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RE: Biennial Review of Attorney Fees Under ORS 656.388(4)

Dear Board Members,

Thank you for holding the December 11, 2018 public meeting and inviting comments and testimony regarding the board's biennial review of attorney fees under ORS 656.388. I understand that an advisory committee will be charged with investigating several rule concepts that have been proposed. Based on the comments and testimony submitted at the meeting, I propose an additional rule concept for consideration by the advisory committee and the board.

Proposed Rule Concept: Fee Objections and Defense Fees

One way to address the reasonableness of fees without adopting or modifying the rules governing the amount of fees is to narrow the number of fee disputes that come before the board. It is my experience that fee objections are routine, basic, and formulaic, because there is no downside to making such an objection. That is, fees are *never* increased for responding to an objection and the objection may often result in a modest decrease in the requested fee, *e.g.*, my testimony regarding a \$1,515 reduction from a requested \$11,515.

To combat routine fee objections, I suggest a rule that requires the board to allow a requested fee *unless* there is a timely objection by a party and the objecting party discloses in detail the gross amount of defense legal fees, costs, and fees charged in the case. I suggest the following rule language:

OAR 438-015-0027

Objection to Requested Attorney Fees Required

(1) In any case in which the board is required to allow or award a reasonable attorney fee, if a claimant requests a specific fee amount, the board shall allow the amount requested unless an insurer or self-insured employer objects to the request within 14 days of the request.

(2) If the insurer or self-insured employer timely objects to a fee request under subsection (1), that party must, along with the objection, disclose to the board and to all other parties, the gross amount charged for legal fees, costs, and expenses along with a detailed explanation of the costs, expenses, and fees incurred.

The above proposed rule should prevent or reduce *pro forma* objections to only those cases in which there is a genuine dispute about the reasonableness of the fee requested. The rule should discourage routine and formulaic objections levied in an attempt to cull the expected ~10% from a requested fee. Additionally, the disclosure requirement creates a more complete evidentiary record, adding information relevant to deciding a dispute. Specifically, it is relevant to several of the current factors, such as the time devoted to the case, the complexity of issues, the value of the interests involved, and the skill of the attorneys involved.

If you have questions, please feel free to contact me.

Sincerely,

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