

## Oregon State Bar

### Special Meeting of the Board of Governors

March 11, 2016

1:30 p.m.

Oregon State Bar Center

Tigard, Oregon

#### 1. Open Agenda

A. Call to Order

B. DSRC Recommendations

Action

Exhibit

1. Professional Adjudicator
2. SPRB and DCO Roles and Responsibilities
3. Extent of Volunteer Involvement
4. Records of Disciplinary Matters
5. Other Process Amendments

#### 2. Consent Agenda

A. DSRC Recommendations - Other

Action

Exhibit

#### 3. Good of the Order (Non-Action Comments)

A. Comments from Members of the OSB

Exhibit

B. Notes from January 19-21 Telephone Conferences

Exhibit

C. Comments from Members of the Public

Exhibit

D. Comments from OSB Disciplinary Counsel

Exhibit

#### Helpful links:

[DSRC Report](#)

[DSRC Minority Reports](#)

[DSRC Website](#)

**Exhibit A**  
**Disciplinary System Review Committee Recommendations**  
**Board of Governors Special Meeting**  
**March 11, 2016**

**1. Professional Adjudicator**

(16) Oregon should establish a professional adjudicator position.

*If YES to (16), consider:*

(12) Retain the regional Disciplinary Board panels and the State Chair, but eliminate Regional Chairs.

*If NO to (16), (12) should be rejected as inapplicable.*

**2. SPRB and DCO Roles and Responsibilities**

(8) SPRB jurisdiction over a matter should end once it authorizes the filing of a formal complaint or a letter of admonition.

*If YES to (8), the following would also likely be “yes” in order to be consistent with (8), but can be considered independently:*

Authority to determine resolution and appeal

(3) DCO should have sole authority to enter into diversion agreements for lesser misconduct.

(4) After the SPRB has authorized the filing of a formal complaint, DCO should have sole authority to enter into mediation and agree to a resolution, to negotiate Discipline by Consent (settlements), and to decide whether to appeal a trial panel decision.

Authority to initiate special proceedings

(6) DCO should have sole authority to initiate temporary suspension proceedings because of a lawyer’s disability or to protect the public during the pendency of discipline investigations and proceedings.

(7) DCO should be responsible for reporting to the proper prosecuting authority upon its finding that a crime may have been committed, without the need to seek SPRB authorization to do so.

(19) DCO should have sole authority to initiate reciprocal discipline proceedings; there should be a rebuttable presumption that the sanction in Oregon will be of the same severity as in the original jurisdiction.

(22) DCO should have authority to initiate temporary suspension proceedings when a lawyer has been convicted of a crime and where immediate and irreparable harm will result if the lawyer is not suspended.

*If **NO** to (8), the following would also likely be “no” but can be considered independently in an effort to streamline aspects of the process:*

Authority to determine resolution and appeal

(3) DCO should have sole authority to enter into diversion agreements for lesser misconduct.

(4) After the SPRB has authorized the filing of a formal complaint, DCO should have sole authority to enter into mediation and agree to a resolution, to negotiate Discipline by Consent (settlements), and to decide whether to appeal a trial panel decision.

Authority to initiate special proceedings

(6) DCO should have sole authority to initiate temporary suspension proceedings because of a lawyer’s disability or to protect the public during the pendency of discipline investigations and proceedings.

(7) DCO should be responsible for reporting to the proper prosecuting authority upon its finding that a crime may have been committed, without the need to seek SPRB authorization to do so.

(19) DCO should have sole authority to initiate reciprocal discipline proceedings; there should be a rebuttable presumption that the sanction in Oregon will be of the same severity as in the original jurisdiction.

(22) DCO should have authority to initiate temporary suspension proceedings when a lawyer has been convicted of a crime and where immediate and irreparable harm will result if the lawyer is not suspended.

(30) In proceedings before the SPRB, the Respondent should be provided with the entirety of DCO’s recommendation and an opportunity to submit a response to the SPRB.

*[Current practice is to provide Respondent with the factual summary portion of the memorandum, but not the legal analysis. This is based on exemptions available under the Oregon Public Records Act and a determination that the SPRB is a client under the current rules.]*

### **3. Extent of Volunteer Involvement in Process**

(2) DCO's dismissal of a complaint for lack of probable cause should be final and should not be subject to review by the SPRB.

*[ABA recommended delegating review to the SPRB chair, but did not recommend eliminating a complainant's ability to seek a review.]*

(11) The Local Professional Responsibility Committees should be eliminated.

*[ABA, DSRC and DCO concur in recommendation. Requires amendment to Bar Act.]*

### **4. Records of Disciplinary Matters**

(18) Records of dismissed complaints should be retained for only three years and then should be considered "expunged."

*[ABA recommended establishing a retention policy in court rule, but did not specify a period of time. Current retention policy is 10 years after dismissal.]*

(26) Amend the Bar Act to provide that complaints of misconduct and all information and documents pertaining to them are confidential and not subject to public disclosure until either (a) the SPRB has authorized the filing of a formal complaint, or (b) the complaint has been finally resolved without SPRB authorization to file a formal complaint.

*[Not an ABA recommendation; Recommended by DSRC. Requires amendment to Bar Act.]*

### **5. Other Miscellaneous Process Amendments**

(10) In exercising its discretion to decline to authorize prosecution, the SPRB should also consider (a) the lapse of time between the alleged misconduct and the SPRB's consideration of the matter, and (b) whether, given the relative seriousness of the misconduct and the likely sanction, formal proceedings are an appropriate use of resources.

*[Discretion currently exists in BR 2.6(f). See Recommendation (9).]*

(24) The Bar Rules should set out a menu of the requirements for suspended or disbarred lawyers regarding notice to clients, disposition of client files, etc., from which the parties in a negotiated resolution or the final adjudicator can select based on the circumstances.

*[BR 6.3(b) requires a disbarred or suspended attorney to "take all reasonable steps to avoid foreseeable prejudice to any client" and to comply with all applicable laws and disciplinary rules.]*

(25) In making its decision to pursue formal proceedings, the SPRB should find “cause for complaint,” which incorporates probable cause and a reasonable belief that the case can be proved by clear and convincing evidence.

(27) Amend BR 4.1 to conform formal discipline complaints to Oregon civil pleading practice.

(28) Eliminate from reciprocal discipline lawyers who resigned prior to hearing on pending charges in another jurisdiction.

(31) Permit Respondents to waive a trial panel at the time of filing the answer.

**Exhibit B**  
**Disciplinary System Review Committee Recommendations**  
**Board of Governors Special Meeting**  
**March 11, 2016**

(1) The SPRB should be appointed by the Supreme Court on nominations from the BOG, with members eligible for reappointment to a non-consecutive term.

*[No opposition expressed. May require amendment to Bar Act.]*

(5) DCO should have sole authority to amend formal complaints to correct scrivener errors, drop charges, delete factual allegations, or add new non-substantive allegations, subject to the discretion of the appropriate DB authority.

*[No opposition expressed. The rules currently provide for this. See BR 2.3(b)(3), 4.1 and 4.4(b). In practice, DCO has brought all amendments to the SPRB, but is not opposed to exercising discretion in these matters.]*

(9) The SPRB's existing discretion to direct, in some circumstances, that no formal complaint be filed notwithstanding the existence of probable cause should be continued.

*[BR 2.6(f) currently allows this. ABA recommended deleting but no opposition expressed to its continuation.]*

(13) Trial panels should be appointed promptly upon the filing of the answer or upon the expiration of the time allowed to answer.

*[ABA recommended; DSRC recommended. No opposition expressed.]*

(14) The Bar Rules should be amended to clarify that the trial panel chair decides all pre-hearing motions and conducts prehearing trial management conferences.

*[BR 2.4(h) currently provides for this. No opposition expressed, however, to clarifying the rules to say that the trial panel chair would not preside at mediation. See also BR 4.6 and Recommendation 15.]*

(15) Settlement conferences requested by either DCO or the accused lawyer should be conducted by a mediator selected by mutual agreement of the parties.

*[BR 4.9 currently provides for this. No opposition expressed to continuing.]*

(17) The neutral terms "Respondent" and "finding of misconduct" should be substituted for "Accused" and "guilt" throughout the discipline process.

*[ABA recommended; DSRC recommended. No opposition expressed.]*

(20) DCO may opt, instead of or in addition to a reciprocal proceeding, to request authority from the SPRB to file a formal complaint based on the facts of the discipline matter in the other jurisdiction, in which case there is no presumption or preclusive effect of the other jurisdiction's findings and conclusions as to the facts or the sanction.

*[The rules currently provide for this. See BR 3.5(a), 4.1(a) and RPC 8.5(a). No opposition expressed to continuing and clarifying the rules on this issue.]*

(21) A two-step process should be implemented that allows for the imposition of a temporary restraining order in exigent circumstances, followed by an order for interlocutory suspension following a hearing if requested.

*[No opposition expressed.]*

(23) Statutory immunity should be extended to volunteer probation and diversion monitors.

*[No opposition expressed. Requires amendment to Bar Act.]*

(29) Authorize DCO to initiate transfers to Involuntary Inactive Status for Mental Incompetency or Addiction.

*[BR 3.2 does not require SPRB involvement (unlike BR 3.1), but no opposition expressed to clarifying.]*

To: President Ray Heysell, Oregon State Bar  
From: Hon. Robert D. Durham, Senior Judge  
Re: Comments on Report of Disciplinary System Review Committee  
Date: February 5, 2016

I received your January 13, 2016, invitation to submit comments regarding the November 19, 2015, report of the Disciplinary System Review Committee. Thank you for the opportunity to comment. The following comments are mine alone and are not attributable to either the Oregon Supreme Court or the Oregon Judicial Department.

I did participate in the January 21 group telephone conference call with several Oregon State Bar Board of Governors members and other callers regarding the DSRC report. During that conference call, Board of Governors members Joshua L. Ross and Michael D. Levelle requested that I submit my comments in writing. I am happy to do. This memorandum responds to their request.

The DSRC report is generally well-prepared and quite helpful. The report notes that its discussion and recommendations touch on a number of areas of the Bar's rules and not only those topics mentioned in the previous recommendations of the ABA evaluation committee. I too will follow that approach in my comments.

At page 3, footnote 5, the report suggests the use of distinctive terminology in referring to the "dismissal" of complaints from clients to the Client Assistance Office and those complaints approved by the SPRB. I agree with that suggestion but I also conclude that the ambiguity of the word "complaint" creates problems that are not necessary. As that footnote indicates, the term "complaint" can refer to more than one legal act. The resulting uncertainty creates needless confusion for the Bar and the public.

For example, the Bar may inform a lawyer that a client has submitted a "complaint" of misconduct and seek the lawyer's response. After the Bar receives the lawyer's response, the Bar may indicate that it will take no action on the "complaint." Later (perhaps many years later), the lawyer may seek employment or a public office, and may encounter questions about whether the lawyer has been the subject of a "complaint" of professional misconduct. Because the rules do not carefully define what constitutes a "complaint," the lawyer will have to explain that there was a "complaint" of unethical behavior from



a client but that the Bar “dismissed” it after an investigation. That is true even though most lawyers understand that a genuine “complaint” of professional misconduct is a formal complaint issued or approved by the State Professional Responsibility Review Board or the Disciplinary Counsel’s Office, not a letter or telephone call from an unhappy client to the Bar.

To remedy that problem, those who draft the Bar Rules should clarify not only what constitutes a “complaint” of professional misconduct but also what *does not* constitute a complaint. My suggestion assumes, of course, that I am correct in my understanding that a communication to the Bar from an unhappy client, by itself, should not be regarded as a “complaint” of professional misconduct. Clients may communicate to the Bar their unhappiness about their legal representation or their legal circumstances with little or no real understanding of the relevant facts, the law, or the pertinent standards of professional conduct. If the Disciplinary Counsel’s Office looks into a client communication of that sort and concludes that no professional misconduct occurred, the lawyer should not have to report that matter as a “complaint of professional misconduct” for the remainder of his or her legal career.

To that end, the Bar Rules should indicate that a client communication to the Bar about a lawyer’s behavior is a “statement,” “report,” “information,” “notice,” or some synonym of those terms, but should avoid describing the client’s submission as a “complaint” of misconduct. Moreover, the Bar Rules should state that such a client communication *is not* a complaint of professional misconduct under the Bar’s procedures. Finally the Bar Rules should clearly indicate that only a formal charge of misconduct issued or approved by the relevant Bar entity *is* a complaint of professional misconduct under Bar Rules.

The Bar also could help in this regard by avoiding using the term “dismissal” or its equivalent in describing the procedural decision to take no action after an investigation of a client communication about lawyer behavior. The term “dismissal” should be reserved for the determination that a formal complaint of misconduct by the Bar lacks merit and any related legal misconduct proceeding against a lawyer should be terminated.

At page four, in the second bulleted item, the report refers to a lawyer’s failure to answer a formal complaint of misconduct. It is important for the rule drafters to bear in mind that an accused lawyer’s failure to file an answer to a formal complaint of discipline is conceptually distinct from a lawyer’s failure to answer an inquiry from Disciplinary Counsel’s Office about a communication from

an unhappy client. A lawyer has a critically important duty to cooperate with the Bar's efforts to investigate potential charges of misconduct. However, a lawyer is entitled, as a procedural matter, to file an answer to a formal complaint of misconduct from a Bar entity; a lawyer has no duty to do so. The rules should not imply that, by choosing not to file an answer to a formal complaint of discipline, a lawyer is declining to fulfill the duty to cooperate with the Bar.

At page 15, the DSRC report recommends the creation of a new Bar position known as Presiding Disciplinary Judge. The report acknowledges that the new "judge" would not be a "judge" within the legal meaning of that term.

I can predict that the use of the term "judge" for that position likely will be controversial within the community of Oregon judges who do qualify for that label under Oregon law. In 1987, I chaired the Oregon Commission on Administrative Hearings at the request of the Oregon Governor. That Commission studied, among other things, whether to recommend the use of the title "Administrative Law Judge" in statutes describing certain state administrative hearing officers. The Commission received several complaints from sitting judges over the potential application of the term "judge" to administrative hearing officers who were not judges under Oregon law. Despite those complaints, the Commission recommended the change to "Administrative Law Judge" in its report to the Governor and the Legislature. The legislature responded by rejecting that proposed change. However, several sessions later, the Oregon Legislature did adopt that change in terminology for many of the hearing officers who presided over administrative hearings in state government.

I report the foregoing simply to indicate that the deliberations of the Oregon Commission on Administrative Hearings in the late 1980s and the subsequent decision of the legislature, as noted above, may provide helpful context for the recommendation of the DSRC. At present, I take no position on whether the Bar should create a new position known as "Presiding Disciplinary Judge."

At page 17, the report discusses expungement of dismissed complaints of misconduct. Two issues arise from that discussion.

First, the rule drafters must bear in mind the point that I mentioned earlier in this memorandum about the needed distinction between, on the one hand, a communication from an unhappy client about a lawyer's conduct and, on the other hand, a formal complaint of misconduct advanced by a Bar entity. Any discussion of "expungement" must take into account whether the procedural

event that is the subject of “expungement” falls into the first or the second of those distinct categories.

Second, the report must answer the question whether the expungement entitles the affected lawyer thereafter to lawfully treat the expunged event as if it did not ever exist and to so state in any later inquiries about the lawyer’s disciplinary record with the Oregon State Bar from employers, governmental entities, and the like. At present, the report addresses the subject of expungement as if it were only a matter concerning the retention or removal of complaint documents from Bar files.

At pages 17 and 18, the report discusses the subject of reciprocal discipline. The report indicates that the DSRC recommends the adoption of a “rebuttable presumption” that the Bar will impose on an Oregon lawyer disciplined in another state the identical disciplinary penalty imposed by the other state’s disciplinary body or court. The report indicates that the other state’s disciplinary sanction will be imposed by the Bar unless either party “makes a case” for a different sanction.

That passage of the report is difficult to understand. In my view, the adoption of another jurisdiction’s factual findings regarding a disciplinary matter is uncontroversial. However, Oregon has its own standards for appropriate disciplinary sanctions in many cases. There should not be a “rebuttable presumption” (a genuine misuse of that legal term) in favor of another state’s chosen sanction for misconduct committed in another state. That is especially so when Oregon’s rule fails to indicate just what a party must do to “make[] a case” to overcome the so-called “presumption” in favor of the original state’s penalty. At present, the SPRB must make a judgment about what penalty Oregon would impose for similar conduct committed in Oregon. That is a valuable feature of Oregon’s present system and should be retained for any Bar entity or officer responsible for determining the appropriate sanction in the context of reciprocal discipline.

At pages 25 and 26, the report discusses potential changes in the procedures that carry out a lawyer’s involuntary transfer to inactive status. I have two comments.

First, the rules drafters should bear in mind that due process principles apply to a lawyer’s involuntary transfer to inactive status. The affected lawyer must receive, at some meaningful time, a notice of the proposed action and be given an opportunity to respond to the proposed action. In most cases, that

opportunity must precede the formation of the decision to transfer. The rules should expressly provide procedures that comply with the minimum requirements of due process.

Second, the rules should take care not to prescribe requirements that purport to control the proceedings before the Oregon Supreme Court or that may conflict with other aspects of Oregon law. The report's suggestion of a potential request to the court to seal files should be advanced only after the Bar satisfies itself that the sealing of files would be permissible under the Oregon Public Records Law and the "open courts" clause of the Oregon Constitution, Article I, section 10.

Thank you again for the opportunity to comment on the report of the DSRC.

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February 15, 2016

Oregon State Bar Board of Governors

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Re: Recommendations of Disciplinary System Review Committee

Dear Board of Governors,

I was an assistant disciplinary counsel at the Oregon State Bar for 24 years, retiring on October 30, 2015. I participated in the ABA's 2014 study of Oregon's disciplinary system and carefully reviewed its January 2015 Report ("ABA Report"). I also reviewed the Reports (majority and minority) issued by the Disciplinary System Review Committee ("DSRC") in

November, 2015. It is my belief that that several of the DSRC's recommendations are not in the public interest, for the reasons set forth below.

### What constitutes an "improvement" of the disciplinary system?

As stated by the ABA Report, "the primary purpose of lawyer discipline is to protect the public. The actions of all system professionals and volunteers should be toward accomplishing this goal efficiently and effectively." (ABA Report, p. 65).

It follows that any proposal to improve a disciplinary system must either increase public protection or improve the efficiency of the system without sacrificing public protection.

The ABA Report flagged three qualities of a viable disciplinary system: independence (i.e., the ability of Disciplinary Counsel's Office ("DCO") to operate free from internal Bar politics), transparency, and complainant due process. (ABA Report, pp. 35, 40, 65).

Several of the changes proposed by the DSRC (specifically, DSRC Recommendations 2, 3, 4, 5, 8, 10, 25, and 30) contradict the ABA's recommendations, advance interests other than public protection, and patently reduce DCO independence, transparency, and complainant due process.<sup>1</sup> Because they would negatively impact public protection, their adoption would diminish the system rather than improve it.

### Recommendations 2, 3, 4, 5, and 8 -- to reduce SPRB oversight

Recommendations 2, 3, 4, 5, and 8 would reduce the role played by the SPRB.

Currently, the SPRB – a volunteer board independent from the Bar – has oversight over a wide range of dispositions, including dismissals of close cases, appeals of dismissals by DCO staff, diversions, prosecution decisions, and proposed stipulations to discipline. The DSRC recommends that the SPRB's role be reduced to a single function: reviewing DCO's recommendation to prosecute. This means that the SPRB could still say "no" to prosecutions, but could no longer insist on "yes."

Under Oregon's system (current and proposed), DCO is employed at the pleasure of Bar leadership – meaning that the Bar's executive can fire Disciplinary Counsel and her staff. Structurally, this makes DC and her staff vulnerable to political pressure – if they make someone influential enough, mad enough (e.g., by refusing to dismiss or divert, or to settle a

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<sup>1</sup> In a conference call on January 9, 2016, I asked Mark Johnson (the chairman of the DSRC) and Helen Hirschbiel to explain the intended purpose of each of these proposed changes. They referred me to the DSRC's minutes, which I subsequently reviewed.

The minutes mention the following considerations: efficient use of resources, additional transparency for respondent lawyers, prompter resolution, and greater consistency of outcomes. They also mention the desire to reduce respondent lawyers' monetary costs, reputational costs, and emotional distress. The minutes do not mention public protection.

case on terms unreasonably favorable to the respondent lawyer), they could lose their jobs. And even where such pressure is not made explicit, the ordinary human desire to please one's boss (for instance, by cooperating with the agenda of Bar leadership) is likely to affect DC's judgment.

This is why the ABA, for decades, has urged that attorney discipline be removed from the control of state bar associations and placed under the direct control of state supreme courts. The McKay Commission Report, adopted by the ABA in 1992, stated that:

“The disciplinary system should be controlled and managed exclusively by the state's highest court and not by state or local bar associations. This is necessary for two primary reasons. First, the disciplinary process should be directed solely by the disciplinary policy of the Court and its appointees and not influenced by the internal politics of bar associations. Second, the disciplinary system should be free from even the appearance of conflicts of interest or impropriety. When elected bar officials control all or parts of the disciplinary process, these appearances are created, regardless of the actual fairness and impartiality of the system.” (McKay Commission Report, Recommendation 4.)

The ABA Report reiterated the ABA's strong preference for direct judicial control in its 2015 Report, while acknowledging that its team was informed that taking direct control of the disciplinary system away from the state bar in Oregon was “not feasible.” (ABA Report, pp. 35-36.)

However, despite the structural vulnerability of Oregon's system feared by the ABA, my own experience has been that DCO can operate independently from Bar politics. This is not because political pressure is unheard of in Oregon. Not uncommonly, respondent attorneys (sometimes very well-connected and influential attorneys) have complained to Bar leadership that DCO was unfairly prosecuting them. However, these complaints (or their prospect) did not affect the way DCO handled cases. It was only in 2013 that I came to understand and appreciate the mechanism that made this independence possible.

In 2013, a new DC (current DC's immediate predecessor) attempted to dismiss or resolve several discipline cases for reasons that seemed to relate more to who the accused attorney was than what he/she had done. (I will provide specific examples if requested.). However, these attempts were unsuccessful because the rules required prior DC to get SPRB approval, which it refused to grant.

The SPRB is an independent board of volunteers. Unlike DC, it cannot be fired for making politically unpopular decisions. And because it is comprised of lawyers from all over the state, in all areas of practice, as well as public members, it does not have a cohesive political agenda

itself. Its focus is and always has been to protect the public through even-handed enforcement of the disciplinary rules as interpreted by the Oregon Supreme Court.

The ABA did not understand (just as I did not understand before 2013) that the mechanism that allows Oregon DCO to operate independent of bar politics are the rules that give the SPRB authority to review and approve dispositions of cases. (I endorse the excellent analysis of this issue set forth in Richard Braun's minority report). Taking this mechanism away would leave DCO twisting in the political wind, which is precisely the result that the ABA most wants to avoid but that some members of the DSRC seem determined to achieve. As one DSRC member wrote in the record of deliberations (5/18/15): "the office of Disciplinary Counsel is not an independent office, nor, I submit, should it be. Disciplinary Counsel is a position created and funded by and answerable to the Oregon State Bar." (emphasis added).

Public protection dictates that DCO remain independent from Bar politics. Recommendations 2, 3, 4, 5, and 8 are therefore not in the public interest.

Recommendation 26 -- to decrease transparency of disciplinary process

Currently, all of DCO's records are public, with the exception of work product or attorney client privileged information. The ABA report praised this feature of Oregon's system, writing:

"Oregon's broad Public Records Law places Oregon in the unique position of being the only disciplinary jurisdiction in the country to make most of its records, including initial complaints and investigations resulting in dismissal, available for public inspection....Lawyers and the public benefit from the availability of such information, as these documents not only provide educational benefit, but also demonstrate the system's transparency and accountability." Emphasis added. (ABA Report, p. 11.)

The DSRC proposes to amend the Bar Act so that complaints of misconduct will remain confidential (exempt from public disclosure) until the complaint is either dismissed or authorized for prosecution.

This proposal seeks to sacrifice public protection to the interest of accused lawyers' "reputational costs." The DSRC's minutes contain no evidence that Oregon lawyers have suffered unduly – or at all -- under the current system. On the other hand, the McKay Commission – looking at that exact issue more than two decades ago – found that:

"Oregon has fifteen years' experience with an open disciplinary system. Records are public in Oregon from the time a complaint is received. The Commission has found no evidence of harm to lawyers from making these records public. On the contrary, the



Oregon bar proudly supports its open system.” (McKay Commission Report, legislative history to Recommendation 7).

The transparency of its discipline system is something in which the Oregon Bar should continue to take pride. It is not in the public interest to reduce transparency.

Recommendation 2 -- to eliminate complainants’ right to appeal summary dismissals by DCO

Currently, DCO has authority to dismiss complaints outright when it becomes clear to staff that there is not probable cause of a violation. (Cases that are “close calls” are referred directly to the SPRB for decision). However, complainants have the right to appeal to the SPRB for review of staff dismissals.

The ABA praised this feature of Oregon’s disciplinary system as “properly balanc[ing] prosecutorial discretion with due process for complainants.” (ABA Report p. 40).<sup>2</sup>

The DSRC proposes to eliminate this feature. If adopted, Recommendation 2 would enable DCO staff to dismiss complaints without ever having to justify dismissal to anyone. Structurally, this would make dismissal the “easy” option – complaints that are factually, legally, or politically too hard, could be swept under the rug without any negative consequence.

This proposed change is purportedly motivated by a desire to “streamline” the process. However, at most, eliminating complainants’ right to appeal would shorten the process by 6 weeks.<sup>3</sup> And this would be a 6 week period during which the lawyer would have already received the emotional satisfaction of a dismissal letter from staff. Balanced against this very minimal “streamlining” benefit is the perception of complainants – and perhaps the reality – that the outcome of their complaint was influenced by politics, that DCO had a conflict of

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<sup>2</sup> The ABA’s McKay Commission report recommended that all jurisdictions should afford a right of review to complainants whose complaints are dismissed prior to a full hearing on the merits. (McKay Commission, Recommendation 8.6), writing that:

“The way many disciplinary systems treat complainants does not inspire confidence in the process...Providing complainants a right of appeal is more than a mere public relations device,...[while i]t is true that in jurisdictions providing this right, few of the dismissals appealed and remanded for further investigation ultimately result in a finding of misconduct,...,[n]evertheless, a complainant appeal procedure does provide a useful check on the effectiveness of disciplinary counsel's initial screening of complaints and on the quality of investigations....A complainant's appeal procedure [is also] important to guard against the "dumping" of disciplinary cases...” (McKay Commission Report, comments to Recommendation 8).

<sup>3</sup> The SPRB meets every 6 weeks.

interest, and/or that their complaints were not fully heard or adequately considered. The balance weighs heavily in favor of public protection.

Recommendation 30 -- to require DCO to share its legal analysis and recommendations with respondents

DSRC proposes to require DCO to share its legal analysis and recommendations with respondent attorneys before prosecution is authorized, and also to allow respondent attorneys an additional opportunity to be heard by the SPRB. The contrast between this recommendation and Recommendations 26 (making the process less transparent to the public) and 2 (eliminating an opportunity for complainants to argue their case to the SPRB) suggests that the DSRC is more concerned about protecting attorneys from the public than vice versa.

Currently, DCO is required (upon request by the accused attorney) to share all factual information developed in a case. This includes DCO's factual summaries of cases, notes, and records of witness interviews. Thus, DCO's current duty to disclose already goes beyond the ethical obligation owed by criminal prosecutors to share all evidence that is or might be mitigating.

However, DCO is not required to share its recommendations and legal analyses. These communications to the SPRB -- DCO's client -- are attorney client privileged. If DCO loses its ability to assert the attorney client privilege, it will also lose its ability to speak frankly with the SPRB about the pros and cons of a case.

Of course, DCO could try to adjust by simply not committing its analyses/recommendations to writing -- telling the SPRB everything orally. But that would clearly not be in the interests of transparency -- how could the public ascertain afterward what happened in a disciplinary case if nothing was put in writing along the way? But more importantly, some (perhaps most) discipline cases are factually and legally complicated. If you build a house without a blueprint, it had better be a really simple house. Similarly, if you build a case without written legal analysis, it had better be a really simple case.

Is there any prosecution, enforcement, or litigation proceeding -- anywhere -- that requires one party's attorneys to share their complete work product, analysis, and recommendations with the other party? If there is, the DSRC's minutes don't mention it and I don't know what it is. Recommendation 30 would hamstring DCO's ability to communicate with its own client.

Then (as proposed), after DCO shares its complete legal analysis and charging recommendations, respondent attorneys would be allowed an extra chance --arguing fine distinctions of the facts and law cited by DCO -- to argue that charges should not be authorized. This proposal contemplates a secret, one-sided "mini-trial" and would tilt the playing field almost ludicrously in favor of respondent attorneys.

The ABA did not propose this recommendation and -- as far as I know -- no other discipline system in the country so blatantly favors respondent attorneys. If adopted, this proposal would

reduce DCO independence (because of the risk of political blowback from DCO's frank analyses and recommendations), would likely reduce the transparency of the process, and would make proving disciplinary violations much more difficult. This is obviously not in the public interest. It cannot even be justified in the interest of efficiency, because it would insert another layer to the pre-prosecution process.

Recommendations 9 and 10 – to increase the circumstances under which the SPRB can decline to prosecute, even where there is probable cause

Currently, BR 2.6(f)(3) allows the SPRB to decline to prosecute even where it has found probable cause, if certain circumstances are present.<sup>4</sup> The ABA recommended that this rule be eliminated altogether, writing:

The SBRB should be making a probable cause determination based on the information relevant to the allegations in the matter before it. The factors set for in this Rule for why the SPRB can dismiss a complaint despite the existence of probable cause exceeds, in [our ] opinion the purview of a probable cause finding body.” (ABA Report, p 50).

Not only does the DSRC reject the ABA's recommendation (DSRC Recommendation 9), it seeks to expand the circumstances under which the SPRB can dismiss a complaint despite finding probable cause to include “(a) the lapse of time between the alleged misconduct and the SPRB's consideration of the matter, and (b) whether, given the relative seriousness of the misconduct and the likely sanction, formal proceedings are an appropriate use of resources.” (DSRC Recommendation 10).

While I am confident that the SPRB would continue to exercise restraint when exercising its discretion under this rule, DSRC's Recommendation 10 is telling in its commitment to creating yet another escape hatch for lawyers.

This proposal is not in the public interest.

Recommendation 25 – to increase the standard of proof required for the SPRB to approve prosecution.

Currently, the evidentiary standard required to justify prosecution on disciplinary charges in Oregon is “probable cause.”

The DSRC proposes to increase the standard of proof to ““a reasonable belief that the charges can be proved by clear and convincing evidence.” I am unaware

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<sup>4</sup> These circumstances include: the attorney's mental state; whether the misconduct is an isolated event or part of a pattern of misconduct; the potential or actual injury caused by the attorney's misconduct; whether the attorney fully cooperated in the investigation of the misconduct; and whether the attorney had a prior record of discipline.

(and the DSRC's minutes do not reflect the existence) of any attorney discipline system that inserts the clear and convincing standard into the charging decision.

This proposed change seeks to ensure that cases can be authorized for prosecution only if they are obvious winners from the outset, i.e., before formal discovery. If this proposed change were applied retrospectively, many if not most of the cases that DCO successfully prosecuted in the past would have been dismissed without charges being filed.

This proposal is not in the public interest.

### Conclusion

DSRC's Recommendations 2, 3, 4, 5, 8, 10, 25, and 30 read less like a legitimate attempt to improve the disciplinary system than a wish list of ways to render DCO ineffective to discipline attorneys. If adopted, they would increase DCO's vulnerability to political pressure. They would allow respondent lawyers to look into the very thought processes of the disciplinary prosecutors, while reducing the information available to the public. They would give accused lawyers an extra opportunity to be heard while taking away complainants' right to appeal staff dismissals. At every step of the process, they would create additional escape hatches for lawyers to avoid discipline.

The DSRC proposes a system in which DCO could dismiss any complaint without oversight or consequence, but would face additional noise, fury, and possible political blowback from any recommendation to prosecute. Making complaints too easy to dismiss while making them too hard to prosecute will inevitably result in a self-serving system that does not protect the public.

It was my privilege to work under the current DC for more than a year. She is a fine and hard-working lawyer who sincerely believes in public protection. It was my even greater privilege to work for more than two decades with dozens of lawyers and non-lawyers on the SPRB. I came to know all of them as conscientious individuals willing to donate thousands of hours to the cause of honest self-regulation. They inspired me and educated me. I am concerned that if DSRC Recommendations 2, 3, 4, 5, 8, 10, 25, and 30 are adopted, honest self-regulation in Oregon will be replaced by a much more cynical and self-protective system.

Thank you for this opportunity to express my views.

Mary Cooper

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February 29, 2016**

Oregon State Bar Board of Governors  
(By email)

Re: Proposed Disciplinary Changes

Folks,

I am generally too ill informed to have an opinion about how the Bar should do things. But because of a recent discussion with a retired assistant disciplinary counsel involving a different matter, I decided to take the time to read the reports and to see if I had any thoughts that might be helpful. Now that I have taken that time, I have an investment in expressing some opinions, recognizing that I am not competent to know what is likely to be “helpful”:

1. The issues are incredibly “dense” in the sense that understanding the implications of the proposed changes requires an in depth knowledge about the existing process and how it has in fact worked. The number of proposed changes is so great that I wonder if it makes sense to make decisions in stages, starting with the most obvious.
2. The system is not, as far as I can tell, broken, at least not so far as unfairly villainizing lawyers. Some want to raise the bar to discipline (a natural pun). The enhanced standard for deciding whether to proceed may or may not constitute a practical change. The overall prosecutorial discretion is reasonably broad to begin with. When I read the disciplinary results in the Bulletin, it seems to me that the behaviors being “prosecuted” tend to be extremely serious transgressions.

If the goal is to protect attorneys from unjustified prosecutions, it appears to me to be a solution looking for a problem that I have not observed. My guess is that if it has any impact, it will provide less oversight than is needed.

The ideal role of lawyers is to assist in solving problems, resolving disputes and efficiently mediating transactions. The inherent conflict between doing that well on one hand, and covering overhead and earning a substantial living on the other hand, has, in my opinion, never been more apparent. The validity of that observation is supported by the ability of successful mediators to read about a dispute for a few hours, meet with the parties for a day (mediations always seem to be resolved at the end of time allotted) and

forge a resolution.

This observation suggests that the disciplinary system is not very robust at all, let alone too robust. In the medical area, surgeons are sometimes cautioned based on whether they too often recommend ill advised, expensive surgery. Lawyers do not have any such oversight.

3. I am unaware of any adverse consequences from the existing transparency. It appears to me to be another solution to a non-problem. I see no reason to reduce transparency in any manner.

To expand, there are two human tendencies: 1) To try to do what is right without regard to self-interest; and 2) To try to act in one's self interest to the extent that the law/rules permit it. If attorneys act in accordance with the former, they are unlikely to run afoul of the Bar, especially considering prosecutorial discretion.

I have difficulty understanding why attorneys should be protected until there has been a resolution. I would leave transparency alone and let the chips fall where they may. I think a member of the public should be entitled to know if a lawyer is currently in the midst of a disciplinary issue. Criminal defendants generally have no protection, and the implications there are much more severe.

4. Requiring DCO to disclose to the "Respondent" all of the thought processes and analysis is highly unlikely to result in an improvement in the system, and is likely to do the opposite. My experience with "ethics" attorneys hired by others and used in both disciplinary matters and in third party litigation has been extremely poor. I have mostly seen terrible arguments and behaviors presented with an arrogance that is shocking. DCO should not have added to their "full plates" being confronted by more of the same, as their honest questions are used against them.

The Bar's attorneys should be allowed to develop their analyses and to disclose their thought processes as they deem appropriate. Forcing them to consider the "blow back" they will receive from the Respondent will distort and damage their capacity to function fully and completely. Let the DCO's office exercise its own discretion whether and what to share. The Respondent has plenty of opportunity to provide his or her own analyses.

5. There are some benefits, and burdens, of including volunteers in the system in the current broader role of the SPRB. Perhaps that broader role introduces some element of inconsistency and delay. But, even though few serve, or are directly impacted, there may be a peripheral benefit. From what I can tell, the SPRB does not abuse its authority and discretion. Therefore, the secondary benefit of involving such volunteers in the process would seem to provide an educational/experiential benefit to those who participate in its current extended form.

I am reminded of a famous sociological observation that might have some bearing on how to proceed. In the 1800's there used to be a contest at fairs where a reward was given to the person who mostly closely guessed the weight of a bull. Usually no one was close. But someone decided to add up all the guesses and divide by the number of guesses. It turned out that the average guess was usually very close. Participatory "democracy" has some societal benefits. Reducing that participation and responsibility may result in a reduction in the quality of the SPRB's involvement, and the overall benefit to the legal community in having members so involved.

6. Enough concern has been expressed about the potential for political bias and "corruption" that I would hesitate to change the existing structure to the extent that those with experience are expressing concern as to this potential cost. My involvement with government staff has caused me to conclude that they have a tendency to "punt" once they have had one experience, with someone who is supervising them, expressing what appears to be a politically motivated question. It is neutering.

#### CONCLUSION

To the extent that many of the proposed changes are intended to protect attorneys, I have not seen the supporting empirical evidence that lawyers tend to be treated unfairly. The breadth of prosecutorial discretion, and its actual implementation, appears to work most of the time. There will always be disagreement at the ends of the bell curve. Trying to cure a perceived failure by attempting to state more concrete rules, especially when the proposed rules favor less oversight, does not always make a better system. But it does provide the impetus for self-examination.

If the process is too slow, it can be accelerated without changing the process. The handling of civil litigation today versus decades ago has proven it.

I am aware of the opinions of those who have some hands on experience of the potential dangers of reducing the current role of the SPRB. The impetus to do so seems to be based on somewhat emotional impulses that are then rationalized, as lawyers are used to doing.

Ultimately, the large number of folks on the list of recipients tells me that a great deal of talent and insight is being brought to bear. I only know some of you, and I have always been extremely impressed by your intellectual honesty. Good luck.

Sincerely,



John M. Berman

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ADMITTED IN OREGON  
AND WASHINGTON

March 2, 2016

*via email only*

Oregon State Bar Board of Governors

Subject: ***IN RE: COMMENTS ON DISCIPLINARY SYSTEM REVIEW  
COMMITTEE RECOMMENDATIONS***

I have been involved in Oregon's attorney ethics and disciplinary process in one capacity or another since 1982. I have served as volunteer trial counsel representing the Bar in Formal Proceedings, have served as Assistant Disciplinary Counsel in Disciplinary Counsel's Office, and have represented and defended clients before the Oregon State Bar since 1992.

Since 1997, my law practice has emphasized the representation and defense of many attorneys in both Oregon and Washington. I have also been privileged to speak on professional responsibility topics at continuing legal education seminars.

I have carefully reviewed that January 2015 ABA Report, the Majority (November 19, 2015 report) and Minority Reports (December 7 and 14, 2015) of the Disciplinary System Review Committee, as well as comments submitted by former SPRB chairs and others.

It is clear that the Committee worked very diligently and I appreciate and concur with many of its recommendations. However, I object to reducing the substantive and procedural authority of the SPRB. I concur with the objections and share the concerns and many of the observations that are addressed and well articulated in both Mr. Braun and Mr. Weill's minority reports. I also join with others who have voiced similar concerns.

I specifically disagree with majority recommendations 2, 3, 4 and 5. I do not believe reducing the SPRB authority and review responsibilities improves the due process that our rules provide for. These recommendations should not be adopted under the current circumstances.

Needless to say, I have not agreed with every decision that has been made by the SPRB over the years. But it has a vital role in our system- as is



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well acknowledged. I think the Board performs its duties with great diligence and brings broad practice and geographical experience to this process. The SPRB's independence from Disciplinary Counsel and its oversight responsibilities are essential to bringing an important sense of credibility to the system. More than one set of eyes and opinions are involved in the decisions that are made in this very important process.

Public and volunteer attorney involvement and oversight in our disciplinary system provides the best safeguards to the public and the profession. I believe that the members of the SPRB generally know what they are getting into when they sign up.

I have a great deal of respect for my colleagues in both the Client Assistance Office and Disciplinary Counsel's Office. Ms. Evans and her team are diligent and highly professional individuals. However, I believe that reposing the vast majority of decisions to discretion of Disciplinary Counsel's Office, and limiting the SPRB's decision making and appellate functions is simply not recommended.

Respectfully submitted.

Very truly yours,



Christopher R. Hardman

CRH/

~~Enclosure/Attachment~~

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March 2, 2016

Board of Bar Governors  
Oregon State Bar  
16037 SW Upper Boones Ferry Rd  
Tigard, OR 97224

Re: DSRC Proposals

The DSRC proposals should be rejected in total for several reasons:

- No one supporting these changes has presented one argument on how these changes (1) *Better protect the public and clients*; (2) *Comply with Oregon's legacy of transparency an oversight*; OR (3) *Provide confidence to a skeptical public that Oregon lawyers can discipline themselves*.
- In its present form the SPRB acts to advise and provide membership and public oversight of the disciplinary process. The proposed changes would remove SPRB oversight and advice on what charges to be dropped and what charges will be pursued. The proposed changes would allow the Disciplinary Counsel to make settlement decisions, drop charges, and even dismiss cases with ***no oversight whatsoever***.
- The proposed changes will make the already political position of DC even more political. Only the DC and the Executive Director would have knowledge of what arrangement was made with an accused attorney. The proposals will promote backroom deals.
- The history and purpose of the rule changes are to remove substantive SPRB oversight of the Disciplinary Counsel. Bigger law firms specializing in defending accused lawyers have pushed this agenda. They are the main proponents now.
- Bigger law firms already have more influence on the Bar and its staff. Bigger law firms will apply that pressure more often with no SPRB advising and providing oversight.
- The DRSC's proposals (most on very close votes) go far beyond any recommendations of the ABA. This shows a specific agenda by Bar staff and members of the DRSC.
- Prior DC John Gleason found the SPRB oversight inconvenient and was stymied in 2013 when he attempted to settle disciplinary cases without following the rules. I was there.

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BOG  
3.2.16

I was a member of the State Professional Responsibility Board 2010-13 and chair for 2013. The 2013 board alerted the Board of Governors by petition that the bar staff, notably Disciplinary Counsel John Gleason, was pursuing a rule change and taking actions the SPRB unanimously found alarming. After attempting to work through Executive Director Sylvia Stevens, who dismissed our concerns upon discussing the matter only with Gleason, the board petitioned the BOG.

While the BOG never did directly engage the SPRB (a board it appointed for the express purpose of oversight of the disciplinary process) it did table Gleason's proposals and invited the ABA to review our system, again. The ABA review begat the DSRC. Gleason moved on.

Bar staff, notably Sylvia Stevens, put a thumb on the scales by making a very curious appointment of Barnes Ellis as a subcommittee chair. While Mr. Ellis was later cleared by the Supreme Court, at the time he was appealing a conviction from a trial panel that he had committed a conflict of interest violation. Ms. Steven's appointment of Mr. Ellis is a tribute to the intense influence the bigger law firms already have on the bar. The new proposals will make this worse.

The chair of the DSRC, Marc Johnson Roberts, is now a paid member of the bar staff and was curiously used to promote the DSRC's proposals during the call-in conferences on the rule changes. Mr. Johnson Roberts (at least in the Region 1 call) was extremely defensive of criticism of the DSRC proposals. No matter the truth the employment looks to be a reward.

Whatever Mr. Ellis's or Mr. Johnson Roberts's good points, the optics are terribly wrong. The implication is a bar staff responding to the bigger law firms' desires to influence the disciplinary process without membership and public oversight provided by the SPRB. The presence of Mr. Ellis and the recent employment of Mr. Johnson Roberts as the leading members of the DSRC can only add to the skepticism by the public and membership that "The Bar" is a secretive cabal interested only in protecting dishonest lawyers and their rich clients.

That the DSRC went far beyond the ABA's recommendations also shows that the DSRC and Ms. Stevens had an additional agenda. The proponents argue the proposals bring Oregon in line with "modern" thinking. Nowhere, however, does either the bar staff or the DSRC present statistics or other evidence that Oregon's system is broken or why New Jersey, Illinois, or California should be our models.

Regards,



Greg Hendrix  
c: Mr. Tim Williams, Esq. (via email)



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March 4, 2016

R. Ray Heysell  
President of the Oregon State Bar  
Oregon State Bar Offices  
P.O. Box 231935  
Tigard, OR 97281-1935

Re: Recommendations of the DSRC on Attorney Discipline in Oregon.

Dear Mr. Heysell:

I am the current chair of the SPRB, having served on the committee since January 2013. My views on proposed changes to Oregon's attorney discipline regulation are set forth below.

1. Discipline Counsel Dawn Evans's Recommendations Should be Fully Adopted.

I fully concur with Discipline Counsel Dawn Evans's (DC) recommendations. I expect that should the Board of Governors adopt Ms. Evans's recommendations, the key ABA and DSRC goals will be achieved and the BOG will be spared the need to implement the more controversial recommendations.

2. Eliminating the Key SPRB Roles Will Unnecessarily Sacrifice Public and Bar Participation in Oregon Attorney Discipline.

I grew up and received my legal education in Canada, where I practiced law for five years prior to moving to Oregon. Shortly after arriving in Oregon, I was intrigued by, and later came to cherish, the American tradition of public involvement in all aspects of society; regular Oregonians can suggest what measures go on the ballot, who should be sheriff, and who becomes a judge. Even the right of a jury trial, though available in Canada, was a right that was rarely exercised. The American checks and balances tradition encourages public scrutiny, tinged with a touch of mistrust of authority, as a way to oversee governmental bodies. Since 1984, this same public involvement/ checks and balances attitude has factored prominently in Oregon attorney discipline as implemented by the SPRB.

DSRC recommendations 2, 3, 4, 6 and 8 depart from Oregon's tradition that the general public and practicing attorneys should be involved in attorney discipline. Indeed, DSRC proposes this power transfer absent any ABA or DSRC data that can lay the structural discipline concerns at the feet of the SPRB.

During my three years as a member of the SPRB, I can confirm that SPRB members thoroughly review the Discipline Counsel's Office (DCO) recommendations and make decisions after considering the complaint file and the confidential recommendations of DCO staff but actively and independently evaluate each file. Every meeting that I can remember, the SPRB members have voted inconsistently with specific DCO recommendations, have sought additional charges, have requested additional investigation, or have even dismissed allegations that the DCO sought to prosecute. Most frequently, the SPRB will take a stronger stance than that recommended by DCO.

SPRB actions are based upon an active and healthy scrutiny of DCO recommendations. For example, I have seen a case where DCO recommended no discipline but where the SPRB discussed the matter literally for hours over several meetings. Three SPRB members reviewed more than a week of trial testimony transcripts and reached differing conclusions than the DCO staff attorney. Ultimately, the respondent stipulated to an appropriate discipline. Public members routinely share a perspective different from that of all the lawyers, DCO staff and SPRB members in the room, which at times alters the way the case proceeds. In short, the SPRB's active oversight of DCO's considerable efforts benefits the discipline process and adds credibility that a professionally administered discipline system could not alone provide.

My comments herein that imply a potential conflict between DCO and the SPRB are not merely an academic discussion. During my tenure on the SPRB, I have experienced situations of deep, prolonged, and vocal mistrust of the then DC by some SPRB members. Although that conflict has passed, any BOG decision needs to recognize this history in deciding whether members of the community and the Bar should scrutinize DCO actions and guard against prosecutorial misconduct. While trial panels do eventually review some of DCO's actions, only a small fraction of the total cases are considered.

Transferring to the DCO greater responsibility as recommended by DC will expedite and simplify the discipline process, but the BOG should not remove the right of volunteers from the community and the Bar to police DCO recommendations.

### 3. Dramatic Changes Proposed Need More Bar Input.

Despite laudable efforts by the ABA and the DSRC, few Oregon attorneys are aware of the DSRC and ABA recommendations. The BOG's recent regional conference calls were minimally successful and inadequate to secure broad-scale input into the proposed changes. Before modifying key provisions of longstanding structure of Oregon attorney discipline, the BOG needs more input on the more controversial changes that will allow more consensus to emerge.

4. BOG Should Implement More Limited Changes to See if the Goals Can Be Accomplished Without Adopting the More Radical Recommendations.

Dawn Evans, as current Discipline Counsel, has urged the BOG to adopt some of the DSRC recommendations. Ms. Evans believes that by so doing, key ABA and DSRC goals may be achieved without eviscerating community member and private attorney participation in the process. If she is correct that changes can streamline the discipline process, the remaining discipline structure should remain intact. If not adequately successful, additional recommendations can be implemented.

In summary, I am honored to serve as the chair of the SPRB. I work with a DC that leads with integrity, with skillful DCO attorneys, with SPRB members that year after year provide outstanding service to our legal community and the public, and with diligent and co-equal public members. The BOG should not destroy this collaborative team framework, which has for many years faithfully scrutinized and directed DCO activities when clear solutions to structural problems exist.

Sincerely,



E. Bradley Litchfield  
Chair of State Professional Responsibility Board

EBL/df/cc

## Camille Greene

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**From:** Mary W Johnson [maryjohnson@orlaw.us]  
**Sent:** Friday, December 18, 2015 4:12 PM  
**To:** OSB President  
**Subject:** Comments to Proposed Changes to Disciplinary Process

Dear Mr. Spier,

I propose that a timeline be established for the disciplinary process. I have defended occupational licensees in the health professions for many years. Board investigations generally last about four months. Investigators have the power of subpoena for records, to interview witnesses, and are required to conduct a personal interview of the licensee. The investigators then prepare reports for presentation to the Board, which meets 10 times per year to discuss and vote on discipline as to each investigation. The Board then directs the investigators what to do, i.e., dismiss, resolve by stipulation, letter of concern, of notice of discipline: reprimand, suspension, probation or revocation of the license. The licensee has a certain number of days to request an administrative contested case hearing before an Administrative Law Judge, and the Judge's decision is sent to the Board for reconsideration.

My experience with the Oregon State Bar is that the disciplinary process is unbounded by time, which allows the investigations to be unnecessarily and excruciatingly long, complex and expensive (i.e., goes on for years) for the lawyers who are being investigated, because there is no timeline in place to require the investigations to be conducted in a timely manner.

Thank you for inviting comments.

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## Camille Greene

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**From:** Tilman Hasche [th@pbl.net]  
**Sent:** Friday, December 18, 2015 1:43 PM  
**To:** OSB President  
**Subject:** RE: Notice of DSRC Report

Dear Rich:

Thank you for your Notice of "DSRC" Report. I actually made an effort to read the reports contained therein, which, given their volume, took up more than an insignificant amount of time.

It would be most helpful if these reports contained either a digest of acronyms used in the report or else – perish the thought! – each report actually defined each acronym when first used. As written, these reports are unintelligible unless one is prepared to waste one's precious time googling a host of acronyms (DSRC, DCO, CAO, SPRB, etc.) in order to know who or what is being talked about.

As an immigration lawyer, I practice in an area of the law full of arcane acronyms only known to the *cognoscenti* with the secret handshake. Fortunately, the literature in our field typically spells out the meaning of each acronym the first time it is used in an article or communication.

The OSB would do well to adopt the same practice. I'm sure I am not the only member of this Bar unwilling to waste his or her time looking up the alphabet soup arcania of Oregon's ethics and Bar governance gurus.

Happy Holidays.

Tilman Hasche

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**From:** Richard Spier [<mailto:president@osbar.org>]  
**Sent:** Friday, December 18, 2015 11:31 AM  
**To:** Tilman Hasche  
**Subject:** Notice of DSRC Report





Dear OSB Colleagues:

Below is a link to the report of the OSB Discipline System Review Committee, together with minority reports from some of the committee members and materials from the Committee's meetings. The DSRC was appointed by the Board of Governors to review an evaluation of Oregon's disciplinary processes and procedures conducted by the ABA in 2014. The DSRC supports most, but not all of the ABA suggestions. The DSRC has also recommended some changes not proposed by the ABA.

The Board of Governors welcomes and encourages your comments on the DSRC recommendations. Comments must be submitted in writing (letter or email) to [president@osbar.org](mailto:president@osbar.org) no later than March 2, 2016. The reports will also be made available to the public, with an invitation for public comment under the same guidelines. The Board of Governors will be reviewing the DSRC majority and minority reports and any comments at a special meeting on March 11, 2016. The Board will identify the DSRC recommendations it supports, and forward its own recommendations to the Supreme Court, with the DSRC reports and comments.

Link: <http://bog11.homestead.com/DSRC/Homepage.pdf>. If you have any difficulty accessing the reports and related materials, please contact Executive Assistant Camille Greene at [cgreene@osbar.org](mailto:cgreene@osbar.org) or (503) 431-6386.

Regards,

Rich Spier  
Oregon State Bar President

Oregon State Bar | 16037 SW Upper Boones Ferry Road | Tigard, Oregon 97224

If you would like to receive your e-mails at a secondary e-mail address go to [www.osbar.org/secured/login.asp](http://www.osbar.org/secured/login.asp) and log in using your bar number and password, then click on Communication Preferences and set up a secondary e-mail address.

From: Theresa M. Kohlhoff, individual member, 803981 January 1, 2016

I recommend the BOG not adopt the task force's recommendations.

My few comments:

1. The BOG only technically initiated the request for the ABA review. The impetus began somewhere else but showed up with short time hire, John Gleason, who specifically wrote, I believe, in the MBA bulletin, that he had been hired to initiate a new disciplinary system, including one with a paid full time presiding disciplinary judge (PDJ). There was some question that the Supreme Court wanted a disciplinary system vetted. The point is that it was not something that the BOG ever thought pressing, at least in the last four years. (As an aside, it would be helpful if the authority over the Bar by its CEO and that of the Supreme Court is made more transparent to the membership and to the BOG.)
2. The premise that disciplinary law is somehow outside of the grasp of volunteer lawyers and therefore "professional" staff is required, is not proven or convincing. Moreover the significant part of the disciplinary process is not the law, but rather fact finding which is something volunteers who are practicing lawyers can do better than anyone else.
3. There is little basis for authority over or guidance to the Oregon Bar from the ABA team's opinion on best practices. What value does it have? This team's view that volunteers cost the process in delay, inefficiency and inconsistency shows a bias for bureaucracy. How would an in house process be better? The personnel would have deadlines? Have access to resources? Have policy standards? Why would these changes, if imposed on staff, work differently than if they were imposed on volunteers? Strengthening the volunteers would save the best aspects of our present system and shore up the worst.
4. The volunteer lawyer, hopefully, has had practice experience. No matter how skilled a judge is or a staff member, years in practice are what count. This is the overwhelming benefit of using lawyers who have been in the trenches - not for a few years before they launched into some non-practice position - making the judgment calls about another lawyer's ethical behavior. No one enjoys being judged but we (and the public) are more apt to be respectful of a judgment if it thoughtfully comes from our peers.
5. The idea that investigation by the LPRC is outdated because the DCO has an investigator is sadly dismissive of the time and energy volunteer lawyers can put into digging into the facts. It is not possible that one investigator can do what the LPRC does. Sunsetting this group is another example of an increasing bureaucracy.
6. Having a presiding disciplinary judge (PDJ) on each panel is one of the most troubling recommendations. It is financially objectionable because the Bar is having to pay for an employee of, uh...(whom?) at a cost of about \$200,000 for the PDJ and supporting staff. We already have one of the most expensive Bars in the country. Yet we are not allowed to do much for fear of controversy over being viewed as political, reduced to a kind of Rotary, presumably because of Keller but also because of general custom. We raised the dues \$50 this last year with the slippery promise that it would not need to be done again for a few years unless there were significant changes in the operating expenses. Given the challenges of cuts, these extra expenses, at least, raise the specter of higher dues in a shorter period. Add on that we are now

being asked to pay for yet another employee(s), wages and 40% or so for benefits, for what could be done and done better by volunteer practicing lawyers. Is this not just bureaucracy getting more intense and more expensive, without benefit to the membership or the public? Who does it benefit then?

The addition of the PDJ is even more objectionable as a substantive matter because who the Supreme Court (unilaterally?) appoints will then be pretty entrenched without obvious accountability, a central pole to a Star Chamber. Who has the right to hire and fire this person? Grade the performance? Influence the decision making? In short, the concept of a PDJ is wholly unnecessary and potentially autocratic and unfair.

And yes, it does chafe that the Bar is still slated to pay for the PDJ and supporting staff, to boot!

7. Although I was a BOG liaison, I was not a voting member of the group. I agree that there may be tweaks needed to the system, but I believe that aspects of the it that are not desirable can be attended to without a big and unwise flip over from sensible reliance on volunteer lawyers to a highly centralized system which could be out of our control and our direction.

I personally do not support these recommendations.

## Camille Greene

---

**From:** Elden Rosenthal [elden@rgdpdx.com]  
**Sent:** Friday, January 08, 2016 10:10 AM  
**To:** OSB President  
**Subject:** DSRC recommendations

Rich – I believe that Mr. Braun’s minority report is compelling. I urge the Board of Governors to reject the Majority Report, and adopt one of the alternatives proposed in the Minority Report.

As a formal criminal defense lawyer, and as a current civil rights lawyer, I have experienced the injury done to citizens when the prosecutorial function is abused. Granting complete prosecutorial responsibility to Disciplinary Counsel without providing adequate oversight invites opportunity for influence and power to be abused.

Sincerely,

Elden M. Rosenthal  
121 S.W. Salmon St., Suite 1090  
Portland, Oregon 97204  
(503) 228-3015  
[www.rgdpdx.com](http://www.rgdpdx.com)

## Camille Greene

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**From:** Elizabeth E. Welch [bizwelch@yahoo.com]  
**Sent:** Friday, January 08, 2016 2:18 PM  
**To:** OSB President  
**Subject:** New Disciplinary System

I echo the sentiments of Theresa Kohlhoff:

If the recommendations are accepted, the disciplinary system will be fundamentally changed. I do not like the idea of a PDJ or the idea that the OSB would be paying that person's salary. I don't like the that the LPRC will be eliminated.

If the present volunteer process needs to be more timely, have more standards and be given more resources, then let's fix that. This, however, can be done without increasing expensive bureaucracy and losing the valuable experience of having practicing lawyers making the factual calls.

In my personal opinion, no matter how skilled a judge is or a staff member, years in practice are what count. This is the overwhelming benefit of using lawyers who have been in the trenches making the judgment calls about another lawyer's ethical behavior. No one enjoys being judged but we (and the public) are more apt to be respectful of a judgment if it thoughtfully comes from our peers.

Thank you.



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## Camille Greene

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**From:** sam@sampace.com  
**Sent:** Wednesday, January 13, 2016 12:54 PM  
**To:** OSB President  
**Subject:** RE: Regional\_conference\_calls\_scheduled\_to\_discuss\_  
OSB\_Disciplinary\_System\_Review\_Committee\_reports

Dear Ray,

I'm not able to participate in the conference call on Thursday, so I am offering a comment by e-mail.

I'm writing to you regarding item #8 referenced in the October 2015 meeting minutes of the OSB Disciplinary System Review Committee in which committee members Ellis and Bauman reportedly proffered the notion that *"the bar should pay the Respondent's attorney fees and costs when a formal proceeding results in a dismissal of all charges."* The motion failed. I hope the Board of Governors will re-visit the issue for the reasons I identify below.

In opposition to the proposal for the OSB to reimburse the attorney fees of a member when charges brought by the Bar are not sustained, committee member Howes indicated reimbursing attorney fees for an attorney who was vindicated by the disciplinary process would bankrupt the Bar, and he offered a metaphor involving prosecutors.

I'd like to offer three observations, and a suggestion:

1. The prosecutor must meet a much higher standard of proof in a criminal proceeding than the standard the OSB must satisfy in a disciplinary proceeding; as a result, the potential financial burdens on the Bar and a prosecutor's office are not sufficiently comparable to make Mr. Howes' metaphor persuasive.
2. If OSB being required to reimburse attorney fees when charges brought by the Bar are not sustained would bankrupt OSB as Mr. Howes is reported to have claimed (and do so even with the benefit for the Bar of a lower standard of proof than a prosecutor must meet), then I would submit Mr. Howe's reported claim remarks makes the case that it's reasonable to expect some individual attorneys may likewise be bankrupted.
3. In this regard, Mr. Howes' metaphor also fails to acknowledge the difference in the magnitude of the financial impacts if the bar has to pay what are hopefully very few of these reimbursements, and an individual attorney - especially an attorney in a small or solo practice - having to pay for the defense against one of these unsupported OSB cases all by herself or himself.

It seems odd to me that the largest justice-oriented organization in the state would be willing to bankrupt a vindicated attorney in solo practice, especially because (unlike the solo practitioner) the bar has financial support from thousands of attorneys, the ability to make larger assessments to cover the costs of its actions if needed, and the opportunity to prepare a financial analysis of the potential impact on the OSB (which I infer has not been undertaken given the lack of any data being reported in the minutes to support Mr. Howes' claims about bankrupting the Bar).

That said, what would **not** bankrupt the bar, would be for the Governors to require publication in the discipline section of the Bar Magazine of the total sum of attorney fees and costs expended by OSB in each individual case in which the disciplinary charges brought against an attorney are not sustained. (The name of the attorney need not be included if the attorney prefers nondisclosure, but a citation to the legal basis - but not the factual basis - on which the charges were based could be reported.) By inference, one might assume a comparable burden may have been shouldered by the attorney who was forced to vindicate himself or herself.

The Bar has a noble mission, self described as "To Serve Justice."

But that is not - and should not be allowed to become - a limitation on the Bar's opportunity and responsibility to be both transparent and accountable, even if it chooses not to be accountable financially to reimburse vindicated attorneys on what one would hope would be those rare occasions when OSB brings charges against a member that it fails to sustain when evaluated against a much lower standard of proof than prosecutors must meet in the criminal courts.

Regards,

Erwin B. (Sam) Pace, Jr.  
OSB # 803340

----- Original Message -----

Subject:

Regional\_conference\_calls\_scheduled\_to\_discuss\_OSB\_Disciplinary\_System\_Review\_Committee\_reports

From: "Ray Heysell" <[president@osbar.org](mailto:president@osbar.org)>

Date: Wed, January 13, 2016 10:19 am

To: <[sam@sampace.com](mailto:sam@sampace.com)>



### **Special BOG Update from OSB President Ray Heysell**

Colleagues:

I am sending this special update to invite your participation in the Board of Governors' consideration of possible changes to our disciplinary system. The board received a report from the Disciplinary System Review Committee at its Nov. 20, 2015 meeting, and subsequently several minority reports and comments. The reports, comments and background information [are available online here](#).

Your comments are welcome and encouraged. To invite broader discussion we have scheduled a series of conference calls by bar region.

#### **Here is the information for your region:**

**Region 8:** Hosted by John Bachofner

**Date:** Thursday, January 21

**Time:** 9:00 a.m.

**Phone:** 866-910-4857; Passcode: 671660

Please join the discussion if you are interested and available – there is no need to reply to this message. If you are not able to participate I still encourage you to review the materials online and submit any comments via email to [president@osbar.org](mailto:president@osbar.org).

Very truly yours,  
**Ray Heysell**  
*OSB President*

Change how the bar communicates with you! Do you want email from certain bar groups sent to a secondary email address? Just visit [www.osbar.org/secured/login.asp](http://www.osbar.org/secured/login.asp) and log in using your bar number and password, then click on Communication Preferences in the left column and select your preferences.

Please note that while you can opt out of some bar communications, you cannot opt out of regulatory notices that may affect your membership status. Also note that other groups – including the Professional Liability Fund – maintain their own email and contact lists. Please contact these groups directly with any questions about their lists.

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## Camille Greene

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**From:** Andrea Ogston [andrea.ogston@lasoregon.org]  
**Sent:** Friday, January 15, 2016 10:39 AM  
**To:** OSB President  
**Subject:** RE: Regional conference calls scheduled to discuss OSB Disciplinary System Review Committee reports

I wish they would stop putting bar discipline in the bulletin.

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**From:** Ray Heysell [mailto:president@osbar.org]  
**Sent:** Wednesday, January 13, 2016 9:33 AM  
**To:** Andrea Ogston  
**Subject:** Regional conference calls scheduled to discuss OSB Disciplinary System Review Committee reports



### Special BOG Update from OSB President Ray Heysell

Colleagues:

I am sending this special update to invite your participation in the Board of Governors' consideration of possible changes to our disciplinary system. The board received a report from the Disciplinary System Review Committee at its Nov. 20, 2015 meeting, and subsequently several minority reports and comments. The reports, comments and background information [are available online here](#).

Your comments are welcome and encouraged. To invite broader discussion we have scheduled a series of conference calls by bar region.

#### Here is the information for your region:

**Region 5:** Hosted by Josh Ross, Michael Levelle, John Mansfield, Per Ramfjord, Kate von Ter Stegge and Christine Costantino

**Date:** Thursday, January 21

**Time:** Noon

**Phone:** 866-910-4857; Passcode: 671660

Please join the discussion if you are interested and available – there is no need to reply to this message. If you are not able to participate I still encourage you to review the materials online and submit any comments via email to [president@osbar.org](mailto:president@osbar.org).

Very truly yours,

**Ray Heysell**  
*OSB President*

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Please note that while you can opt out of some bar communications, you cannot opt out of regulatory notices that may affect your membership status. Also note that other groups – including the Professional Liability Fund – maintain their own email and contact lists. Please contact these groups directly with any questions about their lists.

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## Camille Greene

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**From:** James C. Chaney  
**Sent:** Wednesday, January 20, 2016 12:06 PM  
**To:** Helen Hierschbiel  
**Subject:** FW: Discipline Meeting Today

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**From:** Brad Litchfield [<mailto:Brad@eugenelaw.com>]  
**Sent:** Wednesday, January 20, 2016 9:07 AM  
**To:** Jim Chaney  
**Subject:** Discipline Meeting Today

Jim,

I had the best of intentions of getting you a strongly worded analysis of what changes I feel are merited in Oregon discipline. I'm in trial and have not been able to get to it.

My quick view of the matter is that SPRB as it exists allows practicing Oregon lawyers to be heavily and actively involved in the discipline structure of the state. The proposals gut that public involvement by turning the SPRB into a rubber stamp for discipline counsel. To be sure, I have the greatest respect for and admiration for our current staff of discipline counsel.

However, in our meetings each month, we as an SPRB board disagree with the discipline counsel regularly and we are able to inject the perspective of a practicing lawyer into the process, that is both healthy and helpful. Oregon lawyers are better served by having professional discipline counsel's work be scrutinized by the working lawyers that compose the SPRB. To eliminate that role would be unwise.

**E. Bradley Litchfield** | Attorney at Law | **Hutchinson Cox** | 940 Willamette Street, Suite 400, Eugene, OR 97401  
| PO Box 10886, Eugene, OR 97440 | **541-686-9160** | 541-343-8693 (fax)

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## Camille Greene

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**From:** James C. Chaney  
**Sent:** Wednesday, January 20, 2016 12:06 PM  
**To:** Helen Hierschbiel  
**Subject:** FW: SPRB changes

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**From:** Martha J Rodman [<mailto:rodman@gleaveslaw.com>]  
**Sent:** Wednesday, January 20, 2016 8:59 AM  
**To:** 'jchaney@thechaneyfirm.com'  
**Cc:** 'brad@eugenelaw.com' ([brad@eugenelaw.com](mailto:brad@eugenelaw.com))  
**Subject:** SPRB changes

Jim,

I won't be able to participate today in the discussion.

I have some thoughts re the proposed changes.

As background, I was on the SPRB several years ago.

First, I do not think that the Trial Judge should be a permanent paid professional, position.

I think that a Professional Trial Judge will be more prosecution oriented.

A Professional Trial Judge is going to have a "cozy" relationship with DC staff (who are great people; this is not personal).

A Professional Trial Judge may be viewed as having "Portland" values; it is very likely that a Professional Trial Judge will live in the Portland area, and will be from that area.

More cases may be tried, because if you have a paid Judge, that Judge will want/need cases to try. That won't be expressed, but I think it will be the inevitable result.

A Professional Trial Judge will end up being out of touch of what the typical lawyer in Oregon faces and will as a result, render harsher decisions than would a volunteer Trial Panel.

A Professional Trial Judge will cost much more than the current system. The judge will be paid a good salary, plus benefits and will have a staff, office equipment, training, etc. All that will end up costing much more than is predicted and much more than is currently paid (I assume).

Second, defense counsel should **not** have access to the DC attorneys' analysis and recommendations.

Not sure if defense counsel should have access to witness statements, etc. Probably yes to that but NOT to the analysis. That would result in DC not fully advising the SPRB and that would not be good.

Third, if we are going to make radical changes, which I don't think are warranted, a change that could be made would be to

Have an intermediate sanction. We currently have a Private Admonition, a Public Reprimand and then Suspension (not to mention disbarment).

On the SPRB, it seemed that there were situations where perhaps a Private Reprimand would have been appropriate.

Professional staff may not realize it, but if you asked various SPRB members, they would tell you that there were cases where we would think (if not say) "Gee, I didn't realize that that was required; I didn't realize you could get in trouble for that; or I don't know what I would have done in that situation". That reaction often came when the charge was the 8.4 "conduct adverse to the administration of justice" (paraphrase because I don't have the Code in front of me). That rule is so vague that a lot of conduct could be charged under it.

Fourth, when defense counsel and DC are negotiating, I agree that DC should not have to consult with the SPRB, as that does cause some delay.

Of course, a way to make delays less likely, would be to have the SPRB say: “settle it from one sanction to another, we trust your discretion”.

The SPRB is enormously hard working. They provide the view of the practicing lawyer to the DC. (I think more of the SPRB should be private lawyers who have not retired---maybe 15 to 25 years of experience.) why does that matter? The disciplinary arm of the bar, should be supported and respected by the practicing lawyers. (yes, obviously, the public has to respect it also, but the people who may be judged by it, need to respect it, also).

I'd be glad to talk,

Thanks,

**Martha Rodman**

[rodman@gleaveslaw.com](mailto:rodman@gleaveslaw.com)

p. (541)686-8833 | f. (541)345-2034 | [gleaveslaw.com](http://gleaveslaw.com)



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To: President Ray Heysell, Oregon State Bar  
From: Hon. Robert D. Durham, Senior Judge  
Re: Comments on Report of Disciplinary System Review Committee  
Date: February 5, 2016

I received your January 13, 2016, invitation to submit comments regarding the November 19, 2015, report of the Disciplinary System Review Committee. Thank you for the opportunity to comment. The following comments are mine alone and are not attributable to either the Oregon Supreme Court or the Oregon Judicial Department.

I did participate in the January 21 group telephone conference call with several Oregon State Bar Board of Governors members and other callers regarding the DSRC report. During that conference call, Board of Governors members Joshua L. Ross and Michael D. Levelle requested that I submit my comments in writing. I am happy to do. This memorandum responds to their request.

The DSRC report is generally well-prepared and quite helpful. The report notes that its discussion and recommendations touch on a number of areas of the Bar's rules and not only those topics mentioned in the previous recommendations of the ABA evaluation committee. I too will follow that approach in my comments.

At page 3, footnote 5, the report suggests the use of distinctive terminology in referring to the "dismissal" of complaints from clients to the Client Assistance Office and those complaints approved by the SPRB. I agree with that suggestion but I also conclude that the ambiguity of the word "complaint" creates problems that are not necessary. As that footnote indicates, the term "complaint" can refer to more than one legal act. The resulting uncertainty creates needless confusion for the Bar and the public.

For example, the Bar may inform a lawyer that a client has submitted a "complaint" of misconduct and seek the lawyer's response. After the Bar receives the lawyer's response, the Bar may indicate that it will take no action on the "complaint." Later (perhaps many years later), the lawyer may seek employment or a public office, and may encounter questions about whether the lawyer has been the subject of a "complaint" of professional misconduct. Because the rules do not carefully define what constitutes a "complaint," the lawyer will have to explain that there was a "complaint" of unethical behavior from

a client but that the Bar “dismissed” it after an investigation. That is true even though most lawyers understand that a genuine “complaint” of professional misconduct is a formal complaint issued or approved by the State Professional Responsibility Review Board or the Disciplinary Counsel’s Office, not a letter or telephone call from an unhappy client to the Bar.

To remedy that problem, those who draft the Bar Rules should clarify not only what constitutes a “complaint” of professional misconduct but also what *does not* constitute a complaint. My suggestion assumes, of course, that I am correct in my understanding that a communication to the Bar from an unhappy client, by itself, should not be regarded as a “complaint” of professional misconduct. Clients may communicate to the Bar their unhappiness about their legal representation or their legal circumstances with little or no real understanding of the relevant facts, the law, or the pertinent standards of professional conduct. If the Disciplinary Counsel’s Office looks into a client communication of that sort and concludes that no professional misconduct occurred, the lawyer should not have to report that matter as a “complaint of professional misconduct” for the remainder of his or her legal career.

To that end, the Bar Rules should indicate that a client communication to the Bar about a lawyer’s behavior is a “statement,” “report,” “information,” “notice,” or some synonym of those terms, but should avoid describing the client’s submission as a “complaint” of misconduct. Moreover, the Bar Rules should state that such a client communication *is not* a complaint of professional misconduct under the Bar’s procedures. Finally the Bar Rules should clearly indicate that only a formal charge of misconduct issued or approved by the relevant Bar entity *is* a complaint of professional misconduct under Bar Rules.

The Bar also could help in this regard by avoiding using the term “dismissal” or its equivalent in describing the procedural decision to take no action after an investigation of a client communication about lawyer behavior. The term “dismissal” should be reserved for the determination that a formal complaint of misconduct by the Bar lacks merit and any related legal misconduct proceeding against a lawyer should be terminated.

At page four, in the second bulleted item, the report refers to a lawyer’s failure to answer a formal complaint of misconduct. It is important for the rule drafters to bear in mind that an accused lawyer’s failure to file an answer to a formal complaint of discipline is conceptually distinct from a lawyer’s failure to answer an inquiry from Disciplinary Counsel’s Office about a communication from

an unhappy client. A lawyer has a critically important duty to cooperate with the Bar's efforts to investigate potential charges of misconduct. However, a lawyer is entitled, as a procedural matter, to file an answer to a formal complaint of misconduct from a Bar entity; a lawyer has no duty to do so. The rules should not imply that, by choosing not to file an answer to a formal complaint of discipline, a lawyer is declining to fulfill the duty to cooperate with the Bar.

At page 15, the DSRC report recommends the creation of a new Bar position known as Presiding Disciplinary Judge. The report acknowledges that the new "judge" would not be a "judge" within the legal meaning of that term.

I can predict that the use of the term "judge" for that position likely will be controversial within the community of Oregon judges who do qualify for that label under Oregon law. In 1987, I chaired the Oregon Commission on Administrative Hearings at the request of the Oregon Governor. That Commission studied, among other things, whether to recommend the use of the title "Administrative Law Judge" in statutes describing certain state administrative hearing officers. The Commission received several complaints from sitting judges over the potential application of the term "judge" to administrative hearing officers who were not judges under Oregon law. Despite those complaints, the Commission recommended the change to "Administrative Law Judge" in its report to the Governor and the Legislature. The legislature responded by rejecting that proposed change. However, several sessions later, the Oregon Legislature did adopt that change in terminology for many of the hearing officers who presided over administrative hearings in state government.

I report the foregoing simply to indicate that the deliberations of the Oregon Commission on Administrative Hearings in the late 1980s and the subsequent decision of the legislature, as noted above, may provide helpful context for the recommendation of the DSRC. At present, I take no position on whether the Bar should create a new position known as "Presiding Disciplinary Judge."

At page 17, the report discusses expungement of dismissed complaints of misconduct. Two issues arise from that discussion.

First, the rule drafters must bear in mind the point that I mentioned earlier in this memorandum about the needed distinction between, on the one hand, a communication from an unhappy client about a lawyer's conduct and, on the other hand, a formal complaint of misconduct advanced by a Bar entity. Any discussion of "expungement" must take into account whether the procedural



event that is the subject of “expungement” falls into the first or the second of those distinct categories.

Second, the report must answer the question whether the expungement entitles the affected lawyer thereafter to lawfully treat the expunged event as if it did not ever exist and to so state in any later inquiries about the lawyer’s disciplinary record with the Oregon State Bar from employers, governmental entities, and the like. At present, the report addresses the subject of expungement as if it were only a matter concerning the retention or removal of complaint documents from Bar files.

At pages 17 and 18, the report discusses the subject of reciprocal discipline. The report indicates that the DSRC recommends the adoption of a “rebuttable presumption” that the Bar will impose on an Oregon lawyer disciplined in another state the identical disciplinary penalty imposed by the other state’s disciplinary body or court. The report indicates that the other state’s disciplinary sanction will be imposed by the Bar unless either party “makes a case” for a different sanction.

That passage of the report is difficult to understand. In my view, the adoption of another jurisdiction’s factual findings regarding a disciplinary matter is uncontroversial. However, Oregon has its own standards for appropriate disciplinary sanctions in many cases. There should not be a “rebuttable presumption” (a genuine misuse of that legal term) in favor of another state’s chosen sanction for misconduct committed in another state. That is especially so when Oregon’s rule fails to indicate just what a party must do to “make[] a case” to overcome the so-called “presumption” in favor of the original state’s penalty. At present, the SPRB must make a judgment about what penalty Oregon would impose for similar conduct committed in Oregon. That is a valuable feature of Oregon’s present system and should be retained for any Bar entity or officer responsible for determining the appropriate sanction in the context of reciprocal discipline.

At pages 25 and 26, the report discusses potential changes in the procedures that carry out a lawyer’s involuntary transfer to inactive status. I have two comments.

First, the rules drafters should bear in mind that due process principles apply to a lawyer’s involuntary transfer to inactive status. The affected lawyer must receive, at some meaningful time, a notice of the proposed action and be given an opportunity to respond to the proposed action. In most cases, that

opportunity must precede the formation of the decision to transfer. The rules should expressly provide procedures that comply with the minimum requirements of due process.

Second, the rules should take care not to prescribe requirements that purport to control the proceedings before the Oregon Supreme Court or that may conflict with other aspects of Oregon law. The report's suggestion of a potential request to the court to seal files should be advanced only after the Bar satisfies itself that the sealing of files would be permissible under the Oregon Public Records Law and the "open courts" clause of the Oregon Constitution, Article I, section 10.

Thank you again for the opportunity to comment on the report of the DSRC.

# OREGON STATE BAR

## Region 1 Teleconference Notes (1/21/16 @ 2:00 p.m.)

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### Present

BOG: Ray Heysell (facilitator)

OSB Staff: Dawn Evans, Camille Greene, Helen Hierschbiel, Mark Johnson-Roberts, Kateri Walsh

OSB Region 5 Members: Greg Hendrix, Martin Hansen, John Hummel, Carl Merkle, Rachel Baker, Thomas Peachey

Mr. Heysell reviewed the purpose of the teleconference, the history of the Disciplinary System Review Committee and the major recommendations of the DSRC currently under review by the Board of Governors.

### Summary of Comments

#### Martin Hansen

Mr. Hansen is a former SPRB Chair and he also submitted written comments. He agrees with the concerns about delay in the process but does not see the SPRB as the cause of that delay. CAO is one source of delay, perhaps due to staff constraints. He feels the SPRB plays a critical role in considering serious life-changing charges, by adding a diversity and depth of law practice experience. Lawyers have comfort in the SPRB peer review role and its balancing of DCO staff.

#### Greg Hendrix

Mr. Hendrix was the 2013 SPRB Chair. Mr. Hendrix agrees that the current SPRB role is important for both the public and membership to have confidence in disciplinary system. The SPRB's oversight and advice functions are essential to that trust. Reducing the SPRB function to that of a grand jury eliminates the oversight of volunteers in the process. Under the DSRC recommendations, all decisions after initial charging decision (such as adding or dismissing charges, settlement) would be made behind closed doors without public or member oversight. The proposal would make it easier for politics to come into play in making decisions during the disciplinary process. Mr. Hendrix also raised concerns about the appropriateness of appointing Barnes Ellis to serve on the DSRC while he was appealing a decision of the trial panel to the Supreme Court. Finally, Mr. Hendrix believes that the DSRC went far beyond ABA recommendations.

#### Tom Peachey

Mr. Peachey welcomes the comments of Mr. Hansen and Mr. Hendrix and shares many concerns about placing excess power in DCO. He also expressed concern about the cost involved in hiring a disciplinary judge.

# OREGON STATE BAR

## Region 2 Teleconference Notes (1/20/16 @ Noon)

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### Present

BOG: Jim Chaney (facilitator), Ray Heysell

OSB Staff: Dawn Evans, Camille Greene, Helen Hirschbiel, Mark Johnson-Roberts, Kateri Walsh

OSB Region 5 Members: James Walsh, Ronald Atwood, Floyd Mattson, Arden Olson

Mr. Chaney indicated that he received emails from Martha Rodman and Brad Litchfield. He read the email from Mr. Litchfield by way of introduction.

### Summary of Comments

#### Jim Walsh

Mr. Walsh is a former member of the LPRCs and he favors elimination of the LPRCs. He thinks that public perception of the process might be improved if lawyers weren't quite so involved in the discipline process. Also, he notes there are problems with getting people to volunteer because the disciplinary system has become increasingly complex and there is a steep learning curve. Thus, he thinks eliminating the LPRCs would better serve the public. He has seen cases where an accused lawyer has stalled proceedings by refusing to cooperate, and the LPRC's don't know how to deal with that. He agrees that a more centralized investigation could move the process along.

#### Arden Olson

Mr. Olson served on the DSRC and is attending to note his support of the report. He was impressed with the scope of perspectives on the DSRC. Most of the recommendations were passed unanimously. The biggest criticism that he has of the system is inconsistency. He thinks the answer to that problem is to limit volunteer involvement. He also supports limiting SPRB role to charging decisions, which he thinks is the most important aspect of the SPRB role. It is time that DCO be treated more like a professional prosecutor's office, and be given discretion to make decisions, such as whether to settle a matter, just like prosecutors are.

#### Ron Atwood

Mr. Atwood agrees with Mr. Walsh's comment about eliminating the LPRCs. He says that the LPRCs often take a lot of time, and one of the criticisms of the process is time it takes.

Mr. Atwood asked what the rationale was for having a single presiding judge write all the opinions. Mr. Olson responded that there were two reasons: first to promote consistency, and second to speed up process. The key to accomplishing these objectives will be to hire a good judge.

Mr. Atwood also asked why the recommendation to remove regional chairs of the DB, who currently assign cases. Ms. Evans responded that the decision was tied to the professional adjudicator. The professional adjudicator would assign cases, so no need for the regional chairs. Mr. Atwood noted that he has been the regional chair, and appointing trial panels can take a fair amount of time. He thinks it should the state chair should do the job to ensure that there is a diversity of participation and the professional adjudicator doesn't just pick his or her buddies.

# OREGON STATE BAR

## Region 3 Teleconference Notes (1/19/16 @ Noon)

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### Present

BOG: Ray Heysell (facilitator)

Staff: Dawn Evans, Camille Green, Helen Hierschbiel, Mark Johnson-Roberts, Kateri Walsh

Region 3 Members: Mary Cooper, Brian Green

Ray Heysell briefly reviewed the history of the Disciplinary System Review and the next steps in the comment and review process. Mark Johnson-Roberts reviewed major recommendations of the DSRC.

### Summary of Comments

#### Brian Green

Mr. Green had a question about the ABA recommendations to eliminate the ability to resign OSB membership with charges pending. Ms. Evans offered brief explanation of the Oregon process.

Mr. Green asked whether the DSRC recommendations included a timeframe within which to complete proceedings. Mr. Johnson-Roberts said that DSRC did not review the specific timeline/deadline requirements within the rules as the DSRC was not tasked with rule drafting, but that many of the recommendations were aimed at increasing efficiency.

Mr. Green stated that a key factor for him is the timeframe and efficiency of the process. He spoke with other lawyers who also said that time in the system was their primary concern. Mr. Green indicated that he appreciates the DSRC recommendations that speak to that issue.

#### Mary Cooper

Ms. Cooper noted that her perspective is as a long-time Assistant Disciplinary Counsel for the OSB. She asked what objectives the committee recommendations were trying to meet and what weight the committee gave to such factors as efficiency, public protection, due process, and timeliness. Mr. Johnson-Roberts answered that the DSRC was tasked with looking at improvements to timeliness, efficiency and consistency of decisions.

Ms. Cooper had specific questions regarding several areas where the DSRC recommendations departed from the recommendations of the ABA, areas she placed into three categories: transparency, independence and complainant due process. She expressed a concern that many, though not all, of the committee recommendations would diminish the public protection in the system, with minimal meaningful impact on timeliness. She expressed her desire that the board give considerable weight to the public protection role in consideration of systemic changes.

Ms. Cooper feels that the SPRB role should be retained as is. It provides independence in decision-making and keeps DCO lawyers connected to other lawyers in Oregon. She believes that the complainant's right to appeal should be retained. The fact that someone can appeal makes her work harder to think about and explain her decision because she knows someone else is going to read it.

Ms. Cooper does think there are things that can be done to reduce time in the system. For example, don't allow reconsideration requests after prosecution has been authorized and reduce the number of times the SPRB has to consider stipulations.

Finally, Ms. Cooper shares the concerns of the committee about inconsistency and quality of trial panel opinions, and is supportive of recommendations that would address these issues, including the possible addition of a professional adjudicator.

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# OREGON STATE BAR

## Region 4 Teleconference Minutes (1/19/16 @ 2:00 p.m.)

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### Present

BOG: Guy Greco (facilitator), Ray Heysell, Ramon Pagan

Staff: Dawn Evans, Camille Green, Helen Hierschbiel, Mark Johnson-Roberts, Kateri Walsh

Region 4 Members: Blair Henningsgaard, Leah Johnson

Mr. Greco briefly reviewed the history of the Disciplinary System Review and the next steps in the comment and review process. He then reviewed the major recommendations of the DSRC, currently under review by the Board of Governors.

### Summary of Comments

#### Leah Johnson

Ms. Johnson expressed strong support for professional adjudicator, and feels it will help with both efficiency and consistency of opinions. She also agreed with Mr. Henningsgaard that the current SPRB role is important in bringing in the voice of rural bar members. She believes that involvement of volunteers, however, needs to be balanced against the time it takes for a complaint to go through the process. She believes the current process takes far too long and that streamlining the process benefits lawyers, particularly those who are in smaller firms and unable to withstand a long drawn-out process. In addition, she noted that a faster process also better protects the public.

#### Blair Henningsgaard

Mr. Henningsgaard shared his perspective from four years on the SPRB. He agrees with the elimination of LPRCs; they are rarely of any use anymore. He also supports the addition of a professional adjudicator. In addition to enhancing consistency, he feels that having a professional in charge of case management will help speed up the process.

He advocates for continuation of the current SPRB role in making charging decisions and creating guidelines for settlements.

He disagrees with other changes limiting the role of the SPRB, which he believes plays an important role in inviting more diverse voices (geographic, practice area, firm size, etc) into the process. The "sounding board" role is highly valuable and would be lost to staff. Most notably, the rural voice of lawyers would be lost. He notes that he sent the ABA recommendations to the Clatsop and Columbia bar membership, and received much feedback about the potential loss of rural voices in the process. Finally, Mr. Henningsgaard shared the unique nature of relationship between DCO and SPRB, and the value of in-depth confidential discussions of each case, which he finds highly valuable to the larger system.



# OREGON STATE BAR

## Region 5 Teleconference (1/21/16 @ Noon)

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### Present

BOG: Josh Ross (facilitator) Chris Costantino, Ray Heysell, Michael Levelle, Kate von ter Stegge

Staff: Dawn Evans, Camille Greene, Helen Hirschbiel, Mark Johnson-Roberts, Kateri Walsh

Region 5 Members: Doug Bray, David DeBlasio, Valerie Sasaki, Victoria Blachly, Becky Chiao, Larry Matasar, Chuck Tauman, Hon. Robert Durham, Whitney Boise, Bruce Rubin, Heather Bowman, Maite Uranga, Bryan Beel, Colin Folawn, Kevin Brague, Richard Weill

Mr. Ross reviewed the purpose of the teleconference, the history of the Disciplinary System Review Committee and the major recommendations of the DSRC currently under review by the Board of Governors.

### Summary of Comments:

#### Larry Matasar

Mr. Matasar served on the SPRB for four years, and one of those years he was the chair. He has also been engaged both formally and informally by DCO as an expert. Mr. Matasar expressed agreement with many recommendations, but strong disagreement with removing all SPRB powers other than the charging decision. Mr. Matasar specifically noted the importance of SPRB involvement in settlement decisions. He thinks that it is a mistake to replace the current model of a diverse group of individuals who represent the diversity of Oregon lawyers with a model that places all power in the hands of one person. Mr. Johnson-Roberts stated that the DSRC expected some SPRB powers to move DCO and some to the newly created professional adjudicator.

#### Heather Bowman

Ms. Bowman concurs with Mr. Matasar. She is a brand new SPRB member, but has been impressed already to see so many perspectives represented at the decision-making phase. She finds this to be highly valuable.

#### Robert Durham

Justice Durham is retired from the Oregon Supreme Court. He thanked the members of the DSRC for all of their work and for their diligence in producing such a comprehensive report. He had several suggestions for further consideration, including: clarification of the words "dismissal," "complaint," and "expungement"; clarification that failure to file an answer does not amount to "non-cooperation"; use of a term other than "judge" to describe the proposed

professional adjudicative officer, as “judge” has a specific meaning under Oregon law, and; in default situations, require the bar to make a prima facie showing before imposing discipline.

Mr. Levelle respectfully requested that Justice Durham submit his comments in written form. Justice Durham is happy to comply.

Doug Bray

Mr. Bray commented on recommendation #26 regarding public records. Mr. Bray served a lengthy term on the Oregon Bar Press Broadcasters Council. He knows that this is an area of interest to the media because they have relied heavily on access to records. If this proposal requires an amendment to the public records law, he anticipates it would be very difficult to get passed.

Whitney Boise

Mr. Boise is a former SPRB chair and wanted to echo the comments of Mr. Matasar. Mr. Boise spoke of the importance of local lawyers from all around the state and from different practice areas aiding in decision-making not just regarding what charges to bring, but also as to settlement of cases. Mr. Boise agrees that the process can be streamlined, but thinks the report goes too far. Ms. Hirschbiel asked whether Mr. Boise had any specific suggestions for streamlining. Mr. Boise answered that frequently small issues seem to come back to the board repeatedly and unnecessarily. Many of these issues could be decided by the Chair or DCO. For example, he suggests that the SPRB could give authority up front for DCO to resolve some issues within certain bounds on case by case basis.

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# OREGON STATE BAR

## Region 6 Teleconference Notes (1/19/16 @ 4:00 p.m.)

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### Present

BOG: Vanessa Nordyke (facilitator) Ray Heysell, Julia Rice

Staff: Dawn Evans, Camille Green, Helen Hierschbiel, Mark Johnson-Roberts, Kateri Walsh

Region 6 Members: Mitzi Naucler, Terry Wright

Ms. Nordyke & Ms. Rice briefly reviewed the purpose of the teleconference, the history of the Disciplinary System Review Committee and the major recommendations of the DSRC currently under review by the Board of Governors.

### Summary

#### Mitzi Naucler

Ms. Naucler asked what prompted the invitation to the ABA. Ms. Nordyke identified a number of factors, also present in the introduction to the DSRC report, leading to the ABA invitation. Primary factors were length of time since last review, changes to national norms, and questions about consistency of decisions and efficiency in the system.

Ms. Naucler expressed concern about acting on recommendations without adequate statistics to study timelines and other factors affecting timelines. She shares the impression that the system is too slow, but says that without knowing the reason for the delay, it is difficult to craft solutions to address the delay. For example, if delay is because lawyers are uncooperative, then the solution should be to impose more serious sanctions for noncooperation. Thus, she would prefer empirical data before approving any recommendations. She believes that trying to create policy around anecdotal information is a bad idea.

Ms. Naucler does support the goal of consistency and that any recommendation that supports consistency should be given serious consideration. Further, she supports the goal of efficiency, but would appreciate more numbers and data to determine how to best address.

Ms. Naucler suggested live-streaming the Board of Governors discussion in March, allowing members in more remote areas to view the debate.

#### Ms. Wright

Ms. Wright noted that her experience has been that the process takes a long time and she has seen inconsistency in decisions. If she has more comments, she will submit in writing.

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# OREGON STATE BAR

## Region 7 Teleconference Minutes (1/20/16 @ 2:00 p.m.)

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### Present

BOG: Kathleen Rastetter (facilitator) Ray Heysell

OSB Staff: Dawn Evans, Camille Green, Helen Hierschbiel, Mark Johnson-Roberts, Kateri Walsh

OSB Region 7 Members: Robert Dolton, Ankur Doshi

Ms. Rastetter reviewed the purpose of the teleconference, the history of the Disciplinary System Review Committee and the major recommendations of the DSRC currently under review by the Board of Governors.

### Summary of Comments

#### Robert Dolton

Mr. Dolton would like BOG to consider expungement of lower level discipline such as public reprimands after a certain amount of time. Mr. Johnson-Roberts shared that DSRC did not consider this, but suggests a letter to the Board in the comments section would be appropriate.

#### Ankur Doshi

Mr. Doshi is a current SPRB member. He expressed concern about loss of public oversight over DCO currently provided by SPRB. Proposed changes increase discretion of DCO, which could be subject to political influence. He also expressed concerns about changes to the probable cause standard. He intends to submit written comments. Mr. Johnson-Roberts pointed out that some public protection functions currently held by SPRB would shift to the proposed new judge position under the DSRC proposal (likely an OJD or Oregon Supreme Court position).

# OREGON STATE BAR

## Region 8 Teleconference Notes (1/21/16 @ 9:00 a.m.)

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### Present

BOG: John Bachofner (facilitator), Ray Heysell

OSB Staff: Dawn Evans, Camille Greene, Helen Hirschbiel, Mark Johnson-Roberts, Kateri Walsh

OSB Region 8 Members: James T. Yand (Seattle)

Mr. Bachofner reviewed the purpose of the teleconference, the history of the Disciplinary System Review Committee and the major recommendations of the DSRC currently under review by the Board of Governors.

### Summary of Comments

#### James T. Yand

Mr. Yand noted that it sounds like the ABA is trying to make the disciplinary process more uniform throughout the country. Making the process more uniform is generally a good idea in his opinion, although it does have its advantages and disadvantages. Mr. Yand has been seeing an increased use of bar disciplinary complaints as a strategic weapon. These are not filed by the client, but by a party to the litigation, the purpose of which is to try to create a conflict between the client and the lawyer accused. Will the proposed changes address this issue?


Ms. Evans answered no, there is currently no standing requirement to file a complaint, and the DSRC did not look at that issue. She noted that some states have an ethics rule that makes it professional misconduct for lawyer to file a complaint or threaten to file a complaint to gain an advantage in a civil matter.

Ms. Hirschbiel noted that the Legal Ethics Committee is considering whether to propose the adoption of such a rule.

Mr. Johnson-Roberts noted that the proposal to make the disciplinary investigation confidential up until filing of a formal complaint is intended to address the problem of litigants attempting to use a pending disciplinary investigation to bring media attention to a particular lawsuit or legal dispute.

Mr. Yand says he is still weighing the issues, although he was impressed with one of the minority reports. He likes the idea of streamlining the process but has concerns about limiting the SPRB function. He has talked with some other bar members and concerns were about the experience of DCO. One of the advantages of the SPRB is that it is an additional source of diversity of practice and depth of experience for DCO.

# State lawyer group mulls controversial changes to make pending disciplinary records off-limits to public

Created on Tuesday, 05 January 2016 00:00 | Written by [Nick Budnick](#) | 

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Some lawyers say changes would remove checks and balances, breed cronyism.

The state agency that oversees the investigation of ethics complaints against 15,000 Oregon lawyers is considering changes that would hide from public view most pending complaints and destroy all public records of dismissed complaints after three years, a radical increase in secrecy for a system that's received national praise for its transparency.

The push to withhold pending complaints from the public are among several changes proposed by a committee composed entirely of lawyers who were selected by top bar officials. The group's final report has been greeted by some lawyers as a welcome modernization of state rules to speed up cases and be more consistent with other states. But it's also sparked accusations – including by some of the committee's own members -- that its work has been cynical and self-serving and would harm the public good.

In 2014, about 1,800 complaints were filed against Oregon lawyers. Of those the bar's disciplinary office followed up on about 350 and prosecuted 105, leading to 48 cases in which sanctions such as suspensions and reprimands were issued.

The debate over the proposed changes to state's longstanding disciplinary system highlights the tensions inherent in the Oregon State Bar which doubles as a professional organization while carrying out a state-sanctioned mission of protecting the public from unethical lawyers. While discussion of the issue has previously been restricted to lawyers, members of the public now have until March 2 to submit written comments on the changes, which can be [found here](#).

The changes are not close to being adopted. The bar's board of governors is expected to vote on recommendations to the Oregon Supreme Court in March. The Oregon Legislature would have to sign off on any statutory changes.

The changes would authorize a professional disciplinary judge to help rule on cases, a move that is not highly controversial. The more debated recommendation among lawyers is the push to centralize power in the state Bar's disciplinary office. The committee proposes to severely restrict the authority of a group of volunteer outside lawyers set up by state law to oversee the bar's disciplinary work, called the State Professional Responsibility Board -- long considered the conscience of the bar.

People such as outgoing bar executive director Sylvia Stevens say some of the changes would reduce delays and professionalize the state's disciplinary system. Others say it would unhinge a system of checks and balances that prevents the bar from playing favorites with large, well-heeled Portland law firms that sponsor bar events.

"It's going to make that process more political, and it's going to take away all bar membership and public oversight of the disciplinary process," said Bend lawyer Greg Hendrix, who has been an active volunteer in the state's disciplinary system, once chairing the volunteer oversight board. "They call this 'modernization' but it's going to make the bar discipline process much more subject to cronyism."

Stevens disagreed in a Dec. 30 interview, the day before she retired. She said the push to modernize the system is long overdue.

"It's the way most jurisdictions operate," she said. "We're really behind the times."

The committee proposing the changes was set up to respond to a report by a



OREGON STATE BAR - Sylvia Stevens



OREGON STATE BAR - Sylvia Stevens

committee of the American Bar Association that was invited by the Oregon State Bar to review its disciplinary system. The group praised Oregon for its transparency and for the inclusion of volunteers at every step of the disciplinary process, but also called for the disciplinary office to be granted more independence of the bar.

Following the ABA report, the committee appointed by the Oregon State Bar to make recommendations based on it decided to go in a different direction – many of its proposals mirroring earlier efforts to centralize power that were sought by bar staff such as former disciplinary counsel John Gleason.

The committee recommended that complaints be kept secret until they either were authorized for an administrative prosecution or were acted upon in some way by the bar —such as dismissal.

The ABA had praised Oregon’s commitment to public disclosure, as well as its system of letting people whose complaints are dismissed by the bar appeal that decision to the volunteer professional responsibility board. The Oregon committee, however, recommended eliminating that appeal.

The committee did agree with an ABA recommendation that bar complaints that are dismissed, currently kept for 10 years, instead be purged after three years.

Committee member Richard Weill, a Troutdale lawyer who has been an active volunteer prosecutor for the bar in ethics cases, served on the committee. But after its final report he penned a stinging dissent that questioned the bar’s decision to include on the disciplinary review committee a lawyer, Barnes Ellis, who was at the time being prosecuted by the bar for alleged ethics violations.

Ellis, a respected Portland lawyer, had been accused of a conflict of interest in a high profile case in which he represented some employees of a firm being investigated by the federal government as well as the firm itself. The Oregon Supreme Court overturned his discipline in February 2015, three months after he was named to the disciplinary overhaul effort.

In his own comments on the recommendations, Ellis rejected Weill’s criticism and also praised the push to withhold pending complaints from public disclosure until disciplinary charges are approved, saying it protected the accused lawyer’s “reputational interest.”

Those complaints have been public since a 1976 Oregon Supreme Court decision struck down bar rules that kept them confidential, saying the secrecy was “not for the benefit of the complainant, but for the lawyer complained against.”

Comments on the proposals can be submitted by email to [president@osbar.org](mailto:president@osbar.org) or in writing to Oregon State Bar, PO Box 231935, Tigard, OR 97281.

By **Nick Budnick**

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# Editorial: Lawyers should keep commitment to openness

Published Jan 7, 2016 at 12:10AM

Most professional associations in Oregon make it difficult to find out what's happened when a member of the public complains about treatment or service. If no action is taken, the public might never know a complaint was filed. Thus, a complaint against a doctor remains secret unless the Oregon Medical Board says a violation has been found and issues an order regarding it.

Shares

The Oregon State Bar, which oversees lawyers, is different. Complaints against lawyers are public from the beginning. And after an initial investigation, the bar's professional responsibility board decides if formal charges will be filed and a hearing held. Those records, too, are public.

That may change, if the bar's board of governors approves recommendations that would bring all discipline in-house and shorten the time for which disciplinary records are kept. It would not be a good change.

Rather than making the system more efficient, the changes could open it up to cronyism or retaliation and would deprive the public of what could be useful information.

The value of the professional responsibility board lies, in part, in the fact that its members are limited to four-year terms that cannot be extended. Too, individual members, who are all volunteers, have been quick to step back if there's potential for conflict. Both serve the public well.

So, too, does the availability of records regarding discipline. Those records are now kept for 10 years, a period that could be shortened to three years. There's no reasonable justification for the change and good reason to reject it. Nor is there a sufficient reason to hide complaints against lawyers from the public until they've been resolved. The lawyer's "reputational interest" is less important than a potential client's right to know if that reputation is challenged.

Oregonians seeking lawyers have only a few ways to judge whether they've picked the right one, and an ability to keep one's nose clean is one of those ways. The bar's commitment to open records — the result of a 1976 state Supreme Court decision — has served it well and should not be tampered with.



**REDACTED**

FEBRUARY 8, 2016

## SHOULD THE OREGON STATE BAR KEEP COMPLAINTS SECRET?

LEE VAN DER VOO



Redacted readers are probably going to want to dip their quills on this one, so before I launch into it, two important dates: Feb. 12 (that's Friday) and March 2. The first is the date you want if you're inclined to gripe in public. The second is the drop-dead for written comments. Now onto the issue itself, a pressing question before the Oregon State Bar: should it go dark on complaints involving attorneys?

Here's the story:

Oregon attorneys have been operating in a state of total transparency since we've had transparency laws, making them a standout among regulated professionals in Oregon. Unlike attorneys, Oregon dentists, doctors, nurses, and other broad swaths of professionals have, over time, carved out [exemptions to the Oregon Public Records Law](http://projects.invw.org/redacted/) (<http://projects.invw.org/redacted/>) regarding complaints and investigations.

The Oregon Board of Dentistry primely illustrated the problem six years ago when it refused to release an investigation of a porn-cruising dentist who was also a frequent masturbator.<sup>[1]</sup> (# ftm) The incident captured what was then a growing concern: that Oregon's regulatory authorities were failing to balance public interest with confidentiality for regulated professionals. In effect, the regulators were becoming more like trade groups, and exemptions to public records laws were helping that along.

The dental incident capped four years of inquiry by the Oregon House Health Care Committee, whose then-chair Rep. Mitch Greenlick, D-Portland, had been leading a probe of the state's medical boards. The issue: while the public had access to basic information about discipline involving regulated professionals when discipline was issued, consumers often don't have access to complaints and related documents. And without those, the quality of the regulation itself was suspect.

We especially care about attorneys in this regard. Take a look at the Oregon Legislature. See a lot of dentists, doctors, and nurses? Some, perhaps. But most years you'll see attorneys in greater proportion. Attorneys in the Legislature number 11 at present, or 12 percent of its members, and perhaps a couple of others who have law degrees but aren't bar members. Attorneys turn up in high percentages in public offices for good reason. They know the law, and many have the support of law firms to supplement public service in positions that pay little or nothing. The result is that attorneys occupy the Governor's office, one out of every eight legislative seats, appointments on state boards and commissions, and local offices throughout the state.

Until now, these attorneys have been a bright spot on Oregon transparency. That's why, as Greenlick's committee was dashing off bills in the Legislature, trying to bring the medical community's regulators in line with their charge to protect the public, the Oregon State Bar could be pointed to as a shining example of professionals who resisted the cloak. Complaints about attorneys are public. So are disciplinary files. And if you care enough about them to drag yourself to the State Bar office in Tigard for a look, there's nothing there that is a secret. Many Oregon attorneys are proud of this.

The proposal now before the Oregon State Bar seeks to change that, however. The proposal comes from the bar's Disciplinary System Review Committee, which looked at what works and what doesn't and also considered the findings of a 2014 American Bar Association review of attorney discipline in Oregon, which supported the bar's transparency but suggested a few procedural tweaks. The history of the committee's work stretches back some years, versions of which can be had in the report itself,<sup>[2]</sup> (#\_ftn2) and in a minority opinion by attorney Richard Weill.<sup>[3]</sup> (#\_ftn3) It led to the recommendations now before the bar's Board of Governors that, if approved, would seal complaints about attorneys, all related information and documents, and keep complaints confidential unless a formal complaint is filed by one of two mechanisms that involve a bar committee either formalizing the complaint or settling it.<sup>[4]</sup> (#\_ftn4) The committee is also recommending complaints be expunged after three years.

In a dissenting opinion, Weill argued committee's work was unduly influenced by a heavy-hitting attorney who was the subject of a disciplinary proceeding while serving on the committee. He contends the committee's work so jumped the rails that many of its recommendations aren't in the public interest at all, such as taking away a complainants' right to appeal. The prevailing side, however, concluded the system wasn't doing enough to protect attorneys facing discipline from reputational damage, in effect rendering them guilty until proven innocent while discipline was taking years to carry out.<sup>[5]</sup> (#\_ftn5) (Supporters included the attorney who served on the committee while facing discipline and was later exonerated, Barnes Ellis.)

Their argument for change, in the recommendations itself, is described this way:

"Oregon is unique in the country for having a discipline system that has been fully open to public disclosure since the late 1960's... OSB's open system is credited with enhancing the integrity of the self-regulating system of lawyer discipline and

providing the public with important information about lawyers they may be considering hiring. The counter-argument was that a complainant can use the mere fact of their filing a complaint to smear the reputation of a lawyer” — even one later found to be unsubstantiated.

Would-be employers of these attorneys could get the wrong idea. It sounds measured. But there’s a lot more at stake. Like the ability of the public to judge whether attorney discipline system is up to snuff by weighing complaints against outcomes. The ability to explore worrisome trends among attorneys. And our state democracy, while Oregon attorneys occupy the highest office in the state and quite a few lesser ones, too.

I hear the attorneys’ concern about reputation. But let’s be clear: smearing a person with falsehoods is illegal. Attorneys know that. Libel, slander, and defamation laws have long protected Americans against personal attacks. After all, often embittered people file these grievances. They’ve just been to court, or divorced, or otherwise spent money on things that tend to leave a person unsatisfied. Sometimes they blame the attorney.

But when an attorney’s discipline has risen to a level that winds all the way to the Supreme Court ([http://www.oregonlive.com/business/index.ssf/2015/02/supreme\\_court\\_clears\\_ellis\\_ros.html](http://www.oregonlive.com/business/index.ssf/2015/02/supreme_court_clears_ellis_ros.html)), as was the case with Ellis, it is a matter of public interest, however uncomfortable. When it doesn’t, those open public records have meanwhile helped many a reporter background a political candidate. We couldn’t do as thorough a job without those records. Nor could we and other citizens evaluate whether the bar properly handles complaints and discipline.

I will never forget a story Greenlick told me during his probe of Oregon health boards about a woman who called a state board. Considering surgery with a doctor, she wanted to know if any other patient had complained about him. She was told there weren’t any complaints, because the board didn’t normally release those unless discipline had been issued. In fact, there were complaints about the surgeon at the time — so many they had spurred an investigation that was underway. The woman went ahead and had the surgery, based on the information she received. The doctor blinded her.

Worst-case scenario? Sure. But it illustrates that transparency laws are there for public protection, and is a stark reminder of why public interest is the first charge of professional regulatory boards in Oregon.

<sup>[1]</sup> ([# ftntref1](#)) Why a public agency that polices treatment of the mouth would conceal this information from consumers was the central question of the debate about the dentist. The board argued the documents weren’t in the public interest because it never issued discipline in the case, an opinion with which Oregon Attorney General John Kroger’s office disagreed. The Board of Dentistry briefly sought to sue the attorney general in the case — that’s right, the board sued its own state attorney — to keep the records private. It was only the second time in state history, that I’m aware of, that a state agency sued the attorney general to block access to a public record. Eventually, the Board of Dentistry hired an outside attorney who advised it to drop the whole thing, which it did. You can read about the entire saga [here](http://www.pdxmonthly.com/articles/2010/11/17/nsfw-1210) (<http://www.pdxmonthly.com/articles/2010/11/17/nsfw-1210>).

<sup>[2]</sup> [\(# ftnref2\)](#) The full report of the bar's Discipline System Review Committee can be had [here](http://bog11.homestead.com/DSRC/ReportFINAL.pdf) (<http://bog11.homestead.com/DSRC/ReportFINAL.pdf>). Supporting documents [here](http://bog11.homestead.com/DSRC/Homepage.pdf) (<http://bog11.homestead.com/DSRC/Homepage.pdf>).

<sup>[3]</sup> [\(# ftnref3\)](#) Here's (<http://bog11.homestead.com/DSRC/MinorityReports/WeillMinorityReport.pdf>) the minority opinion by attorney Richard Weill, recapping the committee's charge.

<sup>[4]</sup> [\(# ftnref4\)](#) “\*DSRC Recommendation (26) Amend the Bar Act to provide that complaints of misconduct and all information and documents pertaining to them are confidential and not subject to public disclosure until either (a) the SPRB has authorized the filing of a formal complaint, or (b) the complaint has been finally resolved without SPRB authorization to file a formal complaint.” Here's the [link](http://bog11.homestead.com/DSRC/ReportFINAL.pdf) (<http://bog11.homestead.com/DSRC/ReportFINAL.pdf>).

<sup>[5]</sup> [\(# ftnref5\)](#) Attorney Barnes Ellis penned two minority reports supporting the recommendation and responding to Weill. They can be found [here](http://bog11.homestead.com/DSRC/MinorityReports.pdf) (<http://bog11.homestead.com/DSRC/MinorityReports.pdf>).

*This post has been updated with the correct location of the State Bar office. It is in Tigard, not Lake Oswego.*

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# Oregon Bar considers controversial overhaul of disciplinary rules



The Oregon Bar, headquartered in Tigard, is considering big changes to its lawyer disciplinary process. *(John Givot)*

By [Jeff Manning](#) | [The Oregonian/OregonLive](#)



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One of the most ambitious and controversial disciplinary cases in the history of the Oregon State Bar concluded a year ago when the state **Supreme Court exonerated** high-powered corporate attorneys Barnes Ellis and Lois Rosenbaum of ethical transgressions.

The reverberations of that landmark case are still being felt as the Bar considers sweeping changes to its disciplinary system intended to speed up the process and remedy other shortcomings highlighted by the Ellis-Rosenbaum case.

The proposals would make the process less transparent, keeping complaints secret until the Bar makes the decision to move ahead with a disciplinary case. They would also grant considerable new authority to a "professional adjudicator," who will oversee the system and serve as a judge on all disciplinary cases.

The proposals are controversial, dividing even the committee formed to study the issue. Three committee members issued minority opinions critical of some or all of the recommendations.

The Bar's board of governors is scheduled to decide on the proposals on March 12. It is accepting written feedback from the public until March 2 and will hear public comments Friday at its meeting in Salem.

One of the primary functions of the Oregon State Bar is reviewing the hundreds of complaints it receives each year about lawyers' conduct in the state. In 2014, the Bar got more than 1,800 complaints. The Bar's disciplinary counsel's office opened 240 files and moved forward on 105 of those cases.

The Ellis-Rosenbaum decision was a bruising setback for the Bar's disciplinary counsel's office, which had spent seven years trying to prove its case. The flap stemmed from Ellis' and Rosenbaum's representation of Wilsonville defense contractor Flir Systems Inc. and several of its employees in an accounting fraud case dating back to 2000.

The matter eventually prompted investigations and charges from the U.S. Securities and Exchange Commission and the U.S. Attorney's office. Criminal defense attorneys for the individual Flir executives and the government questioned the multiple representations by Ellis and Rosenbaum, both of whom at the time worked for Stoel Rives, one of Portland's largest and most prestigious law firms.

In May 2013, a trial panel found the two lawyers guilty of conflicts of interest and misrepresentation and issued a public admonition.

Ellis and Rosenbaum immediately appealed. Last Feb. 19, the Supreme Court sided with Ellis and Rosenbaum on every issue and overturned the trial panel's ruling.

The Bar was already in the process of reviewing its disciplinary system. It asked the American Bar Association to take a hard look at the Oregon system in late 2014. Ellis has made it a personal priority to force change.

Ellis wrote letters to Bar leadership accusing the organization's disciplinary lawyers of misrepresenting facts. He volunteered to serve on the committee reviewing the process and has issued his own concurring opinion praising the proposed changes.

In an interview Thursday, he dismissed the current system as slow and inconsistent. Bar disciplinary rulings are reversed on appeal at an alarming rate, he added.

"I'd had a very unhappy experience of being a respondent in a very protracted Bar proceeding," Ellis said. "Based on that, I really felt that there were improvements that needed to be made. The length of time these cases take is obscene. That's bad for the lawyers and from a public protection point of view."

Arden Olson, of the Harrang Long firm in Eugene, said he's optimistic that creation of the "chief adjudicator" role who will serve as judge in all disciplinary cases will result in better decisions, too. "This will professionalize the Oregon State Bar and bringing it into step with other states," he said.

Richard Weill, another Portland attorney who also served on the committee, blasted its findings and Ellis in his minority report. Ellis' goal, Weill wrote, was "not public protection but how to protect lawyers such as themselves from the reputational consequences to an accused attorney and the economic consequences to an attorney of a disciplinary matter."

Weill was out of the country and could not be reached for comment.

Mary Cooper worked in the Bar's disciplinary counsel's office for 24 years before retiring last year. The Bar's pursuit of Ellis and Rosenbaum "was a totally righteous case," she said in an interview Wednesday.

As for the proposed rule changes, Cooper said it amounts to "regulatory capture," the phenomenon of regulatory agencies that cater to the interests of the industry it regulates rather than the public.

-- Jeff Manning

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## Oregon State Bar weighs disciplinary system overhaul

By Jeff Manning  
*The Oregonian/OregonLive*

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**From:** [Kimberley Freda](#)  
**To:** [OSB President](#)  
**Subject:** Oregon Public Broadcasting statement re: proposed changes to Oregon bar disciplinary process  
**Date:** Wednesday, February 10, 2016 6:34:40 PM

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Oregon Public Broadcasting statement re: proposed changes to Oregon bar disciplinary process

To the Oregon Bar Board of Governors:

Oregon media organizations are afforded the benefit of robust transparency and sunshine laws, which allows for honest, trustworthy reporting.

The current Oregon State Bar disciplinary process promotes that transparency. The proposed change would create confidentiality surrounding the filing of a grievance until it is dismissed or a formal complaint is filed.

If approved, the new procedure would eliminate public access to complaints in critical stages of investigation.

Attorneys who work in an open justice system should not be protected by secret disciplinary proceedings.

The proposed change to the disciplinary process only creates additional hurdles that do not protect the public interest.

Oregon Public Broadcasting supports a fully open disciplinary system and accepts the responsibility that it includes.

Kim Freda  
News Content Manager | Oregon Public Broadcasting  
(d) 503-445-1895 (c) 304-641-3388  
<http://www.opb.org/news/>





## MEMORANDUM

**TO: Oregon State Bar Board of Governors**

**FROM: Lisa Ludwig, Chair, Bar Press Broadcasters Council**

**RE: Request for Continued Transparency Regarding OSB Complaints**

**DATE: February 12, 2016**

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On Saturday, February 6, 2016, during a regular meeting of the Council, the members considered, and discussed at length, the Discipline System Review Committee's recommendation that:

[C]omplaints of misconduct and all information and documents pertaining to them are confidential and not subject to public disclosure until either (a) the SPRB has authorized the filing of a formal complaint, or (b) the complaint has been finally resolved without SPRB authorization to file a formal complaint.

After thorough consideration, the Council members present voted unanimously, with one abstention, to urge the Oregon State Bar Board of Governors to:

**Maintain the status quo with respect to public records status of Oregon State Bar complaints.**

The Oregon State Bar has had a more than forty year history of a disciplinary system fully open to public disclosure. Such transparency stands as a national example among state bar disciplinary systems of an unwavering commitment to integrity and public protection.

Diminishing transparency, by making the complaint process confidential at any point in the proceedings, will result in a number of consequences that run contrary to the OSB's dedication to an open system designed to serve the citizens' of Oregon by:

- Providing protection from lawyers whose conduct is unprofessional, immoral, or offensive when such conduct does not result in bar discipline
- Preventing erosion of public trust
- Eliminating Sixth Amendment claims of ineffective assistance of counsel during post-conviction proceedings
- Maintaining the reputation of the OSB as a national leader in transparency and fairness

# LAWYER DISCIPLINE IN OREGON IS UNCONSTITUTIONAL

OREGON LAWYER DISCIPLINARY COURTS ARE UNCONSTITUTIONAL, ILLEGAL AND UNFAIR

**The Spanish Inquisition lasted almost four hundred (400) years. The Inquisition was Ferdinand and Isabella's way of maintaining Catholicism as the primary religion of Europe. It was an unbelievable tragedy for the innocent sufferers. This article explores twenty (20) ways in which the Oregon State Bar lawyer disciplinary process compares with the ecclesiastical courts of the Spanish Inquisition which lasted for four centuries (1478 to 1834) because good people did nothing.**

Quick -- What is the difference between substantive due process and procedural due process? Due process is completely missing in Oregon lawyer disciplinary courts as we shall see.

Substantive Due Process is largely derived from Justice Stephen Field's dissent in the *1873 Slaughter House* cases. Substantive Due Process holds that there are certain inalienable individual liberties that may not be unreasonably taken away by government. The right to earn a living is one of these rights. Procedural due process has to do with a fair process, but does not involve deprivations by government. Substantive due process says there are certain deprivations that are not permitted by unreasonable governmental actions. The government then cannot deprive a person from earning a living in a lawful manner without other restraint which equally affects all other persons.

Well, the Oregon lawyer disciplinary courts do not provide Oregon lawyers with a reasonably fair process before denying them the right to earn a living. **Some of what follows should shock and amaze you.** Some, you already know about, but you may have failed to really cogitate about the elements of irrationality and unfairness in the particular component of the process. Jeff Sapiro has, through stealth, fixed his system in ways that

are simply unconscionable and certainly illegal under the constitutions of Oregon and the United States.

## TWENTY VIOLATIONS OF DUE PROCESS BY OREGON'S LAWYER DISCIPLINARY SYSTEM: (Or How Many Ways Do I Love Thee--Not!)

**1. The Rule of Law** -- Oregon disciplinary cases do not apply the rule of law. Indeed, trial panel opinions and the Oregon Supreme Court written opinions do not regularly cite case law nor substantive precedent except in the canned citations in the 'sanction' portions at the end of the written opinions.

**2. Burden of Proof** -- Since lawyer disciplinary cases amount to a criminal trial, even though they are technically sui generis, the Oregon State Bar must prove their case by "clear and convincing" evidence. But, both the Oregon disciplinary courts and the Oregon Supreme Court simply state, without analysis, that the case met this burden. How? Why? Without an analysis of the standard and how the facts meet that standard under specific precedent, the burden of proof requirement is simply an empty vessel.

**3. Judges** -- By statute, the Oregon Supreme Court is required to appoint the judges for Oregon's lawyer disciplinary courts. ORS 9.534. They don't. The Oregon State Bar Board of Governor's Appointments Committee picks the disciplinary judges, not the Oregon Supreme Court. But, it gets worse.

**4. Judges** -- Jeff Sapiro, Oregon's Disciplinary Counsel, improperly helps pick the judges. He attends the Oregon State Bar Board of Governor's Appointments Committee meetings and weighs in on his opinion of who should be chosen. No members of the Oregon State Bar are advised of this travesty of justice. If the prosecutor is able to help pick the judges, the lawyers should know about it and be able to participate as well. There is no court system in the civilized world that allows the prosecutor to pick the judges of the cases he is going to prosecute.

**5. Appeal Penalty** -- By an egregious Bar Rule, the lawyer who appeals a disciplinary court decision can be even more harshly sanctioned. This rule states that when a lawyer appeals a trial panel opinion, the Bar automatically appeals as well, by virtue of the lawyer's appeal. In real court, the non appealing party does not automatically get a second bite at the

apple as the Bar does in disciplinary appeals unless they cross appeal. The Oregon Supreme Court regularly and happily punishes Oregon lawyers even more severely on a lawyer's appeal of a disciplinary trial panel ruling.

**6. Indigent Defense Counsel** -- Disciplinary prosecutions exact a terrible price on lawyers and particularly lawyers in small practice situations. Often lawyers become indigent over the process or their financial problems led to the disciplinary circumstance in the first place. Are they entitled to court appointed counsel in these dire circumstances? Just the opposite. The Oregon State Bar maintains a program of about 80 volunteer lawyers made up mostly of sycophant downtown lawyers *who represent the Bar free of charge*. The prosecuted lawyer does not get free legal help. The Bar does. Oregon's disciplinary department has a budget of almost \$2 million 'dues' dollars. This turns the whole concept of the right to court-appointed counsel on its head.

**7. Discovery** -- The Bar may and does refuse all discovery requests by the lawyer without sanction.

**8. Retaliation** -- Statistically, the Bar wins about 97% of their prosecutions. In the rare event that a lawyer wins, statistically, the Bar prosecutes that same lawyer *a second time* on new charges with a conviction. During the 2002 Disciplinary Task Force forty seven (47) lawyers wrote letters to the Bar pointing out specific instances of retaliation by Oregon's Disciplinary Counsel. No one at the Bar nor the Oregon Supreme Court investigated these charges. See below at #15

**9. Bias** -- In a recent survey, a permutation of 6,500 (out of 13,000) Oregon lawyers feel there is bias in the State of Oregon lawyer disciplinary process. Nobody has investigated why.

**10. Gender Bias** -- Oregon's Disciplinary Department is the largest department at the Oregon State Bar. Of the **fifteen** (15) **employees** of Oregon's disciplinary department (sans Mr. Sapiro), **all are women**. Of the **141** Oregon lawyers disciplined in 2007 and 2008, **120 of them were men, 21 were women**. (There are about 4,000 women lawyers in Oregon and about 8,000 men)

**11. Misjoinder** -- In criminal court a prosecutor may only prosecute multiple cases against a defendant at the same time is when they have a

common nexus. The criteria for nexus is that only those cases that have some sort of connection may be prosecuted against a person at the same time. The Oregon State Bar may throw as much mud against the wall at any one Oregon lawyer at the same time, as they want, by rule, even if there is no connection between the cases at all.

**12. Prior 'Bad' Acts** -- Prior bad acts may not be brought up in criminal matters unless they show a commonality of scheme. In Oregon disciplinary courts, the prosecutor can discuss ALL of an Oregon lawyer's prior bad acts, real or imagined, in the instant proceeding.

**13. Right to Remedy** -- Oregon's constitution (Art 1, §10) provides that in all cases a citizen has a right to a remedy by due course of the law in the case of injury to reputation. The Oregon State Bar disciplinary counsel lie. There is no remedy.

**14. Alternate Dispute Resolution** -- In accordance with a 2001 House of Delegates resolution, the Disciplinary Task Force took a sweeping new look at Oregon's disciplinary department and decided on sweeping new changes for the good of the system in 2002. These changes were approved by the Oregon Supreme Court and became effective in 2003. Unfortunately, Mr. Sapiro does not believe in anything but punishment. Consequently, the Bar Rule changes permitting mediation and diversion are not used by Oregon's disciplinary department, even now, six years later.

**15. Prosecutorial Misconduct** -- By an incredible act of legerdemain, Mr. Sapiro has fashioned absolute immunity for himself, free of any scrutiny. Here is how it works. The only entity in Oregon that may investigate or indict Oregon's disciplinary counsel is the State Professional Responsibility Board (SPRB) Chairman. [Bar Rule 2.6(g)] The SPRB is Oregon's disciplinary grand jury. The prosecutor and the grand jury work closely together on all prosecutions, per force.

Well, guess what? By rule, [Board Bylaw 18.100], Jeff Sapiro is also the designated attorney for the SPRB. Thus, the only entity that can investigate bad acts of Oregon's disciplinary attorney is.....the client!

**16. De Novo Review** -- By statute, the Oregon Supreme Court is required to review any and all Oregon lawyer disciplinary cases de novo. This means they must read the entire record. They don't. They don't even get a copy of

the entire record. (Come on, Oregon Supreme Court, this is an open challenge to prove me wrong!)

**17. Irregular Proceedings** -- There are 'secret' meetings in the Oregon legal profession. It has been documented that the leadership of the Oregon State Bar secretly meets with the Chief Justice of the Oregon Supreme Court on lawyer disciplinary matters and nobody voluntarily informs the lawyer in question. It has been documented that members of Bar leadership meets with the Professionalism Commission on individual lawyer disciplinary matters. The problem is that trial panel members and Oregon judges are at these meetings, but the individual lawyer is not.

**18. Unconstitutional Delay** -- The Oregon disciplinary counsel has no time constraints on how long it takes to prosecute a lawyer. This was one of the main 'tasks' of the Disciplinary Task Force and they shirked their duty. The entire Oregon State Bar has ignored their own House of Delegates vote in 2001 which required that the Oregon State Bar Board of Governors study "The appropriate speed of the disciplinary process". This has never been done. Therefore, the Oregon disciplinary department takes their own sweet time. Even in criminal courts the defendant has a constitutional right to a speedy trial under the Sixth Amendment. Justice delayed is justice denied. It is incredibly harsh on Oregon lawyers to have a disciplinary matter hanging over their heads and yet nobody cares enough to do anything about it.

**19. The Constitutional Right to Confront Witnesses** -- The Oregon disciplinary courts do not require the personal appearance of witnesses against an Oregon lawyer at trial. Thus, the most basic of our constitutional rights under the Sixth Amendment, ie., the right to confront and cross examine witnesses against them are lost to Oregon lawyers.

**20. Convictions** -- The rules require three judges. The Oregon disciplinary department allows decisions with less than that. No criminal conviction would stand with a vote by only two thirds of a jury panel. Oregon allows conviction with only two of three judges.

WHERE DO WE GO FROM HERE

The rules of procedure in lawyer disciplinary matters in Oregon are a witches brew of civil procedure, criminal concepts and made-up rules that benefit only the prosecutor. As was said about the Inquisition:

*"...many true and faithful Christians, because of the testimony of enemies, rivals, slaves and other low people--and still less appropriate--without tests of any kind, have been locked up in secular prisons, tortured and condemned like relapsed heretics, deprived of their goods and properties, and given over to the secular arm to be executed, at great danger to their souls, giving a pernicious example and causing scandal to many."*

Karen Garst is gone. George Riemer is gone. It is now time to get Jeff Sapiro, Disciplinary Counsel for the Oregon State Bar,---- gone.

Then the Oregon State Bar Board of Governors should reconvene a Disciplinary Task Force II to finish the job voted on by Oregon's House of Delegates in 2001 and commenced in 2002. There have been a large number of the true and the faithful that have been needlessly hanged since then. The integrity of the Oregon State Bar demands that the job Oregon lawyers voted for eight years ago be finished.



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February 19, 2016

To: R. Ray Heysell, President  
Oregon State Bar Association  
16037 SW Upper Boones Ferry Road  
PO Box 231935  
Tigard, OR 97281  
[rheysell@osbar.org](mailto:rheysell@osbar.org)

**Re: Public Comment, RE:OSB Disciplinary Services Review Committee**

Dear Mr. Heysell,

First, my congratulations to you as the State Bar's new President for this year, 2016. From the many beaming smiles in your 'Introduction Article' in the Bar *Bulletin*, January 2016 Edition, it seems you are well suited for this important role and enjoying it at the same time. I pray you will have great successes, both personally and professionally, throughout this year.

By way of introduction, my name is Ian McElroy. I am 59 years (young and old), have three grown children, and six grandkids I adore. I was a successful builder and developer in both residential and commercial construction and enjoyed running my own company, along with my wife, for 20 plus years. Except for two years of private consulting and construction management about 12 years ago, I have *not* worked, per se, in the past 17 years due to serious legal problems that flowed from my last construction project, completed in 1999. The tragedy for my wife and I regarding the systematic demise of our company, then our lives, and then our marriage, had nothing to do with construction or development. Turns out it was political in nature, but was worsened by ethical misconduct of several lawyers involved. Worst of all, that misconduct that caused our travails and ruined us was not discovered until nearly five years later, long after the initial damage was done. I will not belabor this matter because it is a *story* better saved for another time.

However, I will tell you of one *positive result* from being tangled in litigation for twelve straight years: I was pressed to return to college at 54. Five years ago I earned my Paralegal Diploma; four years ago I earned my Associate of Arts Degree in Paralegal Studies; and after that, I enrolled in a Bachelor Program at Multnomah University in Management and Ethics, with an emphasis, and deep passion, for legal ethics. While developing an exacting zeal for people whose lives and families have suffered great harm by misconduct of lawyers in the community, I am careful to maintain a balanced view of the greater share of professionals who practice law with the care and diligence that is expected, and which the public deserves.

Further, I am a member in good standing with the Oregon Paralegal Association, a privilege that affords membership in the National Federation of Paralegal Associations as well. I am part of the Master's group in the OPA, as well as member on the Ad Hoc Committee to establish our own Ethics Board locally. The OPA intends to provide ethics related services to its Oregon membership rather than be fully dependent on the NFPA's Ethics Board when such needs arise. I do not represent the OPA in this letter to you.

Now to my purpose for writing to you today. Last Saturday, the *Oregonian* carried an article *Oregon State Bar Weighs Disciplinary System Overhaul*, by Jeff Manning. This was the first I learned of the Disciplinary Services Review Committee (DSRC). Assuming there were sufficient Public Notices of the Committee's formation and meetings, it is then my problem for "missing out" on prior opportunities to offer public comment to the DSRC. Please know that from this point forward, when I say "you," I am referring to Committees and Boards, not to you personally. Also know that what I say in this letter is not intended to offend anyone.

On Tuesday, CAO Linn Davis sent me the DSRC Website Homepage Link. Last night I perused various reports and captured just a glimpse of the complex Committee discussions I missed because I did not know the Disciplinary Process was being reformed.

In the interest of full disclosure, I have a dog-in-the-fight. Stemming from an Interpleader action filed against me in June 2014, I filed a recent Bar Complaint (December 28, 2015) against six lawyers in the case. For post-trial motions and unsolved legal issues, that case is ongoing. Perceived conflicts aside, my initial comments are neutral and valid.

About full disclosure: It is reasonable to consider that every member of the State Bar involved in substantive changes to the Disciplinary Process also has a dog-in-the-fight — and a potential conflict of interest. This is true because each one of you who practices law are subject to making a mistake that could lead to a complaint filed against you for which these policy changes **you** are now crafting could benefit **your** interests in the future.

From only a cursory review of the DSRC Report, and from the concurring and dissenting Reports, I am compelled to state my first impressions right away, with a goal to submit a more decisive public comment on the technical aspects of the Proposed changes prior to the March 2nd closing of the public comment period.

To start, I have great concern that the Board of Governors, the DSRC, the OSB Leadership, and the Disciplinary Counsel all failed to ensure that reliable public members were selected to represent the Public's interest on the DSR Committee from the start; especially knowing the very purpose of the Disciplinary process is to protect the Public. By preventing the Public from having a voice on the Committee, the DSRC's entire body of work, to be presented to the Board of Governors and then to the Supreme Court, is rendered suspect.

The Disciplinary Process is serious business. Except reading the concurring and dissenting Committee Reports (*see* online homepage), I was struck with an odd sense that much of the process amongst this "professionals only group" was a game of tit-for-tat in terms of what is best for lawyers and the legal profession. Yes, I am speaking of the back-and-forth Minority Reports that shed a bright light on the very reason the Committee should have included Public representation. But who was speaking on behalf of the Public

in those crucial conversations? There is no question the obvious dissention amongst the Committee members would have been calmed with the neutral influence that was missing.

Each of you (each Bar Member) earns your livelihood from the *public*, including government clients whose attorney fees are paid from public taxes. Yet, this **exclusion** of the Public in this ‘*endeavor to improve the system*’ says loud and clear that the State Bar has little regard for Oregonians whose lives, families and business affairs are at stake every day while in the care of its attorney members. The Public deserves your *best*, not what is now being dealt to them to their disadvantage with no say-so. Mine is far from a rogue view, as other non-lawyers are equally concerned here. And the Minority Report from Mr. Weill shows the public’s exclusion as a glaring failure, is a view also shared by attorneys.

I have some valid questions for all of you: Is the Public not trustworthy or capable enough to have been included? Is the Public not a reliable source for open, honest discourse concerning what is purported to be “all about the Public’s good?”

And how many of you have ever been damaged by a professional lawyer sworn to oaths, ethics rules and standards of care to whom you entrusted your entire circumstances to, but then screwed things up by misconduct? Have you ever experienced the emotional and financial damages that attorney misconduct causes?

Do you not understand ***it is the Public who is harmed*** by attorney misconduct, not the accused lawyers?

Yet, this DSRC Process was isolated from Public participation in what is an epic transformation of the legal process that appears, from first glance, to afford greater benefit to the accused while lessening the very Public protection the process is meant to provide.

With all due respect to Committee Member Barnes Ellis, I know the hardship of a bar complaint that lasts for many years. I cannot speak to the fairness or the injustice of the disciplinary process he endured, or even still, about what his client may have suffered. But this matter **is not about** what an accused lawyer endures in a bar complaint, but what is **right and just** in terms of *a process* that is to give greater focus and weight *to the public* that is harmed when a lawyer violates the Rules of Conduct. Has Mr. Ellis ever filed a bar complaint against a lawyer who caused him great harm for acts in violation of the Rules? Would Mr. Ellis wish for a more improved public protection system that would actually stem the swelling tide of misconduct? It seems not. Would any concurring member want for a more open process if they were ever to file a bar complaint? It seems not.

My conclusion on this point: It was inexcusable and a prejudicial failure to prevent genuine public discourse in what should have been a genuine (honest) public debate.

With all due respect, please let me address two other aspects of the legal profession, and litigation, that I am not certain were not considered in your deliberations, but are crucial issues regarding attorney misconduct and disciplinary proceedings.

I can say with certainty, having been seriously damaged by attorney misconduct and left to endure legal proceedings where no unrepresented person belongs, that I have learned key principles that no one wants to discuss. In fact, I am certain the DSRC members did not consider such issues when designing and deliberating their “proposed changes” to an important Disciplinary Process. The first principle concerns ‘*dishonesty*.’

So, why does the subject of *dishonesty* always escape discussion when lawyers are in the room? It is a fair question. The fact is, *dishonesty* is the core of every problem, including in the Disciplinary Process. Dishonest acts cause the problem, then breeds more dishonesty to conceal the committed wrongs. Dishonesty then prevents resolution to avoid accountability. And in the end, dishonesty harms the integrity of the legal profession and harms the reputation of our courts. Troubling is the reality that the Bar seems uninterested and does nothing substantive towards solving the problem. Notably, our Statutes and Rules do not require lawyers to be honest or to tell the truth. Rather, our laws prohibit lawyers from committing acts involving deceit, dishonesty, false statements and misrepresentations.

In my view, and from OSB statistics, more than 1800 bar complaints filed in 2014 and more than 1900 complaints filed in 2015 indicate that more lawyers are committing misconduct each year. Or maybe the Public is just tired of the damages misconduct causes and are filing more complaints. Whatever the case, I would believe more than 95% of all complaints involve acts that are dishonest in nature. Yet it seems that, rather than deal with the problem of attorney dishonesty with firm prosecution and valuable sanctions, lawyers are given a pass. Following are the cornerstone Statutes and Rules prohibiting dishonesty:

**ORS 9.460** A lawyer shall never seek to mislead the court or jury by any artifice or false statement of law or fact.

**RPC 3.3(a)** A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

**RPC 8.4(a)** It is professional misconduct for a lawyer to: (1) violate the Rules of Conduct; (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law; (4) engage in conduct that is prejudicial to the administration of justice.

I raise this subject of *dishonesty*, and the failure of this Committee to adequately or even remotely consider it, because from the 17 years of litigation plights I suffered through, my observations of the legal profession have led to an irrefutable conclusion that the lack of truthfulness in legal proceedings (i.e., dishonesty) is foremost cause of harm that affects the public, the profession and the courts. Yet these acts (prohibited by law) continue to burden both the State Bar and the Public at alarming rates and at staggering economic costs. So, unless the consistent failure of the Disciplinary Process to adequately root out the problem and the consistent failure to impose firm sanctions that would deter prohibited acts, are squarely addressed and resolved, these problems will continue. In a nutshell, the ongoing conduct of dishonesty in our courts and in Disciplinary proceedings is the Bar's biggest problem to solve for the Public good. The question is: Will the State Bar Leadership ever choose to adequately address this fundamental issue with a goal to solve it?

I apologize for my shortcomings to effectively express my thoughts in these regards. But I see this serious issue of dishonesty in our legal system, and the clear, unapologetic refusal to confront it with earnestness, as a dire problem and it bothers me greatly. Said differently, I view this treachery as being the nemesis to the integrity of the court and the cause of great harm to people, yet the Bar seemingly ignores it, as if it is the new normal.

Next is secrecy. Secrecy — or the Committee’s idea to “promote confidentiality” and close-off the Public’s view of bar complaints from their inception — is pure lunacy. In fact, and with all due respect, to encourage and regulate secrecy as I understand the Proposals would accomplish, is in my view fundamentally dishonest at its core. And to go down the road with this Proposal will only serve to encourage *even more dishonesty* in the profession. There is no other way to say it, and there may be no means to stop it under your new guidelines.

Not only does the Public have a right to know when lawyer misconduct is reported by a filed complaint, the Public’s right to view the process, unhindered, **is the only factor** that can promote confidence. To say “*the State Bar is interested in protecting the Public,*” only to then paint its windows of transparency with thick black paint so the Public can no longer view the disciplinary process, will only create greater distrust. If the Board of Governors, the State Bar, and the Disciplinary Counsel are truly interested in promoting greater confidence and Public Trust, then please do not take official action that will do the very opposite.

From a Constitutional view on this confidentiality (secrecy) issue, Article I, of the Oregon Constitution, provides that:

Section 10. Administration of Justice. “No court shall be *secret*, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.” (emphasis added)

A lawyer, who is a resident and citizen in the community like everyone else but happens to be licensed by the authority of the Supreme Court through the State Bar, is subject to trial before a three-judge Bar panel that could result in the loss of his/her license to practice law (as the means to earn a living) for having committed an egregious unlawful act that has harmed a citizen (a member of the public). This would be a loss of a liberty; a right otherwise guaranteed by our Constitution. To my knowledge, every complaint filed with the Bar for decades has been open to the public for view, including inspection of records, from the filing of the bar complaint. The entire process has been, and today still is, open to the public and is not “secret.”

If such action were to take place in a court of law rather than in a public meeting room at the State Bar, the entire legal process, from the filing of the “complaint,” would be open to the public and subject to public records requests ...in other words, the legal process would not be “secret” as a matter of constitutional law.

So how is it, in 2016, that the DSR Committee believes it has the authority to now create a very “secret” legal process to shield both the [accused] lawyer and the State Bar Disciplinary Process from the Public View. I would submit that the proposal to make the bar complaint process “confidential,” for any period of time or for any reason, is clearly inconsistent with, and in violation of Article I, Section 10, of our State Constitution. If not in violation of the letter of the law, certainly in the spirit of the law and to the harm of the Public good.

Even more (but with a caveat that I have not yet research the law the matter before I can claim I know what I am talking about), I cautiously mention one more concern about affording lawyers the privilege of “confidentiality” in bar complaint proceedings in the initial process. So until I learn otherwise, I assert that this Proposed Confidentiality Rule is unconstitutional. Article I, of the Oregon Constitution, states that:

Section 20. Equality of privileges and immunities of citizens. “No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.”

Again, when any citizen commits an act purported as illegal, the [judicial] process is open and accessible through the public process, and particularly when the consequence is the loss of liberties otherwise guaranteed under the Constitution. Under our laws, neither the offender, nor the process, is afforded a shield from public view. When a citizen steals money, breaches a contract, or causes harm through negligence, the process, whether criminal or civil, is open to the full view of the public.

Because our State Constitution says “no law shall be passed granting to any citizen or class of citizens privileges or immunities,” then it seems reasonable to construe Article I, Section 20, as **prohibiting** the Oregon State Bar from enacting a Rule, process or law (the Supreme Court deems Professional Rules as ‘law’) that grants to lawyers who are *citizens* (and the Bar Association is certainly a *class of citizens*) privileges and immunities from public scrutiny for their unlawful acts.

There are lawyers (*citizens*) who steal funds from client trust accounts, who breach fiduciary duties owed to clients, and whose negligence (misconduct) through violations of law (the Rules of Conduct) causes great harm to the client. These realities being undeniably true, then I ask: How does the DSR Committee justify an attempt to establish a new law that would afford such an offender a *special privilege and immunity from Public discourse* that is not equally afforded to all citizens? How would this **not be unconstitutional** under Article I, Section 10, **and** Article I, Section 20, of the Oregon Constitution?

I could be wrong, but in my un-researched opinion I believe the Oregon State Bar should not be considering the enactment of any new Rule (or Rules), or code or law that may very well be in direct violation of our State Constitution.

Last on my initial short list of concerns is the subject of Access to Justice.

(1) The Mission Statement of the Oregon Department of Justice says:

“As a separate and independent branch of government, our mission is to provide fair and accessible justice services that protect the rights of individuals, preserve community welfare, and inspire public confidence.”

...and is accompanied by its Statement of Values that says, in pertinent part:

“Oregon courts provide justice and uphold the rule of law. We Value: Fairness, integrity, openness, timeliness, consistency, accountability.”

(2) Following the ideals of our Judicial Branch, the State Bar promotes its *Mission* as:

“Serving justice by promoting respect for the rule of law, by improving the quality of legal services and by increasing access to justice.”

...and its *Values Statement* includes:

*Fairness*: The bar works to eliminate all bias in the justice system and to ensure access to justice for all; and

*Justice*: The bar promotes the rule of law as the best means to achieve justice and resolve conflict in a democratic society.

...and the Bar publicizes its *Functions* to include:

“We are a regulatory agency providing protection to the public,” and,

“The Bar is an advocate for access to justice.”

Together, our Courts and the Bar Association promote the importance of *access to justice* by the Public, and in fact advocates for it without caveats or exceptions ...except I am not at all certain what is meant by “access to justice.”

In these regards, my experiences with the State Bar, beginning about 1999 or 2000, have been both positive and negative; quite positive in positive circumstances, but quite negative in negative circumstances. And I think the difference depends upon what information I seek, and from whom I seek information from. But mostly, if my inquiry even remotely appears to question lawyer conduct, then the welcome door is swiftly closed by upper staff who might otherwise provide an answer or needed information.

I am quite aware that Bar Staff are prohibited by law from providing legal advice or legal assistance. Knowing this, I never seek advice or assistance in terms inconsistent with relevant rules or law.

On this point, I wish to mention that my experience working with Disciplinary Staff, beginning 15 years ago with Ms. Bevacqua-Lynott, and in the past year with Ms. Stich and Mr. Davis, could not have been more positive and professional. These three persons exemplifies the best of what the State Bar stands for.

But beyond the services these three are in the position to provide, and for the information, or services, or conversations concerning ‘*justice*,’ and the role the State Bar might offer to provide “*access to justice*” that would resolve a concern, I always leave with a clear message that those in the OSB Leadership roles believe their job is to *not provide* an access or pathway to needed justice. Valid questions are avoided, legitimate concerns are ignored, and no one has an answer for any of it.

As a member of the Public, rather than a licensed member of the Bar, it has become my view that important matters or processes involving the State Bar can be quite demeaning and unfair, and that access to justice is denied, or worse, blocked rather than promoted or advocated. In other words, if you are not a licensed lawyer, you are an outsider who, from behind the veil, is not genuinely welcomed.

In any event, and until I can better understand the details of the 30 or so Proposed changes to the Disciplinary Process and offer a studied (public) response, I would ask the BOG, DC, OSB, SPRB, and DSRC to give an extra measure of careful consideration to the entirety of the process that has taken place since November 2014.

Please safeguard the Public Trust and the laws that govern these affairs by ensuring the submission of the Disciplinary Services Review Committee's Final Report to the Board of Governors, and then to our Supreme Court Justices, leads to a lawful and valid Disciplinary Process that will ultimately prove to be a sound legal process that was truly crafted and enacted in the Public's *best* interest.

Mr. Heysell, I would be honored to answer any questions that you, or other persons involved in this process, might have. Thank you for taking time to consider my quickly compiled comments. And thank you for your service to the community as the State Bar's newest President.

Respectfully yours,

Ian A. McElroy

Electronic copies to:

Mark Johnson Roberts, DSRC Chair

DSRC Members: Barnes Ellis, Richard Weill, Richard Braun, Bill Blair, Ken Bauman

Honorable Thomas A. Balmer, Chief Justice Oregon Supreme Court (C/O Lisa Lampe)

Oregon State Senator Frank Morse

Oregon State Representative Andy Olson

Oregon State Bar: CAO, Linn Davis; CEO Helen Hirschbiel; DC Amber Bevacqua-Lynott

Oregonian Reporter Jeff Manning (Disciplinary Article, 2.13.16)

Other Citizens interested in the Administration of Justice and Accountability for Lawyers





OREGONLIVE

**The Oregonian**

OREGONIAN MEDIA GROUP

March 2, 2016

Oregon State Bar  
16037 SW Upper Boones Ferry Road  
Tigard, OR 97224

To the Board of Governors:

I am writing in support of retaining the current practices of complete transparency for disciplinary matters before the Oregon State Bar. Oregon has been a model state for openness, and the present system works well for all involved.

I have many concerns about secrecy around the process. People seeking legal assistance, in particular, will not have complete information when they make important decisions. The public will not see the system at work from start to finish.

In this era of cynicism about powerful institutions, the model of transparency serves the public and attorneys best. Cloaking decisions in secrecy does nothing but raise suspicions; sunlight is best.

The Oregon State Bar is to be commended for its strong and enduring commitment to openness. I urge you to continue it.

Sincerely,

Therese Bottomly,  
Director of news  
The Oregonian/OregonLive

Oregon State Bar  
16037 SW Upper Boones Ferry Road  
Tigard, OR 97224

Feb. 29, 2016

To the Oregon State Bar Discipline System Review Committee:

On behalf of the Oregon Territory Chapter of the Society of Professional Journalists, we write to oppose changes to limit the transparency of the Oregon State Bar's disciplinary process.

We oppose the Bar's proposal to keep complaints secret until a decision is made to move ahead with a disciplinary case on the grounds of timeliness and accountability.

As just one example, we reference a complaint filed in 2011 by a former judge against Washington County District Attorney Bob Hermann in which the DA and a defense attorney proposed a court order that sent a mentally ill man to the state hospital illegally.

A formal complaint was eventually filed, but only many months after the original complaint was received. It was ultimately [dismissed two years later](#), but it was a situation that may have gone unreported if the filing process weren't public.

Placing limitations on these records would make it more difficult for journalists to perform their watchdog role. Particularly in the case of a sitting DA – but in any instance regarding an attorney – there is a compelling public interest in the ability to review a complaint in a timely way. If the complaint will ultimately be released, we see no reason to delay public access to complaints as they are filed.

Last fall, Oregon Attorney General Ellen Rosenblum created a Public Records Law Reform Task Force to recommend improvements to Oregon's public records laws. This came after the Center for Public Integrity and Global Integrity gave Oregon [an F grade](#) – ranking it 42nd among 50 states – in government transparency. This proposed change to the Bar's disciplinary process would be a step backward in the movement toward greater accountability and transparency.

Respectfully,

Oregon Territory Chapter, Society of Professional Journalists Board of Directors

- Samantha Swindler, The Oregonian
- Kaellen Hessel, The Statesman-Journal
- Christen McCurdy, The Skanner
- Craig Brown, Vancouver Columbian
- Inka Bajandas, Oregon Forest Resources Institute
- Ian Kullgren, The Oregonian
- Aimee White, United Way of Deschutes County
- Rob Priewe, Linn-Benton Community College

Date: March 4, 2016

To: Kateri Walsh  
Oregon State Bar

Re: Discussion of Changes to Bar Disciplinary System

Dear Kateri:

Thank you for asking for comment from ONPA about pending proposals to make certain portions of the Oregon State Bar disciplinary process confidential to the public. ONPA's Executive Committee has reviewed the proposals. On balance, ONPA supports leaving the present open system in place.

The Executive Committee's reasons are the following:

1. The Bar is a public agency. As such, its operations should continue to be open to public review. Whether the disciplinary process is handled by volunteer lawyers or by an administrative staff or special office, transparency is a proven method for assuring the most fair and honest process.

2. While it appears historically that disciplinary decisions – particularly the decisions to proceed on a Bar ethics complaint – have generally been made carefully and objectively, making parts of the process confidential will raise the appearance of the opposite outcome. Repeatedly, Oregon newspapers have found that public perceptions of government agencies decline when the agency is not open in its decision-making activities. Our members interact with lawyers on a daily basis. We urge that it is not beneficial to the legal profession or legal services consumers to relegate ethics complaints to a process where accusations can be made that “the good old boys/girls” acted to protect one of their own. That’s one of the challenges of a system largely based on lawyers regulating lawyers, especially so in Oregon’s smaller communities.


3. It may be that a different type of disciplinary process should be used. ONPA expresses no opinion on those possibilities. However, whatever system is used should be open to public access. The Bar ethics rules are confusing and technical to lay people. The public often wonders why something is, or is not, ethical. We understand the historic and sensitive nature of the ethics rules. However, injecting confidentiality into a process most often initiated by a consumer of legal services, only serves to make the legal ethics system seem even more obtuse to non-lawyers.

4. Hard cases make bad law. ONPA notes that the current impetus for ethics complaint confidentiality seems to emanate from a controversial ethics case, concerning prominent lawyers. Interestingly, the report of the lawyers' exoneration was covered just as the initial complaints were covered. Reversing years of openness based on reactions to a high-profile case is not a good rationale for changing the openness of the process. Oregon newspapers rarely cover the filing or the processing of ethics complaints. They do, if there is news value or public interest involved. They do the same for other licensed professions: doctors, realtors, psychologists, etc. Obtaining full and accurate information about cases which are newsworthy, warrants openness by all governmental licensing agencies.

5. Creating confidential disciplinary processes for one licensing agency sets a precedent for others. None of us likes having our ethics questioned or reputation impugned. Yet, those who are licensed are given special legal privileges unavailable to the general public. Being publicly responsible for how that license is used is part of holding the privilege

ONPA is always willing to discuss these matters. Open government – as many recent events have shown – is superior to the alternative. Lawyers probably know this better than anyone else.

# Should gripes about lawyers be public?

Created on Thursday, 10 March 2016 00:00 | Written by [Nick Budnick](#) | 

 [1 Comment](#)

The group that oversees Oregon lawyers may make it harder for members of the public to go after bad or unethical attorneys.

A set of disciplinary rule changes recommended by a committee of lawyers, set to be voted on in a public meeting Friday, March 11, would dramatically tilt the playing field in favor of lawyers accused of wrongdoing, according to comments submitted to the Oregon State Bar.

The changes were proposed in the name of streamlining and modernizing Bar rules. But some current and former Bar disciplinary officials, who are deeply versed in the state legal ethics laws, are among those saying the proposed changes are flawed and would undermine protection of the public.

The rule changes would benefit accused attorneys at several steps of the disciplinary process, making it more difficult to prosecute cases, removing public oversight and creating new loopholes that attorneys facing ethics charges could exploit, according to a March 2 memo from Dawn Evans, the top disciplinary lawyer for the Oregon State Bar.

The rule changes would “sacrifice public protection” in the name of protecting lawyers’ reputations, says Mary Cooper, a retired assistant disciplinary counsel for the Bar who commented on the proposal. If adopted, she added, “honest self-regulation in Oregon will be replaced by a much more cynical and self-protective system.”

The changes will be considered at a meeting of the Board of Governors of the Bar, set for 1:30 p.m. in Tigard.

The Bar doubles as a professional association and a de facto state oversight agency, investigating complaints about lawyers who lie, provide poor representation, or steal their clients’ money.

In 2014, about 1,800 complaints were filed against Oregon lawyers by their clients, members of the public and other lawyers.

But the Bar’s disciplinary unit chafes some attorneys who say the process takes too long and is too transparent. Unlike other states, where complaints are secret unless they are upheld by the state Bar, Oregon’s system allows members of the public to view complaints and find out about a lawyer’s complaint history before hiring them.

The committee proposing the changes was set up to respond to an American Bar Association report on Oregon’s disciplinary system. The national group had praised Oregon for its transparency and for the inclusion of volunteers at every step of the disciplinary process. But it also called for the disciplinary office to be granted more independence within the Bar.

The lawyer-only committee appointed by the Oregon State Bar to mull potential changes decided to go in a different direction.

It proposed centralizing power in the Bar’s disciplinary office and making pending cases secret. It also supported the hiring of a professional judge to help process cases, while significantly curbing the power of the Bar’s board of practicing lawyers that oversees the Bar’s disciplinary prosecutions.

Barnes Ellis, a respected Portland lawyer who sat on the committee, praised its recommendations as a recipe to reduce the length of cases that can take years. Because cases are public, even if the lawyer is eventually not found guilty of ethics violations, the process causes “significant reputational, financial and emotional harm,” he wrote in a Nov. 23 letter to the Board of Governors and the Oregon Supreme Court.

But others questioned the inclusion of Ellis on the committee, noting that he himself was being prosecuted by the Bar for alleged ethics violations when he was appointed. The Bar had accused him of a conflict of interest in a high-profile case in which he represented some employees of a firm being investigated by the federal government, as well as the firm itself. The Oregon Supreme Court overturned his disciplinary admonition in February 2015, three months after he was named to the disciplinary overhaul effort.

The public comment period on the proposed changes closed on March 2.



OREGON STATE BAR - Dawn Evans, Disciplinary Counsel for the Oregon State Bar.

The vast majority of those who submitted comments were lawyers. But most of the comments submitted, including by top lawyers such as Larry Matasar and Elden Rosenthal, defended the current system and questioned the changes.

“Granting complete prosecutorial responsibility to (the Bar) without providing adequate oversight invites opportunity for influence and power to be abused,” Rosenthal wrote in a Jan. 8 email to the Bar.

The Bar’s recommendations will be forwarded to the Oregon Supreme Court for approval. Any statutory changes must be approved by state lawmakers.

By **Nick Budnick**

Reporter

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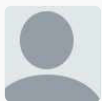
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**Annie M.** · 2 hours ago

One of the potentially unintended consequences of making it harder to go after bad or unethical lawyers is that bad and unethical lawyers will flock to Oregon in droves from states that actually have a fair and robust regulatory process. Texas is a good example. The grievance process conducted by the Texas State Bar is held in complete secrecy. There are almost 10,000 complaints filed every single year. Only a few are sanctioned. This is not safe nor fair for the public, who tend to believe that an attorney will represent the client's best interests.

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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** March 11, 2016  
**Memo Date:** March 2, 2016  
**From:** Dawn M. Evans, Disciplinary Counsel  
**Re:** Disciplinary System Review Committee Recommendations

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### Introduction

The ABA study was undertaken to explore means of enhancing efficiency, reducing redundancy, and promoting consistency in outcome of Oregon's attorney discipline system, without sacrificing protection of the public. In making its decision about whether to support the DSRC recommendations, I encourage the BOG to consider these goals.

In an effort to assist the discussion, I offer information about how the process currently operates, underscore the recommendations that I believe would improve the process, and discuss the need for and consequences of implementing some of the Disciplinary System Review Committee (DSRC) recommendations based on my experience. The discussion of the relative roles of the State Professional Responsibility Board (SPRB) and Disciplinary Counsel (DCO) is presented chronologically through the disciplinary process. A chart mapping the DSRC recommendations in numerical order, summarizing the opinions detailed below, is attached.

I appreciate the opportunity to provide my input, and would be happy to answer questions or provide additional information at the BOG's request.

### The Role and Responsibilities of the SPRB and DCO

#### Current Practice

DCO investigation typically involves months of oral and written communication between DCO and the respondent, with both complainant and respondent receiving whatever written materials the other provides. Respondents have ample opportunity to provide evidence and legal argument. The only outcome DCO can affect without seeking authority from the SPRB is dismissal. When DCO dismisses a complaint after investigation, the complainant can appeal that decision to the SPRB. When DCO concludes there is sufficient evidence of professional misconduct, DCO provides a confidential memo to the SPRB (DCO-SPRB memo), detailing the allegations of the complaint, the respondent's response, and any additional information adduced during investigation; recommending which rules of professional conduct should be charged; and, in many instances, seeking authority from the SPRB for a specific negotiated outcome. In addition to the DCO-SPRB memo, the SPRB member who is assigned the case is provided DCO's complete file and may ask follow-up questions of the staff lawyer prior to presenting the case at the SPRB meeting. The SPRB votes on specific rules to be included in a formal complaint; determines whether DCO can consolidate more than one complaint against a

respondent in a single proceeding; provides settlement authority when it is sought; and, in appropriate cases, authorizes DCO to seek an immediate interim suspension against a respondent, pending the outcome of the formal proceeding. DCO returns to the SPRB for authority to drop or add rule violations and to obtain settlement authority. The respondent may seek the SPRB's reconsideration of a vote to authorize a formal proceeding based upon new evidence not previously considered that would have affected the SPRB's decision or legal authority not known to the SPRB that establishes the vote to file a formal complaint was incorrect. The SPRB votes whether to appeal or cross-appeal a matter that is tried.

#### Authorization of a formal proceeding

In determining whether a formal proceeding should be filed, the DSRC proposes: (1) to mandate delivery of the DCO-SPRB memo to the respondent and afford the respondent an opportunity to respond in advance of SPRB consideration of the matter [DSRC # 30]; (2) to raise the level of proof required to authorize a formal proceeding [DSRC # 25]; and (3) to expand the grounds upon which a dismissal can be made by the SPRB notwithstanding the existence of evidence of misconduct [DSRC # 10].

##### *(a) Confidential communication between DCO and SPRB [DSRC #30]*

This recommendation would eliminate the SPRB's ability to receive confidential written advice from DCO in advance of determining whether formal proceedings should be filed (SPRB). Given the extensive exchange of information with a respondent that typically precedes a DCO recommendation to the SPRB – and that the SPRB member who presents the case has the entire file (including everything the respondent has submitted) to review before making a recommendation – an additional opportunity for a respondent to assert his or her position is unnecessary. Because the SPRB is not an adjudicative body, but is a body that renders the kinds of decisions typically made by a client, it should be afforded the opportunity to engage in full and frank communication with DCO. Any provision of due process for a respondent need not include the turnover of the type of information that would typically be protected by attorney-client privilege as between lawyer and the client decision maker.

For these reasons, DCO is not in favor of DSRC # 30.

##### *(b) "Cause for Complaint" Standard [DSRC #25]*

Currently, the SPRB is required to determine whether there is probable cause to believe professional misconduct was committed in order to authorize a formal proceeding. At trial, the burden of proof is clear and convincing evidence. DCO supports retaining this process as is.

The DSRC proposes to replace "probable cause" with new terminology – "cause for complaint" – terminology that has no parallel in any state or jurisdiction. In order to authorize a formal complaint, the SPRB would be required to find that there is a reasonable belief at that point that the case can be proved by clear and convincing evidence.

The clear intent of the proposed change is to raise the bar on what is required for a formal complaint to be authorized. In addition, as “cause for complaint” would be new, untested language, its usage would create an opportunity to litigate what it means, thereby lengthening the process. Finally, requiring the quantum of proof necessary at trial before a formal complaint can be filed could reward a respondent who has refused to participate in the investigatory process by responding to requests for information and documentation by forcing a dismissal in the absence of proof the respondent has declined to produce.

Certainly, if DCO does not believe there is sufficient evidence to establish misconduct based upon its initial investigation, it will dismiss a complaint. However, requiring an affirmative finding that there is “clear and convincing evidence” at the time a decision is made whether to authorize a formal complaint—which is the burden of proof at trial—is an inappropriate standard at that juncture.

For these reasons, DCO is not in favor of DSRC # 25.

*(c) Additional grounds for dismissal [DSRC #10]*

The existing rule (BR 2.6(f)(2) and (3)) enables the SPRB to dismiss notwithstanding a probable cause finding in a myriad of circumstances. The current rule should be retained intact.

The factors the DSRC recommends adding could be considered under the current BR 2.6(f)(3). The first factor (age of complaint) is also identified as a mitigatory factor in the ABA Standards for Imposing Lawyer Sanctions, which are utilized in assessing an appropriate sanction. The second cost-benefit analysis factor could open an argument for a well-heeled respondent to seek a dismissal based upon the magnitude of the defense.

For these reasons, DCO is not in favor of DSRC # 10.

Limiting the SPRB Role

The DSRC proposes limiting the SPRB’s role to determining whether a formal proceeding is filed against a respondent attorney [DSRC # 8], thereby eliminating SPRB decision-making in: (1) reviewing a complainant’s appeal of a DCO dismissal of a complaint [DSRC # 2], which right to appeal would be eliminated; (2) approving diversion [DSRC # 3]; (3) amending a formal complaint [DSRC # 5]; (4) settling a matter by stipulation [DSRC # 4]; (5) mediating a case [DSRC # 4]; (6) appealing or cross-appealing a trial panel opinion [DSRC # 4]; and (7) authorizing and making recommendations to the Oregon Supreme Court on various types of special proceedings [DSRC # 6, 7, 19, 22, and 29]. Decisions to take steps (2)-(7) would be made by DCO.

If fully implemented, the extent of volunteer involvement beyond the SPRB’s authority to file a formal complaint will be the Disciplinary Board’s role in approving stipulations of six months or less and acting as an adjudicator on the few cases that are tried.

*(a) Streamlining the vote [DSRC #5]*

DCO concurs with eliminating SPRB votes on the amendment of formal complaints, and believes a more efficient practice (consistent with the current rules) is that, once the SPRB has determined that probable cause exists, DCO should plead the rules of professional conduct that fit the facts as they are known at that time. DCO should be free to amend the formal complaint as discovery warrants, and to add additional complaints in a single proceeding, consistent with affording a respondent sufficient time to prepare for trial – which would necessarily preclude adding new complaints beyond a point in time that further discovery was prohibited by an impending trial setting.

*(b) SPRB involvement in negotiated outcomes*

The SPRB should retain its authority to direct the settlement of cases for a sanction – including those matters resolved by diversion – and be given the same level of information currently provided in circumstances that permit confidential communication between the SPRB and DCO regarding that deliberation. This practice permits members of the Bar and the public to meaningfully impact the outcome of the bulk of cases resulting in sanctions. To the extent that SPRB involvement in settlement negotiations lengthens the process, it is time well spent.

DCO favors DSRC # 1, 5, 6, 7, 9, 19, 29, and those portions of DSRC#4 that empower DCO to engage in mediation and to decide whether to appeal.

DCO is not in favor of DSRC # 2, 3, 8, 10, 25, and that portion of DSRC#4 that empowers DCO to negotiate settlements without SPRB involvement.

*(c) Complainant appeal of DCO dismissal [DSRC #2]*

SPRB review of appeals of DCO dismissals is not a substantial portion of its workload, does not unduly lengthen the process, and provides the complainant an additional assurance that a body including nonlawyers is reviewing the appropriateness of the dismissal decision.

For these reasons, DCO is not in favor of DSRC #2.

Increasing DCO Role in Special Proceedings

By rule or practice, SPRB approval is sought by DCO in initiating Title 3 proceedings – seeking an immediate suspension pending the outcome of a formal proceeding, seeking reciprocal discipline of an Oregon lawyer disciplined in another jurisdiction where licensed, seeking immediate suspension of an Oregon lawyer based upon a criminal conviction, and seeking an involuntary transfer to inactive status based upon a lawyer’s incapacity to practice law.

The DSRC proposes empowering DCO to initiate all of those proceedings without SPRB involvement [DSRC # 6, 7, 19, 21, 22, and 29]. DCO concurs with those recommendations.

*(a) Reciprocal discipline*

The DSRC proposes adding a rebuttable presumption in reciprocal discipline matters that the lawyer will receive the same discipline as was imposed in the other jurisdiction [DSRC #19]. At the same time, DSRC would eliminate the bar's ability to seek reciprocal discipline of an Oregon lawyer based upon a resignation in lieu of discipline in another jurisdiction [DSRC #28]. DCO concurs with DSRC #19 and disagrees with DSRC #28. A third recommendation, suggesting that instead of or in addition to seeking reciprocal discipline, DCO can pursue a case based upon the underlying allegations without benefit of the rebuttable presumption [DSRC #20], is unnecessary as that ability exists under the current rules. DCO opposes it as unnecessary.

*(b) Immediate interim suspension*

The DSRC proposes a refinement of the process of seeking an immediate suspension of a lawyer pending the outcome of formal proceeding, intended to expedite the entry of a temporary restraining order in exigent circumstances by filing it with the Disciplinary Board instead of the Oregon Supreme Court [DSRC # 21]. DCO concurs with this recommendation.

*(c) Interlocutory suspension based upon a conviction*

The DSRC proposes requiring a showing of immediate and irreparable harm as a necessary predicate to obtaining a suspension based upon the conviction [DSRC # 22] pending a further determination of what sanction is appropriate. DCO believes the current rule affords sufficient due process to the lawyer as it affords notice and an opportunity to be heard prior to entry of an order. Therefore, DCO is not in favor of DSRC # 22.

DCO Records

The DSRC proposes cloaking complaints in confidentiality until either the SPRB has authorized the filing of a formal complaint or the complaint has been "finally resolved without SPRB authorization to file a formal complaint" [DSRC # 26] and shortening the period of time records pertaining to dismissed complaints are maintained [DSRC # 18].

*(a) Confidentiality of Complaints [DSRC #26]*

Oregon's long tradition of public access to information pertaining to attorney discipline from the outset of the process has served it well and is held up as a model to others at both the state and national levels.

Although intended to discourage complainants from publicizing the facts of the complaint before a determination of its merits has been made, such a rule would not impede a complainant's ability to nonetheless publicize dissatisfaction with a lawyer. It would, however, prevent a journalist from getting an accurate picture by being able to obtain and review everything that has been submitted. Moreover, there is nothing in the current system that

prevents a lawyer from responding to claims made by a complainant, subject only to limitations imposed by RPC 1.6.

For these reasons, DCO is not in favor of DSRC # 26.

*(b) Shortened retention period for dismissed complaints [DSRC #18]*

DCO recommends maintaining the current ten-year retention of dismissed complaints. Complainants will, on occasion, refile a complaint, sometimes years after the original filing. A ten-year retention allows the Client Assistance Office and DCO to review those files to determine whether the complaint is identical or similar to a previous complaint, resulting in a significant time savings for both the lawyer and the bar. Absent the existence of our records, a respondent attorney who has not maintained his or her own records would have difficulty establishing that a new complaint is identical or similar to one already investigated and dismissed.

### **Local Professional Responsibility Committees**

The DSRC recommends eliminating all references to LPRC's in the rules [DSRC #11]. DCO concurs. Volunteers at this stage in the process add unnecessary delay and are well-represented in other stages of the process.

### **Pleading and Pre-hearing Practice**

Rule governing formal complaints and amendments in the discipline process

The DSRC proposes amending BR 4.1 in a number of ways:

- (1) to require a formal complaint to conform with Oregon "code pleading" instead of the current requirement of "notice pleading;"
- (2) to allow for the filing of a "motion to make more definite and certain" and to clarify that a "motion challenging the sufficiency of the complaint" is really a "motion to dismiss for failure to state a claim;" and
- (3) to permit consolidation of claims involving lawyers acting in concert in a single complaint, to allow a respondent in a consolidated complaint to move to sever on a showing of prejudice, and to allow respondents in separate proceedings to move for consolidation of those proceedings [DSRC #27].

The current rules on pleadings and amendments are simple and straightforward. (BR 4.1, 4.3 and 4.4.) In the absence of assertions that the current rules afford inadequate notice to respondents of what they are accused of; inadequate opportunity to seek clarification; or have resulted in improper joinder of complaints, the proposed changes are unnecessary and could serve to lengthen the process needlessly. Most particularly, it makes no sense that one

respondent ought to be able to require another respondent to have his or her formal complaint heard in conjunction with their own. For these reasons, DCO is not in favor of DSRC # 27.

Stipulation to single adjudicator [DSRC #31]

The current rule permits the parties to stipulate to a hearing before a single lawyer trial panelist. BR 2.4(f)(3).

The DSRC proposal would eliminate the ability of both sides to agree to having the matter heard by a single adjudicator. There has been no assertion that the current system is not working or has led to any injustices. DCO sees no reason why this should be changed. For these reasons, DCO is not in favor of DSRC # 31.

Appointment of trial panel [DSRC #13]

DCO concurs with the DSRC recommendation that trial panels be appointed upon the filing of an answer or upon expiration of the time to answer.

Trial Panel Role Pre-hearing [DSRC #14 and #15]

Seeking to address an apparent inconsistency between BR 4.6 (which prohibits any member of the trial panel from presiding at the pre-hearing conference contemplated by that rule) and BR 2.4(h) (which provides that the trial panel chairperson shall rule on all prehearing matters except for challenges pertaining to trial panel members under BR 2.4(e)(3)), the DSRC recommends that the Bar Rules be amended to clarify that the trial panel chair decide all pre-hearing motions and conduct prehearing trial management conferences [DSRC #14]. The DSRC goes on to direct that settlement conferences be conducted by mediators selected by mutual agreement of the parties [DSRC #15].

The inconsistency between BR 4.6 and BR 2.4(e)(3) is a deliberate inconsistency because the nature of the “pre-hearing conference” that is described in the Bar Rules is distinguishable from what would be termed a “pretrial conference” in a civil setting.

As described in BR 4.6, a disciplinary “pre-hearing conference” is more akin to mediation and therefore prohibits a member of the appointed trial panel from conducting or participating in the conference.

The scope of what is contemplated in BR 4.6 does not include more traditional pretrial conference items – such as a scheduling order. Those matters would be handled by the trial panel chair pursuant to BR 2.4(h).

DCO concurs with the concept that, if there is any confusion about whether the trial panel chair rules on all pretrial matters other than a settlement conference, it should be clarified. Given that the DSRC did not propose deletion of the “pre-hearing conference” as it is described, the rule should be clear that a member of the trial panel cannot preside over that conference. A

separate rule discusses mediation (BR 4.9), which is a voluntary process and presumably would also require agreement to the choice of mediator. For that reason, DSRC # 15 is unnecessary.

### **Professional Adjudicator and Disciplinary Board**

DCO concurs with the DSRC recommendation to establish a professional adjudicator [DSRC #16], as a means of promoting consistency and minimizing the delay that frequently occurs now in the issuance of trial panel opinions. DCO also concurs with the DSRC recommendation to eliminate regional chairs [DSRC #12], which is only appropriate if a professional adjudicator position is established.

### **Miscellaneous**

DCO concurs with the DSRC recommendations #1, #13, #17 and #23.

The current rule applicable to suspended or disbarred lawyers (BR 6.3) provides little detail about what the lawyer actually must do or cease doing. The DSRC proposes adding a laundry list of requirements from which a trial panel can choose [DSRC #24], including such items as client and court notification language; requiring the person to close an office and cease holding oneself out as a lawyer; prohibiting the person from acting as a paralegal, legal assistant, or law clerk; and detailing the repercussions for failure to do so. DCO concurs that BR 6.3 lacks specificity. Rather than a laundry list from which a trial panel can choose, the rule should spell out a precise set of requirements that pertain in all cases in which a lawyer is suspended for more than 30 days. DCO concurs with the addition of requirements but would make them default requirements, not options.



DSRC Recommendation	Favor	Do not favor	Other
(1) The SPRB should be appointed by the Supreme Court on nominations from the BOG, with members eligible for reappointment to a non-consecutive term.	X		
(2) DCO's dismissal of a complaint for lack of probable cause should be final and should not be subject to review by the SPRB.		X	
(3) DCO should have sole authority to enter into diversion agreements for lesser misconduct.		X	
(4) After the SPRB has authorized the filing of a formal complaint, DCO should have sole authority to enter into mediation and agree to a resolution, to negotiate Discipline by Consent (settlements), and to decide whether to appeal a trial panel decision.			Retain SPRB involvement in settlements
(5) DCO should have sole authority to amend formal complaints to correct scrivener errors, drop charges, delete factual allegations, or add new non-substantive allegations, subject to the discretion of the appropriate DB authority.	X		
(6) DCO should have sole authority to initiate temporary suspension proceedings because of a lawyer's disability or to protect the public during the pendency of discipline investigations and proceedings.	X		
(7) DCO should be responsible for reporting to the proper prosecuting authority upon its finding that a crime may have been committed, without the need to seek SPRB authorization to do so.	X		
(8) SPRB jurisdiction over a matter should end once it authorizes the filing of a formal complaint or a letter of admonition.		X	
(9) The SPRB's existing discretion to direct, in some circumstances, that no formal complaint be filed notwithstanding the existence of probable cause should be continued.	X		

DSRC Recommendation	Favor	Do not favor	Other
(10) In exercising its discretion to decline to authorize prosecution, the SPRB should also consider (a) the lapse of time between the alleged misconduct and the SPRB's consideration of the matter, and (b) whether, given the relative seriousness of the misconduct and the likely sanction, formal proceedings are an appropriate use of resources.		X	
(11) The Local Professional Responsibility Committees should be eliminated.	X		
(12) Retain the regional Disciplinary Board panels and the State Chair, but eliminate Regional Chairs.			Favor if professional adjudicator is approved
(13) Trial panels should be appointed promptly upon the filing of the answer or upon the expiration of the time allowed to answer.	X		
(14) The Bar Rules should be amended to clarify that the trial panel chair decides all pre-hearing motions and conducts prehearing trial management conferences.	X		
(15) Settlement conferences requested by either DCO or the accused lawyer should be conducted by a mediator selected by mutual agreement of the parties.		X	Already covered in existing rule
(16) Oregon should establish a professional adjudicator position.	X		
(17) The neutral terms "Respondent" and "finding of misconduct" should be substituted for "Accused" and "guilt" throughout the discipline process.	X		
(18) Records of dismissed complaints should be retained for only three years and then should be considered "expunged."		X	
(19) DCO should have sole authority to initiate reciprocal discipline proceedings; there should be a rebuttable presumption that the sanction in Oregon will be of the same severity as in the original jurisdiction.	X		

DSRC Recommendation	Favor	Do not favor	Other
(20) DCO may opt, instead of or in addition to a reciprocal proceeding, to request authority from the SPRB to file a formal complaint based on the facts of the discipline matter in the other jurisdiction, in which case there is no presumption or preclusive effect of the other jurisdiction's findings and conclusions as to the facts or the sanction.		X	Already covered in existing rule
(21) A two-step process should be implemented that allows for the imposition of a temporary restraining order in exigent circumstances, followed by an order for interlocutory suspension following a hearing if requested.	X		
(22) DCO should have authority to initiate temporary suspension proceedings when a lawyer has been convicted of a crime and where immediate and irreparable harm will result if the lawyer is not suspended.		X	Disagree with narrowing of circumstances in which temporary suspension can be sought
(23) Statutory immunity should be extended to volunteer probation and diversion monitors.	X		
(24) The Bar Rules should set out a menu of the requirements for suspended or disbarred lawyers regarding notice to clients, disposition of client files, etc., from which the parties in a negotiated resolution or the final adjudicator can select based on the circumstances.			Agree with concept but should set out default list of requirements
(25) In making its decision to pursue formal proceedings, the SPRB should find "cause for complaint," which incorporates probable cause and a reasonable belief that the case can be proved by clear and convincing evidence.		X	
(26) Amend the Bar Act to provide that complaints of misconduct and all information and documents pertaining to them are confidential and not subject to public disclosure until either (a) the SPRB has authorized the filing of a formal complaint, or (b) the complaint has been finally resolved without SPRB authorization to file a formal complaint.		X	
(27) Amend BR 4.1 to conform formal discipline complaints to Oregon civil pleading practice.		X	

DSRC Recommendation	Favor	Do not favor	Other
(28) Eliminate from reciprocal discipline lawyers who resigned prior to hearing on pending charges in another jurisdiction.		X	
(29) Authorize DCO to initiate transfers to Involuntary Inactive Status for Mental Incompetency or Addiction.	X		
(30) In proceedings before the SPRB, the Respondent should be provided with the entirety of DCO's recommendation and an opportunity to submit a response to the SPRB.		X	
(31) Permit Respondents to waive a trial panel at the time of filing the answer.		X	