

January 18, 2006

Ms. Vickie Fichtner, Oregon State Bar
Regulatory Services Division
PO Box 1689
Lake Oswego, OR 97035

Re: Application for Reinstatement by Mr. Jack Roberts

Dear Ms. Fichtner:

The Bar solicited information relevant to the application of Jack Roberts for reinstatement.¹ I write this letter in response to the Bar's solicitation.

1. Unauthorized practice of law bars reinstatement.

A. Issue: has Mr. Roberts practiced law during his inactive status?

ORS 9.160 prohibits the unauthorized practice of law. A person who engages in the unauthorized practice of law may not be reinstated.² In his application, Mr. Roberts asserts, "I have not practiced law while [serving as executive director of the Lane Metro Partnership]." However, he also discloses, "**I have assisted businesses in complying with state and local laws** regulating their activities and have assisted local governments regarding ordinances and policies affecting economic development." (Exhibit 1, p. 3, emphasis added). The question arises whether Mr. Roberts knows what constitutes the practice of law and has, in fact, engaged in the unauthorized practice of law.

B. Apparently, Mr. Roberts is practicing law but does not realize it.

The practice of law includes far more than appearing in court for another. "[T]he 'practice of law' means the exercise of professional judgment in applying legal principles to address another person's individualized needs through analysis, advice, or other *assistance*." *Oregon State Bar v. Smith*, 149 Or App 171, 183, 942 P2d 793 (1997) (emphasis added). "The practice of law involves, among other things, the application of a general body of legal knowledge to the problems of a specific entity or person." Formal Opinion 2005-101. It also includes explaining documents, making recommendations, and rendering advice. Formal Opinion 2005-115.

¹ *Oregon Bar Bulletin*, (Nov., 2005).

² *See*, Rule 8.1 ("The applicant shall attest that the applicant did not engage in the practice of law except where authorized to do so during the period of the applicant's inactive status.").

For example, providing “procedural and substantive advice on legal issues and [advising people] how to fill out forms” constitutes the practice of law. *State ex rel. Frohnmayer v. Consumer Sounding Bd., Inc.*, 114 Or App 41, 43, 834 P2d 467, *rev. denied*, 314 Or 574, 840 P2d 1296 (1992). Merely advising a foreign national which immigration forms to file and to travel to Mexico for an embassy interview constituted the practice of law in *Oregon State Bar v. Ortiz*, 77 Or App 532, 713 P2d 1068 (1986).

Similarly, “personal contact between defendants and their customers in the nature of consultation, explanation, recommendation or advice or other **assistance** in selecting particular forms, in filling out any part of the forms, or suggesting or advising how the forms should be used in solving the particular customer's marital problems” constituted the practice of law in *Oregon State Bar v. Gilchrist*, 272 Or 552, 563, 538 P2d 913 (1975) (emphasis added). Assisting people, even when couched in terms of “suggestions” constitutes the practice of law if the assistance or advice “involves the application of legal principles.” *Oregon State Bar v. John H. Miller & Co.*, 235 Or 341, 344, 385 P2d 181 (1963).

Mr. Roberts admits to doing even more than those who engaged in the unlawful practice of law in the above instances. He states that he has “assisted businesses in complying with state and local laws regulating their activities.” It appears, then, that Mr. Roberts has engaged in the practice of law during his inactive status, making him ineligible for reinstatement.

2. Alternatively, if Mr. Roberts has not violated the practice bar, then he should be required to take the bar exam, the ethics portion of the bar exam, or pass a significant educational requirement.

A. Issue: what is an appropriate educational requirement?

Rule 8.1 (c) requires the Board of Governors to consider the learning and ability of the applicant. The BOG may require as a condition precedent that the applicant take and pass the bar examination or successfully complete a prescribed course of continuing legal education.

Mr. Roberts has not practiced law since 1989.³ Consider this question: would you refer a loved one to a lawyer who has not practiced law since the 1980s?

³ Although Mr. Roberts has been officially inactive since January, 1996, he indicated in a voters’ pamphlet, that his short legal career extended from only 1980 into 1989. (Exhibit 2).

B. Reply to possible response: “I’m running for Supreme Court Justice.”

The Board of Governors has a duty to protect the public. Mr. Roberts might try to argue that the BOG need not prescribe a significant educational condition precedent based upon an assurance that he does not intend to practice law for hire. Instead, his application notes that he may run for the Oregon Supreme Court. In my opinion, Mr. Roberts’ motivation should encourage the BOG to require a higher standard for education, not a lower one. I hope for Supreme Court justices and candidates who are brilliant and who have been struggling actively with legal conundrums for decades, rather than a legal dabbler who is a perennial political candidate.

C. Reply to possible response: “I headed BOLI.”

Mr. Roberts served as Commissioner of the Bureau of Labor and Industries (BOLI), an agency that engages in much legal work. I requested from BOLI all of the writings and speeches of Mr. Roberts, pursuant to the public records law. BOLI was unable to come up with much that could be attributed to Mr. Roberts, personally.⁴ Certainly, there was nothing that I would consider legal writing.

It is my understanding that Mr. Roberts was a rather disengaged, titular head of the agency. I understand that, quite often, Mr. Roberts did not even write legislative testimony when he appeared before committees, preferring to speak off-the-cuff. My public records search yielded little evidence that Mr. Roberts exercised any legal abilities that would substitute for the active practice of law and the continuing legal education that the rest of us accomplish. I found nothing to indicate that he had any experience writing legal briefs during his tenure at BOLI.

For the public’s sake, one would hope that every lawyer would have recent training or experience in legal writing. We should apply an even higher standard of training or experience for a lawyer seeking to embark on a new career that involves resolving complex legal issues and writing opinions for the Supreme Court.

D. The limited record indicates a need for significant education before readmission to the bar.

Mr. Roberts’ disciplinary file contains an exchange showing that he lacks even the most fundamental understanding of the burden of proof. During one of his campaigns, Mr. Roberts issued a press release attacking two legislators as “pro-crime legislators.” Mr. Roberts wrote:

⁴ For example, Commissioner’s Final Orders are drafted by administrative law judges not the Commissioner.

“Their opposition to anti-crime measures is not surprising, Roberts said, since both are heavily backed by the Oregon Trial Lawyers Association, which Roberts characterized as ‘the state’s leading pro-crime lobbying group.’ * * *

Roberts admitted that crime in Oregon represents a huge industry, and that Drug money has a corrupting influence throughout our society, so it is not surprising that some of it finds its way into politics. He pointed out that laws protecting attorney-client confidentiality make it possible for a substantial amount of that drug money to be filtered through lawyers into political action committees such as that set up by OTLA.”

(Exhibit 3).

Art Johnson, the 2006 recipient of the prestigious Own M. Panner Professionalism Award and past President of OTLA wrote to Mr. Roberts, advising him that OTLA works on civil law matters and that his press release was false and libelous. Mr. Johnson asked Mr. Roberts “in decency and fairness [to] withdraw the statements and issue a full apology.” (Exhibit 4).

In response, Mr. Roberts acknowledged that Oregon lawyers who associate professionally through the Trial Lawyers Association represent civil plaintiffs. Nevertheless, he conditioned any retraction on proof that his self-described “speculation” is false:

“[R]egarding the possibility that some drug money might be filtered into the political statement [sic] through attorneys, I find it hard to believe that you believe this statement is false, much less libelous. You may not believe that it does happen, or may think that it is extremely unlikely or happens very rarely, but I don’t think you can honestly say that it isn’t possible.”

(Exhibit 5, emphasis in original).

In my opinion, the above exchange shows that Mr. Roberts needs significant legal education to re-learn the most fundamental legal concepts. Please ask yourself if you would hire a lawyer who exhibits this type of reasoning. Ask yourself if you would hire a lawyer who has not (lawfully) practiced law for 17 years. If your honest answer is “no,” then you should condition any reinstatement upon passing the bar examination, passing the ethics portion of the bar exam, and / or completing a significant course of legal education.

3. Conclusion

In response to your request, I have provided information on Mr. Roberts. The information indicates that Mr. Roberts probably engaged in the unauthorized practice of law, and, therefore, is ineligible for reinstatement.⁵

If further investigation reveals that Mr. Roberts's legal work does not constitute the practice of law, then you must consider an appropriate education pre-condition to admission. The Rules provide for retaking the bar exam as a potential condition to readmission. One wonders if there were ever a more appropriate case for imposing the bar exam requirement than this case, in which the applicant has not practiced law for 17 years and has demonstrated a lack of understanding of basic legal concepts. Those of us who have remained active must pass 45 credit hours every three years, on top of our busy practices. If the BOG recommends reinstatement without requiring the bar exam, then the BOG should prescribe a course of education significantly more rigorous than the CLE requirements that apply to practicing lawyers and should require the applicant to pass the ethics exam.⁶

Respectfully Submitted,

Jeff Merrick
OSB No. 84298

⁵ As a member of the profession, the reputation of the entire profession reflects on me. I would feel aggrieved if the BOG recommended reinstatement to someone who had engaged in the unauthorized practice of law.

⁶ I would feel aggrieved if the BOG did not impose an adequate pre-condition to readmission. As an attorney, I have an interest in the quality of the bar, if not an affirmative duty to police fellow members. The overall quality of the bar reflects on each of us.