

Oregon State Bar
Special Open Session of the Board of Governors
March 11, 2016
Minutes

President Ray Heysell called the meeting to order at 1:30 p.m. on March 11, 2016. The meeting adjourned at 4:20 p.m. Members present from the Board of Governors were John Bachofner, Jim Chaney, Chris Costantino, Guy Greco, Michael Levelle, Vanessa Nordyke, Per Ramfjord, Kathleen Rastetter, Julia Rice, Josh Ross, Kerry Sharp, Rich Spier, Kate von Ter Stegge, Tim Williams and Elisabeth Zinser. Not present were Robert Gratchner, John Mansfield, Ramón A. Pagán and Charles Wilhoite. Staff present was Helen Hirschbiel, Amber Hollister, Dawn Evans, Susan Grabe, Mark Johnson Roberts, Kateri Walsh, Karen Duncan and Camille Greene. Also present were Carol Bernick, PLF CEO, and unidentified members of the public.

1. Call to Order

Mr. Heysell reminded the audience that this was a working session and only board members and those they call upon will be able to speak. He also reminded the board members that they may remove agenda items from the consent agenda and add them to the open agenda for discussion.

At Mr. Heysell's request, Mark Johnson Roberts, Chair of the Disciplinary System Review Committee, gave background on the Committee and development of the recommendations.

Mr. Heysell asked the board to consider the Disciplinary System Review Committee recommendations in the order set forth in Exhibit A.

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.

Several members expressed concern about the proposed position being a bar employee and too close to other bar employees. If the adjudicator were a bar employee, it might suggest that the adjudicator and the disciplinary attorneys were not independent of one another. Concerns were also expressed that there would be a lack of oversight, transparency, and accountability with the creation of such a position. Some suggested that the idea ought to be vetted further and more thought given to the details of how it would work. Others were troubled by the reversal rate of trial panel opinions by the Supreme Court and by the quality and consistency of the trial panel opinions. Several members opined that a professional adjudicator would necessarily result in improved quality, consistency and efficiency. In addition, it would add professionalism to the process. Volunteers would still be involved and provide accountability and transparency.

Motion: Mr. Greco moved the board disapprove recommendation (16). Mr. Greco withdrew his motion.

Motion: Mr. Chaney moved, Ms. von Ter Stegge seconded, and the board accept recommendation (16). Mr. Ramfjord amended the motion, Ms. Nordyke seconded, to add discussion with Supreme Court to employ the position. Mr. Chaney withdrew his motion.

Motion: Mr. Ramfjord moved the board approve recommendation (16) provided the Supreme Court would employ the position. Mr. Chaney seconded. The board voted 7 in favor and 7 against the motion. Yes: Mr. Greco, Ms. Nordyke, Ms. von Ter Stegge, Mr. Chaney, Mr. Ramfjord, Mr. Levelle, and Ms. Zinser. No: Mr. Ross, Ms. Rastetter, Mr. Williams, Ms. Rice, Mr. Bachofner, Ms. Costantino, and Mr. Sharp. Mr. Heysell broke the tie with his vote in favor of the motion to accept recommendation (16) provided the Supreme Court would employ the adjudicator. The motion passed.

Motion: Mr. Chaney moved, Mr. Greco seconded, to table recommendation (12). The board unanimously approved the motion.

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.

Motion: Mr. Levelle moved recommendation (8) be approved. Mr. Ramfjord seconded. Ms. von Ter Stegge asked for clarification of the current role of the SPRB. Ms. Evans informed the board of the SPRB's current role. After considerable discussion about the role of the SPRB, the board voted 2 in favor and 12 against the motion to accept recommendation (8). Yes: Ms. von Ter Stegge and Mr. Ramfjord. No: Ms. Zinser, Mr. Sharp, Mr. Greco, Mr. Ross, Ms. Rastetter, Mr. Williams, Mr. Bachofner, Ms. Costantino, Ms. Rice, Mr. Chaney, Ms. Nordyke and Mr. Levelle. The motion failed.

*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.

Motion: Mr. Levelle moved recommendation (3) be approved. Mr. Greco seconded. Mr. Bachofner moved to amend the motion to say where appropriate DCO could enter into diversion agreements with SPRB approval. The motion to amend died due to lack of a second. The board voted 7 in favor and 7 against the motion to accept recommendation (3). Yes: Mr. Greco, Ms. Nordyke, Ms. von Ter Stegge, Mr. Chaney, Mr. Ramfjord, Ms. Zinser, and Mr. Sharp. No: Mr. Ross, Ms. Rastetter, Mr. Williams, Mr. Bachofner, Mr. Levelle, Ms. Rice and Ms. Costantino. Mr. Heysell broke the tie with his vote in favor of the motion. The motion passed.

(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.

Motion: Mr. Greco moved to accept recommendation (4). Ms. Nordyke seconded. The board voted 6 in favor and 8 against the motion to accept recommendation (4). Yes: Ms. von Ter Stegge, Ms.

Costantino, Mr. Ramfjord, Mr. Sharp, Ms. Zinser, Ms. Rastetter. No: Mr. Greco, Mr. Ross, Mr. Williams, Mr. Bachofner, Mr. Levelle, Mr. Chaney, Ms. Rice, Ms. Nordyke. The motion failed.

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.

Motion: Mr. Greco moved to approve recommendation (6). Mr. Ramfjord seconded. The board voted unanimously to accept recommendation (6). The motion passed.

(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.

Motion: Mr. Greco moved to accept recommendation (7). Mr. Ramfjord seconded. The board voted unanimously to accept recommendation (7). The motion passed.

(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.

Motion: Mr. Greco moved to accept recommendation (19). Mr. Chaney seconded. The board voted 11 in favor and 2 against with 1 abstention to the motion to accept recommendation (19). Yes: Mr. Greco, Mr. Ross, Mr. Williams, Mr. Sharp, Mr. Bachofner, Mr. Levelle, Mr. Ramfjord, Mr. Chaney, Ms. Costantino, Ms. von Ter Stegge and Ms. Nordyke. No: Ms. Rastetter and Ms. Rice. Ms. Zinser abstained. The motion passed.

(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.

Motion: Mr. Williams moved to accept recommendation (22). Mr. Chaney seconded. The board voted unanimously to accept recommendation (22).

(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.

Motion: Mr. Chaney moved to accept recommendation (30). Mr. Greco seconded. Several members expressed concern that this recommendation would burden the process without necessarily accomplish its goal. Others were in favor of the recommendation because it opens discovery of all the strengths and weaknesses of a case. Mr. Bachofner moved to amend the motion to require the full file be turned over. The motion to amend failed due to a lack of a second. Mr. Bachofner moved to end debate on the motion. The motion to end debate was passed unanimously. The board voted 4 in favor and 10 against the motion to approve recommendation (30). Yes: Mr. Levelle, Mr. Ramfjord, Mr. Chaney, Mr. Sharp. No: Ms. Zinser,

Mr. Greco, Mr. Ross, Ms. Rastetter, Mr. Williams, Mr. Bachofner, Ms. Rice, Ms. Costantino, Ms. von Ter Stegge, Ms. Nordyke. The motion failed.

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.

Motion: Mr. Greco moved to accept recommendation (2). Mr. Chaney seconded. The board voted 7 in favor and 7 against the motion to approve recommendation (2). Yes: Mr. Ramfjord, Ms. Zinser, Ms. von Ter Stegge, Ms. Costantino, Mr. Chaney, Mr. Sharp and Mr. Levelle. No: Mr. Greco, Mr. Ross, Ms. Rastetter, Mr. Williams, Mr. Bachofner, Ms. Nordyke and Ms. Rice. Mr. Heysell broke the tie with his vote against the motion to approve recommendation (2). The motion failed.

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

Motion: Mr. Chaney moved to accept recommendation (11). Mr. Ramfjord seconded. The board voted unanimously to accept recommendation (11). The motion passed.

4. Records of Disciplinary Matters

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

Motion: Mr. Chaney moved to accept recommendation (18). Mr. Greco seconded. Several members of the board noted that retaining files related to dismissed complaints for a longer period of time provides greater transparency, and provides information that may assist individuals in selecting a lawyer of their choice. The motion failed.

(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.

Motion: Mr. Greco moved to accept recommendation (26). Mr. Ramfjord seconded. Several members of the board noted the importance of transparency in the process for the credibility and protection of the public. Members noted that although many bar complaints do not result in discipline, some complaints reveal matters that are of public concern. For this reason, the public deserves to know about complaints early in the process. The board voted unanimously against the motion. The motion failed.

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.

Motion: Mr. Greco moved to accept recommendation (10). Mr. Ross seconded. The board voted 4 in favor and 9 against the motion to approve recommendation (10) Yes: Mr. Ross, Ms. Nordyke, Mr. Chaney, and Mr. Ramfjord. No: Mr. Greco, Ms. Rastetter, Mr. Williams, Mr. Bachofner, Ms. Von Ter Stegge, Ms. Costantino, Ms. Rice, Ms. Zinser, and Mr. Sharp. The motion failed.

(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.

Motion: Mr. Greco moved to accept recommendation (24). Ms. Nordyke seconded. The board voted unanimously to accept recommendation (24). The motion passed.

(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.

Motion: Mr. Greco moved to accept recommendation (25). Mr. Chaney seconded. The board voted 2 in favor and 11 against the motion to accept recommendation (25). Yes: Mr. Sharp and Ms. Zinser. No: Mr. Greco, Mr. Ross, Ms. Rastetter, Mr. Williams, Mr. Bachofner, Mr. Ramfjord, Mr. Chaney, Ms. Rice, Ms. Costantino, Ms. von Ter Stegge, and Ms. Nordyke. The motion failed.

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

Motion: Mr. Greco moved to accept recommendation (27). Mr. Ross seconded. The board voted 1 in favor and 11 against the motion to approve recommendation (27). The motion failed. Yes: Mr. Ramfjord. No: Mr. Ross, Mr. Williams, Ms. Rastetter, Mr. Bachofner, Ms. Nordyke, Mr. Sharp, Ms. Zinser, Mr. Chaney, Ms. Costantino, Ms. von Ter Stegge, Ms. Rice. Abstain: Mr. Greco. The motion failed.

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

Motion: Mr. Greco moved to accept recommendation (28). Mr. Chaney seconded. The board voted unanimously to reject the motion. The motion failed.

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

Motion: Mr. Greco moved to accept recommendation (31). Mr. Chaney seconded. The board voted 1 in favor and 12 against the motion to accept recommendation (31). Yes: Ms. von Ter Stegge. No: Mr. Greco, Ms. Zinser, Mr. Sharp, Mr. Ross, Ms. Rastetter, Mr. Williams, Mr. Bachofner, Mr. Ramfjord, Mr. Chaney, Ms. Rice, Ms. Costantino, Ms. Nordyke. The motion failed.

Mr. Heysell asked the board to consider the Disciplinary System Review Committee’s other recommendations in their final report as listed on the consent agenda. **[Exhibit B]**

Ms. Rice requested that recommendation (5) be removed from the consent agenda to be discussed and voted on by the board in open session.

(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.

Motion: Mr. Greco moved to accept recommendation (5). Mr. Ramfjord seconded. The board voted unanimously to accept recommendation (5). The motion passed.

Motion: Mr. Bachofner moved to approve the remaining recommendations contained on the consent agenda. Mr. Chaney seconded. The board voted unanimously to approve the recommendations on the consent agenda. **[Exhibit B]**

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.]

OUR VIEW

MED FOR MAIL TRIBUNE EDITORIAL
3/17/2016

Bar takes a stand for transparency

The Oregon State Bar has rejected an ill-advised attempt to make its disciplinary procedures less open. The move is a victory for the principle of public disclosure.



SUNSHINE WEEK

The Oregon State Bar is not, strictly speaking, a government agency, but it fulfills the governmental role of protecting the public by licensing attorneys, investigating reports of wrongdoing and meting out punishment if necessary. It also has maintained one of the most open disciplinary processes of any Bar in the country. The Bar investigates complaints against attorneys filed by their clients, the public or other

attorneys. Members of the Bar can be disciplined for lying, providing standard representation or mishandling or stealing clients' money.

A committee of lawyers worked for a year on recommended changes to that disciplinary system. Among the committee's recommendations were to destroy disciplinary records after three years instead of 10 and to keep pending complaints secret. As it stands now, the complaint process is open from the beginning.

The Bar's governing board voted down those changes last week, along with others that would have raised the burden of proof for launching prosecutions of attorneys and given accused attorneys access to the Bar's internal deliberations about their case.

The board's decision came just in time for Sunshine Week, dedicated to promoting openness and transparency in government.

Public confidence that governmental and quasi-governmental institutions are acting in the public interest depends on the disclosure of those actions. An agency that won't even acknowledge that an investigation is underway does not inspire confidence.

The Oregon Medical Board, for example, keeps complaints against doctors secret unless the board finds a violation has occurred and issues an order. That kind of secrecy benefits doctors, not the public.

The Bar's board of governors is to be commended for valuing the public interest over that of the legal profession.

From: [Kateri Walsh](#)
To: [Camille Greene](#); [Helen Hirschbiel](#); [Dawn Evans](#); [Mark Johnson Roberts](#); [Linn Davis](#); [Susan Grabe](#); [Kateri Walsh](#)
Subject: Bend Bulletin Editorial on Discipline
Date: Friday, March 11, 2016 7:47:32 AM

Another media piece for packet. 3/11/16 editorial, Bend Bulletin.

<http://www.bendbulletin.com/opinion/4102077-151/editorial-dont-hide-complaints-against-lawyers?referrer=fpblob>