against their lawyer."
>
> Instead, the judge argued, the PLF strategy was an attempt to "unfairly and wrongly defeat the plaintiff's claim." What's more, Haas said, "The very concept of asset acquisition continues to enable the public to look at lawyers and think of sharks."
>
> . . .
>
> . . . In his 39-page response to a Bar investigator's findings, Hall argued, "While the strategy used in the Pearce case is subject to a policy debate, it was ethical and legal."

Only recently has he turned contrite. Now calling the asset acquisition approach "clearly questionable," . . . .

. . .

Karen Garst, the Bar's executive director, said Monday that the asset-acquisition gambit won't happen again. "While it is perfectly legal for an insurance company to do this, that is not the type of insurance company we want to run," Garst said.

But in a revealing addendum, Garst noted the strategy was employed only because the plaintiffs refused to settle."

The very next day, November 17, 1999, The Oregonian published a third article addressing the State Bar's refusal to demonstrate remorse and rehabilitate itself, that read in part as follows :

"Oregon is the punchline of a joke that the State Bar, the association of lawyers, played on the Legislature and Oregon citizens.

The bar convinced the Legislature in 1977 to create a Professional Liability Fund, a pot of money the bar promised to oversee and use to ensure that the victims of malpractice had a remedy against their lawyers.

Now, the bar has admitted that the managers of the malpractice insurance fund tried to rip off the very people the fund was supposed to protect from unethical, unprofessional behavior by lawyers.

Further, the bar's leaders are unwilling to state clearly and forcefully that this scheme was wrong, it was sleazy, and should never be repeated. Instead, Kirk Hall, the bar liability fund's chief executive, says only, "I probably would not do it again."

. . .

This scheme ought to prompt major changes in the oversight of the fund. If the bar continues to insist that its scheme was legal and ethical, then the Legislature should either take the administration of the fund away from the Bar and give it to the state treasurer or attorney general's office, or create some permanent independent oversight board more accountable to citizens."

On November 28, 1999 the Oregon State Bar published a letter of apology on its' Internet web site, which read in part as follows :

"Oregonian reporter Jeff Manning did an excellent job of reporting this very complex case last Sunday. Columnist Steve Duin followed up on Tuesday with a column that was intensely critical of the bar and the fund, as was the lead editorial on Wednesday's editorial page.

The Oregonian got it right. While the "judgment acquisition" strategy does not violate any laws or legal ethics rules, it is still just plain wrong. It was wrong to use it . . . .

. . . We have two apologies to make : one to the public, and one to our members.

. . .

The state bar has violated your trust. We are sorry.

. . .
This has been an ugly episode in the history of our organization. . . ."

On April 15, 2000, The Oregonian published that Kirk Hall, Chief Executive officer of the PLF who had spearheaded the idea behind Westview Investors Inc., had submitted his resignation to the PLF. He said that he was quitting for personal reasons and was ready to move into the private sector stating :

"It's something I'm very happy about and very excited about."

I. THE OSB PLF TASK FORCE REPORT

On June 28, 2000, the Oregon State Bar published the results of its' PLF Task Force Report. Approximately seven months had passed since The Oregonian succeeded in obtaining their uncoerced confession that the Bar had violated the public's trust. The Report was designed essentially to save the PLF. The Bar simply dug a deeper political hole for themselves, as the Report contained substantial false and misleading information.

For ease of reading, I have identified the passage of the Task Force Report at issue, and then described the manner in which it is False or Misleading by numbering such as "COUNTS." Although the Task Force Report contains numerous inaccuracies beyond the below listed five "Counts," the following is sufficient to demonstrate that the PLF still is intent on engaging in false, misleading, and deceptive conduct, and is amenable to further violation of the general public's interest.

COUNT 1 :
The Task Force Report published in June, 2000 states as follows :

"2. The PLF **mission statement** provides :

The mission of the PLF is to **manage for the Oregon State Bar** a legal malpractice liability program at the least possible assessment consistent with a sound financial condition, superior claims handling, efficient administration, and effective loss prevention."

In reference to the foregoing, the Report failed to disclose that as recently as 1997, its' Claims Made Plan incorporated a **public interest element**, which was apparently eliminated thereafter. Section 6 of the 1997 Plan stated:

> "The object of this program was to provide mandatory coverage at minimum cost to attorneys **while assuring the public** that each attorney in private practice would have certain minimum levels of protection."

The discrepancy is further exacerbated by the fact that in Section III of the Task Force Report, the PLF Mission Statement was delineated as follows:

"This brief mission statement **does not specifically address the notions of a duty to the public** on behalf of the PLF. The PLF Long-Range Planning Committee has proposed that the mission statement be enhanced . . . ."

The Task Force Report then goes on to propose adoption of a public interest component. The inescapable conclusion that basic predicates of logic mandates is as follows. As recently as 1997, the

stated "mission" included a public interest component. That element was subsequently eliminated, in all likelihood without knowledge of the Oregon legislature.

Regarding the "public interest" discrepancy, the Report vacillates between falsely conveying the impression that such an element never even existed and occasionally mentioning a public interest component. The Report then proposes adoption of such an element. By failing to candidly acknowledge the existence of the original public interest component of their mission statement, and then attempting to appear benevolent by suggesting that the Bar is now taking the initiative to incorporate a public interest element, the Task Force engaged in false, misleading, and deceptive conduct designed to violate the public's trust even further.

COUNT 2 :

The Task Force Report published in June, 2000 states as follows :

> "The overall finding of the Task Force is that PLF policies, practices and procedures are legal, **ethical and professional** in every respect."

Yet, in November, 1999 the President and President-elect of the Oregon State Bar issued a public apology regarding the PLF that stated as follows :

> "The state bar has **violated your trust**. We are sorry."

This author submits that if the PLF violated the public's trust, there is absolutely no way possible for its policies, practices and procedures to be ethical and professional in every respect. The operative phrase is "in every respect." The foregoing Task Force Report passage is unreconcilable with the State Bar's letter of November, 1999. As such, the assertion that its' policies, practices and procedures "are legal, ethical and professional in every respect" must be held as false, misleading and deceptive.

It is noteworthy that the November, 1999 letter was written in response to intense public scrutiny that the PLF was under from the Oregonian newspaper. It appears that the goal of the PLF was to neutralize the political impact of The Oregonian's reporting by issuing an apology, and then once the public clamor evaporated, the PLF intended to go right back to conducting itself in the same immoral manner to which it had become accustomed.

COUNT 3 :

The Task Force Report issued in June, 2000 states as follows :

> "The overall finding of the Task Force is that PLF policies, practices and procedures **are legal,** ethical and professional in every respect."

The State Bar's letter of apology issued in November, 1999 stated as follows :

> "While the "judgment acquisition" strategy **does not violate any laws** or legal ethics rules, it is still just plain wrong."

The Task Force Report however, then later states:

"Conclusion : Whether the judgment acquisition strategy is legal in Oregon **is uncertain**. . . ."

Since the legality of the acquisition strategy was uncertain, the Task Force's contradicting statement that it was legal, as well as the statement of legality in the November, 1999 letter of apology must logically be construed as false, misleading, deceptive and a further violation of the general public's trust.

COUNT 4 :
The Task Force Report published in June, 2000 states as follows :

> "The Task Force found no evidence of a pattern of unwritten claims practices or strategies that raised legal, ethical or professional concerns."

Since it appears that the "judgment acquisition" strategy was not incorporated into any written policies or procedures of the PLF, and was used at least 5 times according to the PLF Task Force Report, which thereby constitutes a pattern, and further as it was apparently discussed at length on numerous occasions by PLF officials, and further as it's method of implementation resulted in the State Bar violating the public's trust as confirmed by the November, 1999 letter of apology, the foregoing conclusion in Paragraph (7) must logically be held to be a further example of false, misleading and deceptive conduct designed to violate the public's trust.

COUNT 5:
The Task Force Report published in June, 2000 states as follows :

> "The PLF is operating **legally**, ethically and according to its mission and policies to the benefit of the public and Oregon lawyers."

Since the state bar confessed to violating the public's trust in its' letter of November, 1999 the foregoing conclusion is unsupportable by the facts, law and evidence. Additionally, since the Task Force confessed that the legality of the "judgment acquisition" strategy was "uncertain" in Oregon, the foregoing conclusion is false, misleading, deceptive and a further attempt to violate the public's trust.

COUNT 6 :
The Task Force Report published in June, 2000 states as follows :

> "However, because of our strong duty to our insured, we have never believed it was appropriate for us to warn a claimant or claimant's attorney of a specific, approaching statute of limitation. We believe our insured would tell us we were breaching our duty to them if we did so."

The Task Force is correct on this issue. The problem however, is that the Oregon State Bar and State Supreme Court adopted a diametrically opposed position in the Porter and Bodyfelt case described on page 682, herein. In that case, the Oregon State Bar and Court determined that local "courtesy" required an Oregon attorney to provide notice before obtaining a default judgment, even though no rule or statute required such. The disparity between the stance adopted in the Task Force Report, and by the State Bar Disciplinary Committee when dealing with Zealous attorneys who do not work for the PLF,

has the impact of increasing the probability that a PLF Defense would be successful, since PLF attorneys are exempted from so-called "courtesies" and "local custom" required of other Oregon attorneys. The Task Force failed to disclose this disparity, and as such its' assertion of a "strong duty" is misleading. Essentially, the Task Force seeks for Oregon attorneys to only be Zealous, if they are working for the PLF.

PLF Task Force Concluding Analysis :

Based on the information included in the PLF Task Force Report, it must be concluded that the State Bar's 1999 letter of apology was written solely for the purpose of quelling public clamor about the PLF which occurred as a result of the investigation skills of The Oregonian. Once the PLF felt it could escape the immediacy of the situation, it formulated a Task Force and issued a Report that was solely designed to justify its' program for its' own self-interests. In doing so, the Report included numerous inaccuracies, false statements, misleading statements, and was a further example of the deceptive nature and mindset of Oregon State Bar officials.

Once the State Bar issued its' November, 1999 letter openly confessing in no uncertain terms to having violated the public's trust; the legitimacy of the PLF was wholly and conclusively gone. No governmental system or institution can be viewed as credible by the general public in light of such. The Task Force was cognizant of that fact, and consequently tried to withdraw from the expressed certainty of the Bar's earlier overt and express confession of guilt.

V. CONCLUSION

A. THE PLF and ATTORNEY FEES AND COSTS

Several years ago, I came across at the University of Oregon law school library a book for Oregon attorneys published by the Oregon State Bar on family law. Included within was an article titled "Attorney Fees And Costs" written by Paul Saucy, an Oregon attorney of the now defunct law firm of Saucy and Lipetzky. Paul Saucy coincidentally represented my ex-wife in our child custody dispute which I lost. I do not address that case however within this discussion of the PLF.

I only seek herein to address the article Mr. Saucy wrote since its' perspective was adopted by the Oregon State Bar. The article standing alone, indicates the detrimental effect on the quality of justice rendered to the general public by the Bar Friendly attorney, which is created by the existence of the PLF. Saucy discusses various aspects of imposing legal fees on the client such as how to quote fees, obtain a retainer and the need for written fee agreements. He writes the article from the perspective of serving the attorney's interest. The problem arises when he stresses (on behalf of the Oregon Bar) that the attorney's interest must be served even if doing so is at the sacrifice of the client. Specifically, he states :

> "Remember how much more important it is to feed and cloth your family than it is to help a client with her particular problem"

This statement included in the Oregon State Bar's family law publication captures fully the lack of regard held by the Oregon Bar for the litigants. The callousness with which Saucy's opinion is phrased, lends to an impossibility of rationally justifying the Bar's rubber stamp of approval. Saucy is certainly free pursuant to the First Amendment to publish and express his opinions, however stupid they are. The Bar however, if indeed it is designed to further the interests of the general public, should never have given their stamp of approval to a premise that elevates the attorney's interest above that of the common citizen. It suggests undeniably that the fees, earning, security and safety of the attorney and his family come before the interests of the helpless general public who are at their mercy and whim. To promote such financial security and safety, their exists the PLF for the benefit of the Bar-friendly attorneys.

B. THE PORTER and BODYFELT CASE

In Re Complaint as to Conduct of . . . Porter, 320 Or. 692 (1995)

Any case involving an attorney named Bodyfelt, has to be a great one. I love the name. The attorney being disciplined however, is Porter, upon the filing of a complaint by Attorney, Bodyfelt. Typically, members of the public properly believe that lawyers are not disciplined frequently enough. This is due to the fact that after Nonattorneys become the victim of unethical lawyer conduct, they find the State Bar simply ignores their ethical complaint. There is however a corollary to the rule, almost unknown to the public.

The corollary is that certain groundless ethical complaints, typically filed not by aggrieved litigants, but rather instead Nonzealous attorneys, are given too close and strict consideration by the State Bar. Instead of applying ethical predicates in accordance with the law and enacted rules, the Bar searches and strives to find a justification for disciplining what it perceives to be a Zealous attorney. There is little need in my belief to cite cases of disciplinary complaints that should have received attention by the State Bar filed by Nonattorneys which are whitewashed. Pretty much everyone knows by now that is common place. Rather instead, I wanted to provide a good example of an attorney who was unjustifiably subjected to discipline for violating the local "customs" of "Bar Friendliness."

Attorney Porter, on behalf of his Nonattorney clients (apparently a husband and wife), instituted suit against a large company regarding a defective mobile home. Porter properly informed his clients that if the Defendants did not respond to their Complaint, his clients could obtain in Federal Court what is known as a Default Judgment. Essentially, it means that if the opposing party doesn't file an opposition to the claim, the Plaintiff just wins automatically.

In Oregon, at the time (and currently I believe) there was a difference in State law and Federal law about defaults. If the claim was filed in State Court, before applying for a default, the Plaintiff was required to provide the Defendants with a Notice of Intent to Apply for Default. Federal rules however had no such requirement. You could just go and obtain the default, so long as you had properly served the Defendants with the Complaint.

The Nonattorney Plaintiff clients, obviously loved the idea that if they filed their suit in federal court, a default could be obtained without additional notice, if the Defendants didn't answer. The Plaintiffs repeatedly called Porter on the phone to find out whether the time for the Defendants to file an answer had expired. I would have done the exact same thing.

The time expired. They instructed Porter to obtain the default judgment. Porter properly complied. He was fully in compliance with the Federal Rules of Civil Procedure in doing so, and did exactly what zealous representation on behalf of his client demanded. Incredibly, he was then disciplined by the Oregon Bar for doing so.

The Oregon Supreme Court's opinion on the discipline of Porter is nothing short of irrational. He was disciplined notwithstanding his compliance with the written Federal rules and law. Specifically, the Bar and Court determined that although he was in compliance with the written Federal rules and law, he violated norms of "local custom and courtesy" between Oregon attorneys. Local custom (be a nice guy to the opposition, even at the expense of your client) purportedly required Porter to not obtain a default judgment, without giving the opposition notice, even though the written rules contained no such requirement. The disciplinary opinion states :

> "The accused argues as an overarching matter that, if a lawyer complies with all of the procedural courtesies required by the Federal Rules of Civil Procedure (FRCP), the lawyer cannot be guilty of an ethical violation. . . . That argument is unpersuasive. . . .
>
> . . .
>
> Oregon's ethical rules and standards of professional conduct began as **customs of courtesy** and practice. There was nothing else. . . .
>
> "A member of the state bar **shall not ignore known customs** or practices of the bar of a particular court, **even when the law permits**, ...
>
> . . .
>
> Accordingly, we hold that it is no defense to a charged violation of DR 7-106(C)(5) that the offender's acts were in compliance with another rule. . . .
>
> . . .
>
> "A **custom has the force of law**, and furnishes a standard for the measurement of many of the rights and acts of men. . . . "
>
> . . .
>
> DR 7-106(C)(5) provides for the **discipline of lawyers who "fail to comply with known customs of courtesy . . . .**"

The Disciplinary rule relied on, by the Court DR 7-106(C)(5) in force at the time, and cited in Footnote 2 of the opinion read as follows:

> "In appearing in the lawyer's professional capacity before a tribunal, a lawyer shall not: . . .
> (5) Fail to comply with known **local customs of courtesy**. . . ."

That rule in my belief is nothing short of crap. The lawyer's duty is to comply with objective, unambiguous court rules and objective standards of practice. Clients hire lawyers to fight their battles for them. They are not hired to be friends with opposing counsel, or waive procedural points of leverage at the expense of their clients. I close discussion of this case by noting three additional points that cut into the purported legitimacy of the Oregon Supreme Court's irrational opinion, and the Bar's so-called Statement of "Alleged" Professionalism, which fosters the precise animosity the public has towards the manner in which Nonzealous attorneys sell them out regularly. Those points are as follows:

1. Why is there no comparable "custom of courtesy" required for Oregon attorneys litigating against Pro Se litigants ?
2. Doesn't disciplining the attorney in this case, result in Oregon State Law being elevated above Federal law ?
3. Is procedure in Federal courts to be dictated by State "local custom and courtesy.?"

C. THE PLF, THE UNAUTHORIZED PRACTICE OF LAW and PROCEDURAL BIAS REVISITED

On July 8, 1998 I visited the Oregon State Bar's web site on the Internet. The web site at that time had a small section on the PLF which provided a summary of the Plan, but notably did not include the statutes, regulations or specific rules of the Plan. This was surprising because the same web site did include virtually all other rules and regulations pertaining to the State Bar. It was clear they wanted to hide the detail and specifics of the PLF.

In the mid 1990s, while thumbing through some old Oregon Bar Bulletins at the Lewis and Clark Law School Library, I came across an article titled "Have License, Will Travel" from the October 1993 issue, written by Sylvia Stevens in the "Bar Counsel" section. It addressed the status in Oregon with what is known as the unauthorized practice of law. Most people are aware that to practice law you need a law license issued by a state, which requires a law school education and admission to a state bar which is normally the licensing agency. If you perform legal services without a license, depending on the state you may be in violation of a statute and/or subject to an injunction from a court prohibiting you from continuing to do so in the future. Throughout the years and in all states, there has been a great deal of litigation regarding the unauthorized practice of law and what actually constitutes the "practice of law" so as to fall within its' prohibitions.

Typically, those seeking to liberalize rules and statutes pertaining to the unauthorized practice of law stress the current state of dissatisfaction with attorneys nationwide, the unavailability of legal services, and the anticompetitive nature of such rules and statutes. Those supporting stringent rules and statutes that prohibit the unauthorized practice of law stress the need to protect the public from having services provided by incompetent individuals and having the practice of law regulated to protect the public. I do not address herein the merits of either position, since the issue is sufficiently complex that a separate article would be necessary on the subject. I raise the issue only to point out a specific peculiarity that I came across pertaining to this issue in Oregon. Typically, an attorney licensed in one state can not provide legal services in another state. The article "Have License, Will Travel" in

addressing the issue of Oregon attorneys performing legal services for those in other states, states as follows:

> "On the other hand, it seems clear that a lawyer licensed in Oregon, and whose only office is in Oregon, is free to advise a client about another states' law, even where the client is a resident of the other state and the matter involves factors physically related to the other state, such as land. Similarly, there is no logical reason why a state should refuse to give effect to legal documents (such as deeds) prepared by an out-of-state lawyer, so long as the work was permissible in the lawyer's own state and is otherwise in compliance with the other state's requirements."

The thrust of this statement is that Oregon lawyers can provide legal services for clients located in other states. The article then hypocritically flip flops and with typical Oregon State Bar arrogance states in reference to Non-Oregon attorneys :

> "The other facet of this issue concerns the nature and extent of practice that can be conducted in Oregon by attorneys licensed in other states. . . .
>
> ORS 9.160 states that "No person shall practice law or represent himself as qualified to practice law unless he is an active member of the Oregon State Bar."

The hypocritical arrogance of these positions is incredible to me. Oregon attorneys under Oregon law can provide legal services to people in other states, but attorneys from other states can not provide legal services to people in Oregon. It has the exact same precise stench of the PLF's requirement that malpractice insurance (excuse me, I mean "coverage" because it's not considered "insurance") must be purchased from the Oregon State Bar, thereby essentially excluding all other insurance companies from selling malpractice insurance to Oregon attorneys.

The PLF is nothing short of an ethical atrocity or comedy depending on how you look at it. The constitutional infirmity and hypocrisy that permeates it is both ethically atrocious and yet, so obvious in nature as to be comical. It almost eliminates the possibility of a fair adjudication or zealous representation particularly in the area of legal procedure. Procedural rulings become dependent on what is in the best interests of the Bar and who has the Bar Friendly attorney.

In 1994, Judge Paul J. Lipscomb of the Marion County Circuit Court was assigned to the child custody dispute between my ex-wife and I. I was a third year law student acting Pro Se. She was married to William Francis, an Oregon attorney and represented by Paul Saucy, also an Oregon attorney. Saucy filed a Motion to Modify that was procedurally defective. I was a Pro Se who knew the law. I filed a Motion to Dismiss respectfully citing each deficiency. In his chambers, when denying my motion, the official transcript indicates Judge Lipscomb made the following statement to me :

> "Let me give you a little background on me. I am a real poor one to argue procedural form over substance type of issues. . . . I have sometimes trouble being patient with skirmishes over paperwork. . . . I just don't have patience for that." (Official Certified Court Transcript)
>
> "What I'm telling you is that I am not going to spend a lot of time worrying about whether the Ts are crossed and the Is are dotted. I'm going to get to the end of the line as quickly as we can. . . . That is the way I do business." (Official Certified Court Transcript)
>
> "You prefer it done on paper. That is not real life." (Official Certified Court Transcript)

After I irritated his hyper-sensitive judicial ego a bit more, by respectfully insisting the rules of procedure be followed, and after I lost custody of my son, I began researching Lipscomb's appellate record and the briefs filed. In *125 Or. App. 385* (1993) the Defendant was a Pro Se Nonattorney who was not at all versed in the law. When dealing with this individual Judge Lipscomb adopted a substantially different tact. The official transcript cited in the appellant's brief filed by the Public Defender includes the following exchange :

DEFENDANT : Sir, I'm not guilty, your honor, that's all I've got to say.

THE COURT (Lipscomb) : That doesn't matter. I'm only concerned about the procedures. . . . I just have to make sure that the procedures go along.

Two different litigants. Both acting Pro Se. One well versed in the law, the other not. Same Judge. Two entirely different approaches to procedural law, by that same Judge. The purpose of this paper has been to demonstrate that the PLF creates that disparity.

D. THE PLF CAUSES JUDICIAL RULINGS TO BE BASED ON FINANCIAL INTERESTS OF THE OREGON STATE BAR

The provision of malpractice coverage by the State Bar conflicts with the disciplinary function and therefore creates unconstitutional economic incentives to predicate Judicial Rulings on financial interests of the State Bar, rather than the law, facts and evidence. Litigants are consequently deprived of fair and impartial adjudications in violation of their Fourteenth Amendment rights. A litigant's right to an impartial adjudication is also unconstitutionally infringed because the PLF diminishes the likelihood of finding an Oregon attorney who will zealously argue all points of their case. Any Oregon attorney who zealously represents a client potentially jeopardizes State Bar financial interests, thereby placing their own professional status before the Bar at risk.

The PLF unconstitutionally infringes on a litigant's ability to obtain an impartial adjudication by placing an inordinate burden on the Oregon attorney. This occurs because the PLF creates a legal environment that penalizes Oregon attorneys for providing zealous representation. The provision of zealous representation increases the likelihood opposing counsel will be sued for malpractice. The few zealous Oregon attorneys that exist are placed in a situation where by providing zealous representation they jeopardize State Bar financial interests. That same State Bar has disciplinary power over them. The State Bar has the perfect means at its disposal to get even with such an attorney, which is to subject them to unwarranted discipline. Similarly, the PLF creates economic incentives to unjustly reward attorneys who protect State Bar financial interests by treating them inordinately lenient in the context of discipline. The result is discipline for ethical, zealous representation, and an absence of discipline for unethical conduct.

The burden placed on Oregon attorneys unconstitutionally infringes the litigant's right to an impartial adjudication by creating economic incentives for judicial rulings to be predicated on whether a litigant's counsel protects State Bar financial interests by failing to provide zealous representation, or whether such counsel is a potential financial cost to the Bar by providing zealous representation. If the Court is faced with two Oregon attorneys on opposing sides of a case, both of whom protect the State Bar financial interests, a unique situation occurs. There exists potential for the issue to actually be decided on the merits.

The PLF unconstitutionally infringes on a Pro Se litigant's ability to receive an impartial adjudication most acutely, by creating an irrational bias within the Judiciary against Pro Se litigants. Pro Se litigants therefore have an unconstitutionally diminished likelihood of receiving fair rulings on their

Motions by maintaining the right of self-representation. Competent Pro Se litigants who are typically more skilled in procedural matters than members of the Oregon State Bar, represent an economic threat because they will file motions delineating procedural defects in pleadings of opposing counsel without hesitation. Such motions if granted will result in opposing counsel being potentially liable for malpractice. Only in Oregon, does this result in the State Bar's financial interests being jeopardized, since malpractice coverage is provided by the PLF. This creates acute economic incentives to deny meritworthy motions filed by Pro Se litigants by falsely characterizing them as meritless.

The requirement that malpractice coverage be purchased directly from the "fox" (PLF), implemented under threat of suspending the attorney's law license is unethical and unconstitutional. The conflict of interest has caused the disciplinary process to become infected by State Bar monetary interests. The following is an easy reference summary of how litigants in both the civil and criminal context are deprived of impartial adjudications due to economic incentives created by the PLF :

1. Oregon attorneys have an economic incentive to ignore valid objections to procedural defects in the pleadings of opposing counsel, since if they successfully contest defective pleadings, opposing counsel may be sued for malpractice which would cost their State Bar money.

2. Trial court judges have an economic incentive to deny motions to set aside incompetently drafted Judgments VOID on their face, since if they grant such motions, either party may sue the attorney that represented them for malpractice which would cost the State Bar money.

3. Trial court judges have an economic incentive to deny motions directed at procedural defects in pleadings, since if they grant such motions, counsel that submitted the defective pleading may be sued for malpractice which would cost the State Bar money.

4. Competent Pro Se litigants who are typically more skilled with respect to procedural matters than members of the Oregon State Bar, represent an economic threat to the Bar, because they will file motions delineating all procedural defects in pleadings, which if granted will result in opposing counsel being potentially liable for malpractice. As a result, Pro Se litigants are unjustly branded by Oregon attorneys as economic enemies of the Bar. Acute economic incentives therefore exist to deny meritworthy motions filed by Pro Se litigants by falsely characterizing them as meritless.

5. Since breaches of ethical conduct are not covered by the PLF, the State Bar has the opportunity to unjustly evade liability for malpractice by imposing discipline on the attorney.

6. Trial court judges have an economic incentive in support of State Bar financial interests to render rulings resulting in the exclusion of evidence when an aggrieved litigant sues an attorney for malpractice.

7. The PLF's lack of active supervision allows the financial incentives incorporated in 1-6 above, to dominate the legal profession within Oregon.

8. Oregon attorneys know that if they represent aggrieved litigants who are the victim of attorney malpractice, they will cost the Oregon State Bar money. Since the State Bar possesses disciplinary power, a financial incentive is created for the Bar to discipline Oregon attorneys that regularly represent litigants instituting malpractice suits against other Oregon attorneys. The result is that attorney malpractice runs substantially unchecked in Oregon.

9. DR 7-101 which is titled, "Representing a Client Zealously" states as follows :

"(A) A lawyer shall not intentionally :

(1) Fail to seek the lawful objectives of the lawyer's clients through reasonably available means permitted by law . . . .

. . .

2. In the lawyer's representation of a client, a lawyer may :

(1) Where permissible, exercise the lawyer's professional judgment to waive or fail to assert a right or position of the lawyer's client."

Subsection (B)(1) dilutes the responsibility of (A)(1). The factors determining when failure to assert a client right or position, is allowed are when "permissible" and within "professional judgment." The PLF creates economic incentives to expand the scope of "permissible," beyond reason. It also infects "professional judgment" with economic incentives resulting in irrational waivers of valid objections, commonly referred to by litigants as "betrayals."

10. Trial court judges have economic incentives in support of State Bar financial interests to falsely represent Judgments have been signed and entered, or fail to serve signed Orders upon litigants as required by ORCP 9, for the purpose of frustrating the litigant's Right of Appeal when they know a successful appeal may place Oregon State Bar financial interests at risk.

11. Trial court judges have economic incentives in support of State Bar financial interests to intentionally frustrate a litigant's Right of Appeal by any means at their disposal when they know a successful appeal may place Oregon State Bar financial interests at risk.

The result of the PLF is that every single "Oregon litigant" is treated in a manner disadvantageously compared to litigants in every single other state. Oregon litigants represented by counsel are treated in a disadvantageous manner compared to litigants in other states because the PLF creates improper economic incentives for such counsel to fail to raise valid objections on behalf of their clients, when an opposing party is represented by counsel, in order to protect each other from malpractice lawsuits. The concept is essentially a premise that "if you don't point out my errors, then I won't point out yours and neither of us will be sued for malpractice."

Oregon litigants who represent themselves Pro Se are treated in a disadvantageous manner compared to Pro Se litigants in other states, because they represent a greater economic threat to the Bar. This occurs because the Competent Pro Se, will not hesitate to point out procedural deficiencies in pleadings of opposing counsel. Such counsel therefore has an increased probability of being sued for malpractice. Only in Oregon does this place State Bar financial interests at risk. An economic incentive is created to neutralize the State Bar's financial risk by denying meritworthy motions filed by Pro Se litigants, by falsely characterizing them as meritless.

The ultimate result is that the State of Oregon now has the most unethical legal profession in this entire nation, and no litigant in any case of either a civil or criminal nature can receive a fair and impartial adjudication due to the PLF.