

**Oregon State Bar
Special Meeting of the Board of Governors**

January 10, 2014

9:00 a.m.

Oregon State Bar Center – Tigard

McKenzie Room

1. **Call to Order**
2. **Welcome and Introductions [Mr. Kranovich]**
3. **Meal Planning - February BOG meeting - Salem [Ms. Stevens]** **Exhibit**
4. **Request for Discipline System Evaluation [Mr. Gleason]** **Exhibits**
5. **Preview of ABA HOD Agenda [Ms. Harbur]** **[Resolutions](#)**
6. **Request for Sponsorship for NLADA Conference [Ms. Baker]** **Exhibit**
7. **Response Supreme Court Deferral of PC 8.4 Amendments** **Exhibit**
8. **Assignment to Bar Press Broadcasters Council [Mr. Kranovich]**
9. **OSB Participation in Innovation Workgroup [Mr. Haglund]**
10. **Report on Regulatory Monitoring [Mr. Gleason]** **Exhibit**

EVENT FORM - OSB BOARD OF GOVERNORS

EVENT: BOG Meetings **YEAR:** 2014
Salem **DATES:** Feb 20-21
LOCATION: The Grand Hotel / Salem Conf. Ctr. Willamette U OCJC

2/20 Thursday: 12:00pm Lunch with Supreme & Appellate Courts Location TBD
2:00-5:00pm Committee Meetings (20-25/room) Two rooms. **Santiam 4 & 5**
5:30-7:00pm Local Bar Social (125) **OLC Bldg**
Willamette U
7:00pm **BOG Dinner?** **Location TBD**

2/21 Friday: 8:00-9:00am **Breakfast - Hotel Buffet or Additonal Breakfst?** **Location TBD**
9:00am-1:00pm BOG Meeting - Washington/Hood (35) **Croisan A & B**

DRAFT

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: January 10, 2014
From: John S. Gleason, Director of Regulatory Services & Disciplinary Counsel
Re: Proposal for Discipline System Review

Action Recommended

1. Ask the Oregon Supreme Court to invite the ABA Center for Professional Responsibility Standing Committee on Discipline to conduct an on-site review of the OSB discipline system.
2. Create a task force of stakeholders to review the ABA evaluation and make recommendations to the BOG and the Supreme Court.¹

Introduction

Depending on one's perspective, Oregon's discipline system works well to protect the public while treating accused lawyers fairly; or it is slow, inconsistent, out of touch and selectively applied. Not surprisingly, the most positive views are held by those who work or volunteer in the system. Comments from a sizeable number of members², however, indicate views ranging from mistrust to hostility; perhaps most disappointing is the widespread lack of respect for disciplinary counsel staff, who are seen as unfamiliar with and isolated from the "real" practice of law.

Throughout the history of the bar, concerns about and dissatisfaction with the discipline system have generated a variety of reviews and evaluations. There have been seven comprehensive reviews since 1972, and four that were more focused.³ The common theme in nearly every review was the problem of delay and the most-often suggested solution was to reduce or eliminate reliance on volunteers at every level. With few exceptions, however, the suggestions have been rejected time after time.

The system now in use has been in place for 30 years and is grounded in statute⁴ and the Oregon State Bar Rules of Procedure ("the BRs). The current BR's were adopted by the Supreme Court in 1983, when there were approximately 7,000 active Oregon lawyers. The bar staff was small and discipline was the responsibility of the General Counsel; the investigation

¹ ORS 9.542 authorizes the BOG, "subject to the approval of the Supreme Court," to adopt rules of procedure for disciplinary proceedings.

² John Gleason has met with counsel for accused lawyers as well as with many local bar and other groups over the last year to get a sense of how our members view the discipline system. Other staff receive similar comments on a pretty regular basis.

³ See attached memo.

⁴ ORS Chapter 9 mandates the establishment of local professional responsibility committees and the state professional responsibility board (ORS 9.532) and the disciplinary board (ORS 9.534). The composition and authority of each body "shall be as provided in the rules of procedure."

and prosecution of lawyers was handled almost exclusively by volunteers. There have been some changes over the ensuing years. The most significant may have been the separation of the discipline function from General Counsel's Office in 1987 at the suggestion of an ABA evaluation team. Other structural changes were the creation of a central intake office (CAO) and the implementation of diversion in 2003,⁵ and the gradual evolution of local professional responsibility committees into panels of individual investigators.

In 2013 there were approximately 16,000 active Oregon lawyers. It hardly needs saying that the practice of law has changed considerably since 1983 and continues to do so at a rapid pace. Over the 30-year span, Disciplinary Counsel's staff has grown to accommodate the increasing size of the bar; simultaneously, professional responsibility and lawyer regulation have become recognized specialty areas. Disciplinary cases have become more complex and often more contentious. At the same time, the number of lawyers able to volunteer the kind of time required for disciplinary investigations and prosecutions has declined. Additionally, few have the specialized knowledge and expertise of the professional staff lawyers.

Our 30-year-old system was workable for many years (and to the thinking of some remains so), but there are many who believe it is again time to look at whether there are better ways to handle lawyer discipline. There are few organizations that can function well using the same processes that were put in place 30 years ago during a very different era. Ongoing evaluation of the discipline system is a part of continual process improvement to assure the OSB is meeting the needs of its member and public constituents.

Much of what is likely to come from another review of the discipline system undoubtedly will be similar to suggestions made in the past. While some may represent a significant change from the way we have done things for more than 30 years, they are a natural outgrowth of the "professionalization" of lawyer discipline systems, and will bring Oregon into the mainstream of professional regulation. Considering changes is not intended as nor should it be viewed as criticism of the long-standing volunteer-based system; rather, it is recognition of the increased complexity of lawyer discipline, the difficulty of expecting volunteers to have sufficient time and expertise to make some decisions, and the maturation of professional responsibility principles.

Discussion

ABA Evaluation

A comprehensive review of Oregon's disciplinary system is a significant undertaking. The ABA Center for Professional Responsibility Standing Committee on Discipline has the necessary expertise and experience to give an independent look at our system. The Standing Committee was established in 1973 and since 1980 it has conducted 59 state reviews and consultations (it reviewed Oregon's system in 1986-87⁶). The process is initiated upon an invitation from the Supreme Court and consists of a review of the entire lawyer discipline system by a team of national experts. Before visiting, the team reviews relevant court rules, reports and statistics.

⁵ Both were recommendations of a 2002 task force report that was adopted by the HOD.

⁶ See attached.

While on-site, the team conducts in-depth interviews with bar officials, adjudicators, complainants, respondents, respondent's counsel, members of the judiciary and disciplinary staff. In conducting the review the Committee refers to the *ABA Model Rules for Lawyer Disciplinary Enforcement*, the McKay Commission Report and *Lawyer Regulation for a New Century*. However, the Committee does not use the criteria as a checklist. Rather, when formulating its recommendations, the Committee considers local practices unique to the jurisdiction. If a local practice works well the Committee will not recommend change simply because that practice does not comport with ABA policy.

Approximately three months after the on-site portion of the consultation, the Standing Committee provides its report and recommendations to the Supreme Court. The report is designed to assist the court and others responsible for the administration of the disciplinary process to improve the system by providing recommendations based on the team's investigation, its collective knowledge and experience.

The ABA asks that the BOG contribute \$7,000 to help underwrite the consultation costs. The ABA bears the balance of the expense plus all costs associated with producing the report.

OSB Discipline System Task Force

The BOG should establish a broadly-comprised stakeholder's task force to review and consider the ABA evaluation and thereafter submit findings and options to the BOG regarding possible adjustments to the discipline system. Members of the task force should represent the Supreme Court, the BOG, Disciplinary Counsel's Office, the SPRB, the Disciplinary Board, volunteer bar counsel, CAO, counsel for accused lawyers, and the general membership. If possible, there could also be two or three lawyers who have been the subject of disciplinary proceedings within the last five or ten years.

In addition to suggestions from the ABA, there are some areas that staff believes should be considered by the OSB task force:

1. *Creation of the Office of the Presiding Disciplinary Judge.* Several jurisdictions have moved to the PDJ model in recent years. As envisioned, there would be a presiding judge to sit on all disciplinary cases together with a volunteer lawyer and a volunteer public member. The experience of other jurisdictions has been increased consistency in decisions and less delay both in pre-trial proceedings and in the rendering of the opinion. The Supreme Court would select the PDJ, who would serve at the pleasure of the court. The OSB would pay the PDJ's salary and provide administrative support, but the PDJ would be accountable solely to the court. As with the Disciplinary Board the PDJ would be independent of BOG or OSB Executive Director. The CJ has indicated his interest in the idea and it enjoys modest support from the SPRB. The current case load would require at least a .5 FTE position with some administrative assistance. A rough estimate of the cost of a half-time PDJ (presumably a retired judge) is approximately \$100,000 to \$125,000 annually.

2. *Expand Authority of the Client Assistance Office.* Consideration should be given to authorizing the Client Assistance Office to negotiate and enter into diversion agreements in minor matters.
3. *Comprehensive rewrite of the Bar Rules of Procedure.* As a result of the various amendments to the BRs over the years, they are not well organized and are difficult to navigate. There are also areas where the authority of the respective participants is not clear. As any changes recommended and approved through the review process will necessitate amendments to the BRs, this will be an opportune time to undertake a complete review and updating of the rules.

HENDRIX, BRINICH & BERTALAN, L.L.P.

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December 16, 2013

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Mr. Timothy Williams, Esq.
Bend, OR

Re: 2013 State Professional Responsibility Board // MEMORANDUM OF CONCERN

Dear Board of Bar Governors,

Attached is the Memo of Concern passed unanimously (w/2 abstentions) by the SPRB. It is the Board's wholehearted opinion that any committee formed to review and recommend changes to the Oregon State Bar's disciplinary process be appointed by the BOG and not selected by the Bar's professional staff or outsourced to the ABA. Thank you.

Regards,


Greg Hendrix, 2013 SPRB Chair

c: SPRB

Ms. Mary Kim Wood, Esq., 2013 State Disciplinary Board Chair

Ms. Pam Yee, Esq., 2014 State Disciplinary Board Chair

Ms. Sylvia Stevens, Esq., Executive Director, OSB

Ms. Helen Hierschbiel, Esq. General Counsel, OSB

Mr. John Gleason, Esq., Disciplinary Counsel, OSB

MEMORANDUM OF CONCERN

To: Oregon State Bar Board of Governors (BOG); Sylvia E., Stevens, Executive Director,
Oregon State Bar
From: 2013 State Professional Responsibility Board (2013 SPRB)
Date: December 10, 2013

**RE: DISCIPLINARY COUNSEL'S PROPOSED CHANGES TO DISCIPLINARY SYSTEM
AND PROCEDURAL RULES**

Our current Disciplinary Counsel and Director of Regulatory Services for the Oregon State Bar (DC), recently presented to the members of the 2013 SPRB a Memorandum setting forth his perceived "Concerns Expressed by the Supreme Court" and his "Proposed Changes" to our Bar's disciplinary system and procedural rules. A copy of that Memorandum (DC Memo) is attached hereto for your reference. The 2013 SPRB presents here its considered concerns and position regarding DC's proposed changes, along with our recommendation that further, in-depth analysis and study of the proposed changes be undertaken by the BOG, the House of Delegates (HOD) and Bar membership, before moving forward with implementation of any such proposed changes.

We preface our comments with the acknowledgment that the 2013 SPRB does not believe the Oregon disciplinary system is "broken" or in need of a dramatic "fix." We view our disciplinary system as a very good and progressive model, with its emphasis on volunteer peer and public involvement, checks and balances, and transparency. We fully support in-depth inquiry into and proper and adequate study of how new ideas or changes might improve our disciplinary system. However, we do not see how the wholesale changes suggested here by DC, with an apparent goal of aligning Oregon with some 15 states that have adopted such a disciplinary system, are now warranted. To date, the only reason we have been given as to why our Bar needs these changes is DC's personal opinion that they are the "natural outgrowth of the 'professionalization' of lawyer discipline systems and would bring Oregon into the mainstream of professional regulation." (DC Memo, p.4)

DC's Memo relates four concerns of the Oregon Supreme Court:

- 1) Overcharging in initial Bar complaints;
- 2) Excessive appeals;
- 3) Proposed creation of a Presiding Disciplinary Judge position; and
- 4) Handling of an attorney's clients, files and bank accounts subsequent to Form B resignations, disbarments or lengthy suspensions. (DC Memo, pp. 2-3)

DC's Memo then proposes the following changes:

- 1) A complete re-draft of the Bar Rules of Procedure (BR's);
- 2) Creation of the office of a Presiding Disciplinary Judge;
- 3) Drastic reduction of the oversight role and authority of the SPRB in the disciplinary process, coupled with vesting of that authority in DC. (DC Memo, pp. 3-4)

Generally, the 2013 SPRB does not see a direct connection between the enumerated Supreme Court concerns and DC's proposed changes, with the exception of the proposal to create a Presiding Disciplinary Judge position. Specifically, the 2013 SPRB's concerns and position regarding each proposal are as follows:

Proposal No. 1: A complete re-draft of the State Bar Rules of Procedure, to be undertaken by a committee composed of representatives of disciplinary proceeding respondents' defense bar, Disciplinary Counsel staff, the SPRB and the Supreme Court.

The 2013 SPRB acknowledges that periodic reviews of any rules of procedure are advisable, especially to ensure internal consistency with actual practices and statutory authority. However, no compelling reason, directive from the Supreme Court, or outcry from Bar membership or the public for a "complete re-draft" of our Bar Rules of Procedure (BR's) has been identified by DC. No study or analysis of which the SPRB is aware has been undertaken to determine whether such a complete re-draft is currently necessary or advisable. It is evident that DC's proposed changes concerning a Presiding Disciplinary Judge and DC's proposed elimination of the SPRB's current role and authority would indeed require a complete redraft of the BR's. However, those changes are presently DC's proposals only, not directives from the Supreme Court, BOG, HOD, bar membership or the public. The 2013 SPRB believes that a rush to undertake a complete redraft of the BR's is premature at this juncture, without first considering and determining whether the proposed changes that would be implemented by new BR's are necessary or desirable.

Proposal No. 2: Creation of the Office of the Presiding Disciplinary Judge, selected by the Supreme Court, serving at the pleasure of and accountable solely to the Supreme Court, but with his/her salary and administrative support provided by the Oregon State Bar.

The 2013 SPRB generally supports exploring the concept of creating a salaried position for a Disciplinary Judge who would serve statewide as trial panel chair, but only if a three-person panel is retained that includes an attorney member and a public member. We do not support vesting all decision-making authority in one individual judge. We recognize that there is concern about the length of time it takes for a disciplinary proceeding to progress from the charging decision to trial, and finally, to the issuance of a trial panel opinion. One Disciplinary Judge serving as trial panel chair for all disciplinary proceedings might streamline the process and reduce the amount of time that elapses from service of the charging complaint to ultimate resolution of the charges. One Disciplinary Judge chairing all trial panels might provide more consistency of analysis and outcome in trial panel opinions among the various Regions. Again, this suggestion requires further study and analysis before moving forward. Consideration should be given to how creating this new judicial position might impact the membership's and public's perception of fairness or lack thereof in disciplinary proceedings. By statute, disciplinary proceedings are "within the inherent power of the Supreme Court to control," ORS §9.529, but the 2013 SPRB can envision potential constitutional challenges to a procedure in which the chair

of all trial panels is paid by the Oregon State Bar and accountable solely to the same Supreme Court to which the disciplined member must appeal the trial panel's decision.

Proposals 3 (a) - (h): These are presented as "some examples" of DC's proposed changes to the authority that is currently vested in the SPRB. The proposed changes would have the effect of eliminating any significant input or involvement in, or oversight of, the prosecution and resolution of a bar complaint by DC, once the SPRB has made an initial determination that probable cause exists to warrant the filing of formal discipline charges.

As the BOG might expect, the 2013 SPRB is strongly united in its opposition to DC's proposals (a) - (h), which eliminate the current role and authority of the SPRB in the manner stated. To refresh, the SPRB is composed of eight attorneys (two from Region 5 and one from each other Board Region) and two public members (at-large), all of whom are approved and appointed by the Board of Governors. ORS 9.532(2). Each member serves only one four-year term, and the terms are staggered, so new members are continually rotating in and out, and no one group of attorneys and public members retains long-term authority. *See* BR 2.3(b)(1). We are unpaid volunteers.

Currently, when a matter is referred to the SPRB by DC after DC believes that probable misconduct has occurred, the SPRB is authorized by BR 2.6(c)(1) and (1)(A)-(C) to make a determination of whether or not probable cause exists to believe that misconduct occurred. After consideration, the SPRB may authorize prosecution; dismiss the complaint; refer it to an LPRC or back to the DCO for further investigation; authorize a letter of admonition to the attorney; or, where eligibility for diversion exists, authorize DC to negotiate and enter into a diversion agreement as provided in BR 2.10.¹

Once prosecution has been authorized by the SPRB, our current BR's require DC to obtain SPRB approval before a complaint can be dismissed or rescinded. BR 2.3 (b)(3)(A) gives the SPRB general authority to dismiss complaints, and BR 2.6(f)(2) and (3) provide the SPRB with specific authority to dismiss or direct no further action on a complaint under particular circumstances. Pursuant to Bar Rule 2.6(e)(2), the SPRB may only rescind a complaint when a majority of the SPRB finds that good cause exists. Good cause is defined in Bar Rule 2.6(e)(2)(A) and (B) as either new evidence that would have affected the SPRB's initial charging decision, or legal authority, not known to the SPRB when it considered the matter, establishing that the charging decision was incorrect. BR 4.9 (a) provides that the SPRB shall decide for the Bar whether to voluntarily mediate a disciplinary matter. BR 3.6(d) provides that pleas of no contest and stipulations must be approved in substance by the Chairperson of the SPRB.

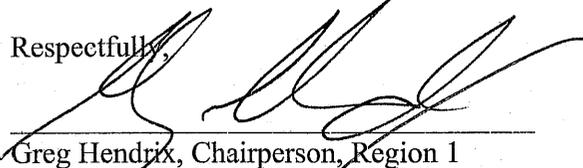
¹ Note that our current BR 2.6(b) allows DC to dismiss a matter prior to referring it to the SPRB if DC determines that probable cause does not exist, and also allows DC to refer a matter to an LPRC for further investigation before referring it to the SPRB.

In contrast to our current system, DC's proposed changes would vest unilateral authority in DC to decide whether to refer a matter to an LPRC or Bar Counsel; offer and negotiate a diversion agreement; dismiss; rescind; mediate; settle or appeal a Bar complaint, after prosecution has been authorized by the SPRB. (It appears that already-negotiated diversion agreements still would be subject to approval by the SPRB. DC Memo, p. 3, ¶3(c)) In essence, DC's proposed changes would reduce the SPRB's role to that of a criminal grand jury.

It is the 2013 SPRB's position that such centralization of power and authority in DC is not a progressive or healthy change to our disciplinary system, which has traditionally included the participation of volunteer Bar member peers, as well as members of the public. In our collective experience, the substantive advice and opinions of the SPRB members, coming from a wide range of law practice subject areas and geographical regions, has provided helpful and well-received assistance and guidance to DC's staff in the prosecution and resolution of Bar complaints, and has promoted public and membership trust in the process. Under DC's proposed changes to the SPRB's role, any checks and balances that are currently provided by the SPRB's input and oversight would disappear along with membership and public involvement.

The 2013 SPRB does not see how the proposed changes to the functions of the SPRB would better protect the public, nor do we understand how the proposed changes would better regulate our membership. We strongly suspect that these proposed changes would reduce both public and membership trust in the disciplinary process and the Bar. For these reasons, we strongly oppose moving forward with changes that concentrate disciplinary authority in the DC. If changes of this nature are under consideration, there should be thorough, open discussion, with careful consideration of the consequences of such changes, and clear evidence of support and direction from the Supreme Court, BOG, HOD, Bar members and the public, before they are implemented.

Respectfully,



Greg Hendrix, Chairperson, Region 1

ATTACHED

Timothy Jackle, Member, Region 3

ATTACHED

Chelsea Armstrong, Member, Region 6

ATTACHED

Dr. Michael Sasser, Public Member



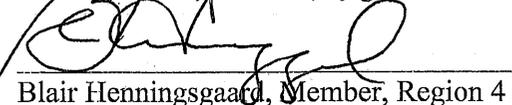
Michael Gentry, Member, Region 7



Danna Fogarty, Member, Region 5



Whitney Boise, Member, Region 5



Blair Henningsgaard, Member, Region 4

Note: Judy Clarke, Public Member, abstained and Brad Litchfield, Region 2, abstained.

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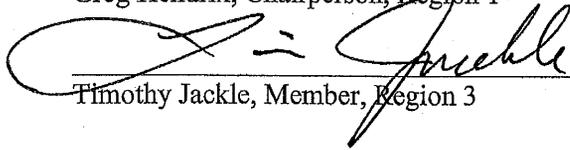
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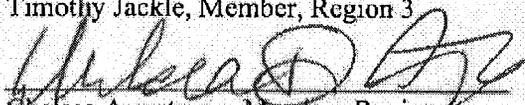
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Whitney Boise, Member, Region 5



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Blair Henningsgaard, Member, Region 4

Note: Judy Clarke, Public Member, abstained and Brad Litchfield, Region 2, abstained.

Memo to SPRB

Date: October 23, 2013
To: State Professional Responsibility Board
From: John S. Gleason, Disciplinary Counsel - Ext. 319 
Re: November 9, 2013 meeting

Overview

The current Oregon State Bar Rules of Procedure ("the BRs) date to 1984¹ with minor amendments through 2013. Substantively, the BRs regarding structure and duties of the disciplinary, contested admissions and reinstatement processes have remained largely unchanged for at least 30 years. The creation of the Client Assistance Office and the Diversion Rule² are notable exceptions.

In 1983 there were approximately 7000 active Oregon lawyers. In 2013 there are approximately 16,000 active Oregon lawyers. Prior to 1987 discipline matters were handled by General Counsel's Office. In response to recommendations from an ABA evaluation team invited to review the OSB system, the prosecutorial function was separated and Disciplinary Counsel's Office began in September, 1987 with one employee who moved from the General Counsel's office. Notwithstanding the creation of a separate disciplinary office, all investigations and prosecutions continued to be delegated to volunteers. Staffing of the Disciplinary Counsel office with "professional prosecutors" proceeded slowly over the years as did the duties handled by staff lawyers.

The discipline system has been the subject of seven comprehensive reviews since 1972, together with several more focused reviews. The central issue in nearly every review was delay and the most often suggested solution has been to reduce or eliminate reliance on volunteers at every level. See attached memo.

The history of the office is important in understanding why the Rules of Procedure are premised on the use of LPRC and volunteer bar counsel rather than Discipline Office staff lawyers. Susan Isaacs, who worked in General Counsel's Office

¹ The first Rules of Procedure in the bar's archives date from 1966.

² Both were recommendations of the 2002 Disciplinary Task Force adopted by the HOD; CAO and the diversion rule were implemented in 2003.

and then the Regulatory Services Division, from 1982 until 1988, confirmed that Bar staff did not conduct *any* field investigations or prosecutions. Rather, they presented initial case review to the SPRB and the SPRB forwarded matters to LPRC for further investigation. Very simply, for decades the entire regulation process relied entirely on volunteers rather than Bar staff.

Concerns Expressed by Supreme Court

In three separate conversations with the Chief Justice and other members of the court the OSB Executive Director and I were directed to address the following concerns:

1. *Over charging in formal complaints.* The court's view appears to be that we should charge only the most serious alleged violations in the formal complaint. Simply because the conduct may warrant charging lesser violations is not justification to do so. A *minor* (an analogy may be a lesser-included in a criminal matter) rule violation should not be alleged in a formal complaint unless it will change the level of discipline. The court's view is that the current practice is unnecessary and over-complicates the trial panel findings as well as any appeal to the court.
2. *Excessive appeals.* The majority of appeals are filed by respondent attorneys rather than Disciplinary Counsel. The court's view is if the question on appeal is only the level of sanction (e.g. too short of suspension) and will not significantly change case law we should not appeal. Additionally, the court directed us to determine what other changes would reduce the number of appeals filed by respondents.
3. *Creation of Presiding Discipline Judge Position.* The Chief Justice has expressed his support for this and I am working on proposed rule changes for submission to the Board of Governors, with whom I have discussed the idea in principle. The change would reduce time spent in the adjudicatory phase of a discipline proceeding, result in more specific and detailed findings of fact and law and ultimately reduce appeals. At least 15 states use professional judges in disciplinary matters and several other states are considering the change.
4. *Handling of clients, files and bank accounts in Form B resignations, disbarments or lengthy suspensions.* The court is unwilling to enter final orders in these cases without assurance that the lawyers' clients will be

adequately protected. I will be working with the General Counsel and the PLF to develop a solution addressing this concern.

Proposed Changes

1. *A complete re-draft of the State Bar Rules of Procedure.* This is a difficult and complex task which will take time. I believe the best approach is to establish a committee to undertake this project. Ideally, the committee will include representatives of the respondents' defense bar, Disciplinary Counsel staff, the SPRB and Supreme Court.
2. *Creation of the Office of the Presiding Disciplinary Judge.* Current case load would require at least a .5 FTE position with administrative assistance. The administrative support is currently available through the Disciplinary Board Clerk in General Counsel's Office. The Supreme Court will select the PDJ, who will serve at the pleasure of the court. Although the OSB will pay the PDJ's salary and provide administrative support, the position is accountable solely to the court. As with the Disciplinary Board the PDJ will be independent of the OSB Executive Director administrative oversight.
3. *Review of the duties of the SPRB.* I recommend no change to the specific duties of the SPRB related to the determination that probable cause exists to warrant the filing of formal discipline charges. I do recommend changes to several areas where authority is vested in the SPRB. Some examples follow:
 - a. Selection of or referral to a LPRC investigator should be in the discretion of Disciplinary Counsel.
 - b. Selection of or referral to a Bar Counsel should be in the discretion of Disciplinary Counsel.
 - c. Negotiation of diversion agreements should be in the discretion of Disciplinary Counsel. All diversion agreements would remain subject to the approval of the SPRB. I also believe the Client Assistance Office should have broader discretion to negotiate diversion agreements. BR 2.10.
 - d. Discretion to dismiss or rescind a formal discipline complaint should rest with the Disciplinary Counsel. An alternative could include consultation with the Chair of the SPRB prior to dismissal or rescission of the formal complaint.
 - e. Settlement of formal discipline matters prior to trial should be in the discretion of Disciplinary Counsel. An alternative could include

consultation with the Chair of the SPRB prior to any final resolution.
BR 3.6(d)

- f. Consolidation of charges and proceedings should be in the discretion of Disciplinary Counsel. BR 4.1(d)
- g. Mediation of formal discipline matters should be in the discretion of Disciplinary Counsel. BR 4.9
- h. A decision to appeal (or not appeal) a decision of a hearing panel should be in the discretion of Disciplinary Counsel.

Many of the foregoing suggested changes are similar to suggestions made in the many reviews of the discipline system. While they represent a significant change from the way we have done things for more than 30 years, they are a natural outgrowth of the "professionalization" of lawyer discipline systems, and will bring Oregon into the mainstream of professional regulation. The proposed changes should not be viewed as criticism of the long-standing volunteer-based system; rather, they recognize the increased complexity of lawyer discipline, the difficulty of expecting volunteers to have sufficient time and expertise to make some decisions, and the maturation of professional responsibility principles.

+6Memo

Date: November 2011
From: Sylvia Stevens, Executive Director
Re: Disciplinary System Reviews

What follows is a brief summary of the various reviews that have been conducted of the OSB disciplinary system.

Over the last 40 years there have been seven comprehensive reviews of the OSB disciplinary system and a handful of smaller reviews. The central issue in nearly every review is delay, and a variety of solutions have been offered and implemented. The most-often suggested solution is to reduce or eliminate reliance on volunteers, but changes in that area have been only infrequently adopted, largely because of the perceived value of having “real lawyers” evaluate the conduct of their peers.

The earliest review of which records can be found was in **1972**, a time when the BOG was significantly involved in disciplinary matters. The review appears to have been instigated by the BOG in response to criticisms of lawyer discipline by then-Chief Justice Burger of the US Supreme Court and threats to put public members on the BOG. The thrust of the review was to identify ways to eliminate or reduce delays in the resolution of cases. Recommendations included hiring staff investigators and prosecutors,¹ eliminating the Disciplinary Review Board and creating a “permanent” Trial Board.

The next review was in **1982**, requested by the Disciplinary Review Board. At the time, SPRB recommendations for prosecution were reviewed by the BOG. If prosecution ensued, the trial panel opinion was reviewed by Disciplinary Review Board before being sent on to the Supreme Court. The average time to conclude a case was 28 months, and the DRB questioned whether its review was of value. Recommendations from that review included hiring professional (staff) prosecutors;² eliminating LPRCs or treating them as panels of individuals, and clarifying that their role is to investigate rather than recommend disposition; have the BOG step out of its “grand jury” role; and eliminate the DRB. It is not clear what, if any, changes were made in response to that review.

In **1986** and **1987**, the ABA Committee on Discipline conducted a comprehensive review in light of the recent McKay Commission report. The recommendations that ensued included separating the disciplinary functions from General Counsel’s Office; publishing final (not appealed) trial decisions; replacing the Disciplinary Board with a permanent panel that had some staff support; eliminating the SPRB and giving Disciplinary Counsel prosecutorial authority subject to review by a trial panel; and reducing the reliance on volunteers by using

¹ At the time, prosecution of disciplinary cases was handled by OSB General Counsel.

² The thrust of this recommendation seems to be that prosecution of disciplinary cases should be done by someone with special expertise, rather than just one of the General Counsel staff.

staff investigators and prosecutors instead of LPRCs and volunteer bar counsel. Only the first two suggestions were implemented.

Another review was conducted in **1992** following a suggestion at the BOG retreat that the Disciplinary Board model wasn't working. After study, the BOG rejected a "single-adjudicator" model, but recommended allowing pre-hearing conferences, giving the SPRB chair authority to approve stipulations, and establishing a standing committee on discipline. The first two recommendations were implemented, but not the third.

The BOG retreat in **1997** generated another review, focusing on a central intake process, hiring more staff investigators, adopting a criminal-case model to streamline discovery, and developing a method to identify practice-area specialists for trial panels. A central intake pilot project ensued, and in 1998 we hired our first staff investigator, but the other ideas were never implemented.

A Professional Discipline Workgroup of the BOG was created in **2001**. It suggested expediting intake and LPRC investigations, implementing a cost-benefit factor in SPRB charging decisions, rewarding volunteers, immediately suspending lawyers who don't respond and adding another staff investigator. Nothing concrete came from that study.

Later in **2001**, the HOD passed a resolution requiring the creation of a Disciplinary System Task Force to perform a comprehensive review of the disciplinary system, motivated in large part by concerns about the slowness of the process and the perception of bias against solo and small-firm practitioners. The DSTF presented 12 recommendations at the **2002** HOD meeting, all of which were approved and subsequently implemented in some manner: (1) study the disciplinary rules to make them simpler and easier to comply with; (2) create a rule allowing lawyers to rely on written ethics advice from the OSB; (3) develop CLEs for lawyers in high-risk practice areas; (4) establish a central intake separate from discipline counsel's office; (5) establish a diversion program; (6) purge records of dismissed complaints; (7) give SPRB authority to decline prosecution; (8) create a Disciplinary Board clerk to function like a trial court clerk in trial proceedings;³ (9) develop alternative dispute resolution for disciplinary cases; (10) allow Supreme Court review only on request; (11) increase the use of probation; (12) label as a "disciplinary complaint" only those matters where it has been determined there is an arguable violation of a rule.

The DSTF report indicates that the task force "considered but didn't adopt recommendations that would address [the issues of delay and bias] directly. It chose to focus instead on what it found to be their root causes." The DSTF rejected the elimination or severe reduction of the role of volunteers because it found broad membership support for volunteers and no support for the costs associated with replacing volunteers with paid staff. The task force noted a recurring theme that bias exists against solo and small-firm practitioners, particularly in the area of criminal law, but was not persuaded that bias could be assessed objectively. The report concluded with the task force's belief that adoption of its

³ At the time, records of formal disciplinary proceedings at the trial level were "filed with" and maintained by Disciplinary Counsel's Office rather than in a central and neutral location.

recommendations would significantly reduce the time required to resolve legitimate disciplinary problems and also its general confidence that the system is fair.

In 2004, then-BOG member Lauren Paulson suggested that the BOG continue to study the issues of delay and bias that he contended were not addressed by the DSTF and asked for the creation of a new task force. The BOG declined, but in 2005 the Policy & Governance Committee looked at substituting staff investigations for LPRCs; eliminating the use of volunteer bar counsel except in complex cases; establishing mandatory timelines and dismissing cases if they weren't met; and replacing the Disciplinary Board with one or more professional adjudicators.

No formal changes in the disciplinary process resulted from that study, but in 2005 the bar began to assign investigations to individual LPRC members rather than to the committee as a whole (in effect using the LPRC as a panel of available investigators), which resulted generally in faster investigations. It also alleviated the difficulty of finding willing volunteers to serve.

A bill was introduced to the 2011 Legislature to conform the Bar Act to the process being used by eliminating LPRCs and authorizing direct assignment to individual volunteer investigators. SB 381 passed the Oregon Senate, but ran into resistance in the Oregon House because a few lawyer/legislators from Eastern and Southern Oregon believed the bill would diminish local input or influence in disciplinary investigations. Our attempts to explain that the bill would not change how investigations are done currently and that the disciplinary rules are statewide standards in any event had no effect, and the bill died.

Some of the administrative benefits anticipated from SB 381 were nevertheless achieved administratively. The BOG determined that there was no need to maintain 16 separate LPRCs throughout the state and that it was free to appoint one LPRC for each BOG region, thereby reducing the number to 7. With fewer LPRCs, it is easier to filling committee rosters with willing volunteers and there are fewer administrative details to coordinate.

EVALUATION OF THE
OREGON LAWYER DISCIPLINARY SYSTEM

FINAL REPORT
February, 1987

Sponsored by the
American Bar Association
Standing Committee on Professional Discipline



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February 12, 1987

Hon. Edwin J. Peterson
Supreme Court
Supreme Court Building
Salem, Oregon 97310

Dear Chief Justice Peterson:

I am pleased to provide you with the Final Report of the Evaluation of the lawyer disciplinary system in the state of Oregon which has been approved by the Standing Committee on Professional Discipline of the American Bar Association. Please note that while the contents of this report will be held confidential by the ABA, it is not unusual for the local media to become aware of its existence. Officials in your jurisdiction should be prepared to respond to media inquiries. ABA staff will refer media inquiries to officials in the jurisdiction.

On behalf of the team, I extend our appreciation to you, the members of your staff, the Supreme Court and all those who assisted us during the evaluation process. We hope this document will provide meaningful assistance in the improvement of the Oregon disciplinary system.

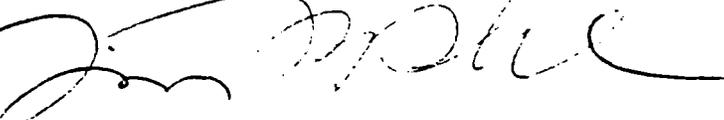
The Standing Committee strongly suggests the jurisdiction appoint an ad hoc committee to receive the team report and make further recommendations to the Court. The Ad Hoc Committee should not contain members with disciplinary positions. The ABA team reporter will revisit the jurisdiction to meet with the Ad Hoc Committee as part of the evaluation process upon request.

If the bar counsel will notify the Standing Committee of the names and addresses of the committee who will receive and review the final report, we will forward to each member of that committee a copy of Professional Discipline for Lawyers and Judges

Hon. Edwin J. Peterson
February 12, 1987
page two

which contains standards upon which we based our evaluation.
The cost of these materials is included in the evaluation
charges.

Very truly yours,



Timothy K. McPike
Regulation Counsel

cc: Standing Committee on Professional Discipline
George A. Riemer
Celene Greene
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Encl: Professional Discipline for Lawyers and Judges

9967q

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INTRODUCTION

In 1980, the Standing Committee on Professional Discipline of the American Bar Association initiated a national pilot project to evaluate, upon invitation, individual state lawyer disciplinary enforcement programs. In aid of the evaluation process, the Standing Committee developed 107 criteria adapted from the American Bar Association Standards for Lawyer Discipline and Disability Proceedings (hereinafter "Lawyer Standards") to be applied by the team during its evaluation of the discipline system. The Lawyer Standards reflect the best policies and procedures drawn from the collective experience of disciplinary agencies throughout the country, and were unanimously adopted by the House of Delegates.

The evaluation project involves sending a team of individuals experienced in the field of lawyer discipline to examine the structure, operation, and procedures of the disciplinary system to be evaluated. At the conclusion of its investigation, the team reports its findings and recommendations for the improvement of the system to representatives of the lawyer disciplinary agency on a confidential basis.

A team conducted an on-site evaluation of the Oregon lawyer disciplinary system in August, 1986. The team was composed of Stephen Hutchinson from Salt Lake City, Utah, a member of the Standing Committee on Professional Discipline; Linda D. Donnelly of Denver, Colorado, Disciplinary Prosecutor for the Supreme Court of Colorado; and Terrence Brooks and Timothy McPike from Chicago, Illinois, Counsel at the ABA Center for Professional Responsibility.

During its investigation, the team conducted interviews with persons involved with all facets of the disciplinary system, including members of the Supreme Court, the Local Professional Responsibility Committees, the State Professional Responsibility Board, the State Disciplinary Board, the Chief Judge for the U.S. District Court, volunteer Bar Counsel, respondents' counsel, respondents, Bar Association officials, and members of the bar generally. Members of the team also reviewed internal office records and procedures in the General Counsel's office as well as the rules governing lawyer discipline.

We are grateful to all participants in this evaluation. The team was consistently impressed with the high dedication to public service evidenced by the members of the disciplinary system. We are especially grateful to the General Counsel and his staff for their assistance in the preparation and coordination required for the team's visit.

This report is designed to provide constructive recommendations based upon the investigation and our collective knowledge and experience in lawyer discipline. The report generally excludes from discussion those areas of the system that are operating effectively and which are consistent with the criteria drawn from the Lawyer Standards.

OVERVIEW

Oregon's lawyer population is concentrated in Multnomah County (Portland) with approximately 3,600 of Oregon's 7,500 resident lawyers practicing there. The Oregon lawyer disciplinary system comprises:

General Counsel - employed by the Oregon State Bar, has the authority to dismiss complaints that do not state a claim, refers serious cases to the Local Professional Responsibility Committee (LPRC) for investigation, or investigates and reports directly to the State Professional Responsibility Board (SPRB). General Counsel also assists the volunteer Bar Counsel who presents the case at hearing. General Counsel briefs and argues the case before the Supreme Court.

Local Professional Responsibility Committees - investigate matters referred to them by the General Counsel or the State Professional Responsibility Board (SPRB) and report back to the SPRB. Organized by Oregon State Bar Board of Governors-determined districts, each committee has at least three resident lawyers and one nonlawyer. Members are appointed by the Board of Governors.

State Professional Responsibility Board - oversees the investigation of complaints and may begin an investigation on its own motion. The SPRB determines whether probable cause exists: it may dismiss a matter, refer to General Counsel or an LPRC for further investigation, issue an admonition (which requires respondent's consent as under the ABA Standards but is public in Oregon), or order General Counsel to file formal charges of misconduct. The SPRB is appointed by the Board of Governors, and comprises seven lawyers and one nonlawyer. The SPRB is conceived as

a prosecutorial body making a charging decision rather than an adjudicative body determining whether probable cause exists.

Disciplinary Board - sits in regional Trial Panels to hear evidence, make findings of fact and conclusions of law, dismiss charges or impose sanctions. The Disciplinary Board is composed of one state chairman, six regional chairmen, and 61 additional members including 18 non-lawyers. Trial panels of three members are appointed from the region of the respondent's residence or practice.

Oregon Supreme Court - reviews all decisions to suspend for more than sixty days or disbar, and reviews dismissals or suspensions of less than sixty days upon appeal by either party.

RECOMMENDATIONS

I. General Counsel

Recommendation 1 - Functions of General Counsel

General Counsel should perform all prosecutorial functions, including investigating all allegations which, if true, would constitute grounds for discipline or transfer to disability inactive status; investigating all facts pertaining to petitions for reinstatement; recommending a disposition based upon the facts revealed by the investigation; and prosecuting matters at all stages. General Counsel should appoint and supervise all staff members.

Until a separate disciplinary counsel's office is established, General Counsel should be appointed by the Board of Governors.

The Oregon System

The General Counsel's responsibilities include general counsel work for the state bar, limited disciplinary investigation, executive secretary and administrative functions for all levels of the disciplinary system, assistance to volunteer Bar Counsel, and true prosecutorial functions only at the appellate level.

True prosecutorial discretion over case management rests with the State Professional Responsibility Board that determines which cases to prosecute. While this procedure appears similar to a probable cause determination by a magistrate, the team was told it is in

fact a determination to charge made by a corporate prosecutor and unreviewed by a neutral third party adjudicator.

While General Counsel has a great deal of discretion over hiring and dismissing staff, it is clear that the Executive Director of the State Bar has the authority to make final decisions on all staffing matters. This naturally results from the dual role of the General Counsel as disciplinary counsel and general counsel to the State Bar.

Effects

The General Counsel staff is overworked as a "paper pusher," keeping track of and urging along various volunteer entities' handling of the caseload, and at the same time is underutilized as an experienced staff of disciplinary counsel. General Counsel staff spend a great deal of time administering volunteer handling of investigations (by LPRCs), decisions to prosecute or dismiss cases (by the SPRB), and presentations at hearing (by volunteer Bar Counsel). Yet the team was told the State Bar could not "afford" to hire enough investigators and counsel to assume these functions from the volunteer bodies. Clearly, the cost of the delay created by the use of volunteers and the cost of administration by General Counsel staff are not being considered.

The lack of a full-time, professional, independent Counsel and staff to perform investigations, make charging recommendations, and present cases at hearing has created problems in Oregon:

- 1) delay is inherent in transmitting documents, scheduling meetings, tracking case progress, finding suitable volunteers, and overseeing administrative chores

created by using volunteers instead of professional staff;

2) delay is routine in investigations performed by busy volunteer lawyers, and the team was told that some LPRCs are notorious for poor work;

3) decisions tend to become miniature trials on merits rather than probable cause determinations. Because the SPRB acts as a "corporate prosecutor" rather than a grand jury in the decision to file formal charges, there are no institutionalized roles in the decision process, i.e., no neutral third party adjudicator to be convinced and no advocate for a specific disposition based on the investigation;

4) because General Counsel lacks real prosecutorial discretion, borderline cases that could be screened out early are often sent to the LPRCs for investigation and then to the SPRB where real authority to dispose resides.

Although the Oregon Supreme Court has seen the problems associated with volunteer counsel appearing before it and has instructed the General Counsel to assume that role, volunteer counsel still handle presentations to the Trial Panels of the State Disciplinary Board (SDB). General Counsel staff must continue to work closely with volunteer counsel because the expertise rests with the General Counsel's staff. Therefore, efforts are duplicated to a great extent.

There is neither an independent, centralized prosecutor in the Oregon system nor a centralized volunteer adjudicative or administrative authority. As a result:

1) the SPRB acts as a corporate prosecutor, not as an adjudicator or administrator, and even in its prosecutorial role has only loose control over the LPRCs that act as investigators;

2) the State Disciplinary Board serves no policy-making role, performs only minimally as an

administrative body to coordinate its hearing schedules, serves no appellate function, and splits into independent Trial Panels to hear cases.

Overall coordination and administration of the system is left to a General Counsel's staff that lacks basic prosecutorial independence or discretion. The Supreme Court, the ultimate disciplinary authority, does not (and properly should not) hear cases involving less than sixty day suspensions unless they are appealed. Thus, the majority of disciplinary decisions affecting accused lawyers in Oregon are made by numerous and various quasi-independent bodies only occasionally guided by precedent or any centralized policy.

The Recommendation

A system of Oregon's size handling this number of cases per year needs centralized points of authority and decisionmaking. General Counsel must have prosecutorial discretion to investigate cases, dismiss those that fall outside the jurisdiction of the agency, and for the rest make recommendations for case disposition to a neutral third party adjudicator.

The Oregon State Bar's hesitancy to create a strong staff disciplinary authority stems from its history as a small bar. Reliance on volunteers, however, is misplaced for certain functions once the disciplinary caseload reaches the size of Oregon's. The use of LPRCs and the SPRB to determine whether charges should be filed causes delay and spends too many volunteer and staff hours for the number of cases being investigated.

We elsewhere recommend that individuals replace the SPRB in reviewing General Counsel's recommendation for

case disposition after investigation, LPRCs be eliminated, and volunteer bar counsel be eliminated. Volunteers in these roles cannot function as efficiently as an independent General Counsel with prosecutorial discretion.

The experience of states where independent centralized disciplinary counsel are used demonstrates that staff can handle investigation, decisions to charge (subject to review by volunteers), and presentation of cases more efficiently and with a more consistent policy than can volunteers. Under the present Oregon system, a good-sized staff of lawyers is serving as a prop to an outmoded system that is essentially all-volunteer.

The power of an independent disciplinary counsel can be balanced appropriately by placing the appointment and removal authority with the State Disciplinary Board, by placing review of the decision to charge with an independent adjudicator, and by maintaining the existing right of a respondent to appeal.

We elsewhere recommend a gradual transition from an omnibus General Counsel's office to a separate Disciplinary Counsel position. Until that time, General Counsel should be appointed by the Board of Governors and should be granted as much independent authority as possible within his or her position as Counsel to the State Bar administered by the Executive Director.

The General Counsel should not be subject to the authority of the Executive Director for hiring or dismissal of disciplinary staff, however. To do so undercuts the independence of the position and subjects it to immediate political pressures.

Recommendation 2 - Separate Disciplinary
Functions of General Counsel

The General Counsel's staff should be partitioned and all disciplinary functions should be handled by specified personnel who have no other duties, except where such other duties will not interfere with disciplinary enforcement.

As the disciplinary workload grows, a separate and independent Disciplinary Counsel position and staff should be created from the existing General Counsel office.

The Oregon System

The General Counsel's office handles all the usual legal matters concerning an integrated state bar association in addition to the unusual administrative demands of the present disciplinary structure. It also staffs the Ethics, Client Security Fund, Fee Arbitration, Unlawful Practice, Disciplinary Rules, Ad Hoc Model Rules, and Lawyers Assistance Committees, and acts as liaison between these and other bar committees and the Board of Governors. At the request of the Executive Director, it acts as staff liaison for several Bar Sections. It coordinates and reports on the activities of outside counsel when the Bar is involved in a lawsuit, which averages five actions at any given time. The office also handles contested admissions to the bar and telephone ethics inquiries.

Effects of the Oregon System

As stated elsewhere, the administrative burden posed by the current disciplinary structure is out of proportion to the number of cases being processed, and is created by the need to prop up the use of volunteers in the prosecutorial function. That administrative burden, combined with all of the non-disciplinary functions performed by General Counsel's office, results in a significant diversion of legal resources from the evaluation and processing of allegations of lawyer misconduct.

Almost everyone interviewed by the team mentioned the delay in processing cases as an important problem with the system. The use of trained legal staff as jack-of-all-trades administrators rather than as specialized disciplinary counsel seems to the team to be one cause of the delay. The General Counsel and staff accept their varied duties professionally and responsibly. Nevertheless, the differing functions they are required to perform detract from their collective and individual proficiency in the disciplinary area.

The Recommendation

In the team's opinion, the ultimate goal as Oregon grows to a medium-sized bar is a separate and independent disciplinary counsel and staff. To move from an all-volunteer system to that of professional disciplinary counsel obviously requires both time and money. Transition should be gradual to prevent disruption of a basically effective system.

To the extent possible within the current legal staff, disciplinary duties should be assigned full-time to specific individuals and non-disciplinary duties to others. Allowances should be made for cross-training for backup purposes, and assignments should be flexible enough to allow the General Counsel to meet all obligations to the State Bar.

Gradually, the specialization of the existing staff should evolve into a separate Disciplinary Counsel Office. There currently exist several possibilities for conflicts of interest in General Counsel representing other State Bar entities (for example, the Client Security Fund) and serving as disciplinary counsel. Specialization and ultimately separation will avoid these.

Lawyer discipline is one of the most important functions of our self-regulating profession. The interim specialization and ultimate separation of the disciplinary function in the General Counsel's office is really a matter of clarifying priorities. When all staff members are doing a variety of tasks, priorities tend to be set by external events; "the squeaking wheel gets the grease" syndrome appears in force. Lawyer discipline is important enough and voluminous enough in Oregon, in our view, to have full-time, specialized staff lawyers tending it.

Recommendation 3 - Administrative and Legal Staff
for State Disciplinary Board

The State Bar should provide administrative staff to assist the State Disciplinary Board and separate legal staff to advise the Board and its constituent Trial Panels.

The Oregon System

The SDB has no administrative or legal staff. The team was told the Chairmen of the State Board and regions are responsible for obtaining Trial Panelists, scheduling meetings, securing meeting places, and handling administrative chores. The team was also told that because of the inherent conflict of interest, the General Counsel's staff is unable to advise the SDB or Trial Panels on legal matters pertaining to cases under decision.

Effects of Current System

The State Disciplinary Board is really six local "pools" of volunteers from which local Trial Panels are chosen. Each Trial Panel is both composed and scheduled ad hoc. The combination of requiring local Panelists and constituting panels ad hoc makes the administrative chore a never-ending struggle. Since there is no administrative staff, this burden falls on the volunteer chairmen.

Because Trial Panels are adjudicative, the General Counsel cannot advise them. LPRCs and the SPRB are prosecutorial components, so there is no conflict in General Counsel staff advising them. LPRCs and the SPRB are also ongoing groups that meet repeatedly and whose members therefore develop some expertise in Oregon disciplinary procedures. Trial Panel members, in contrast, may sit on cases only two or three times a year or less. Thus, the part of the system that often faces the most difficult procedural issues is also least likely to have experienced members and is the only component the General Counsel cannot advise.

The Recommendation

We elsewhere recommend that the State Disciplinary Board be reconstituted into three or more statewide, permanent Trial Panels that meet on a fixed, rotating basis. This would eliminate most of the current administrative burden.

Regardless of whether that recommendation is adopted, it is essential to the efficient operation of the disciplinary system that hearings are scheduled promptly and in a consistent fashion. The current system of ad hoc local hearing committees is used in other states, but in those states a paid staff member is responsible for scheduling. The combination of the unwieldy system and the use of volunteers as administrators is a prescription for delay. It is unfair to burden busy lawyers with low-level administrative tasks. There is no problem with conflict of interest rules in the State Bar providing administrative personnel to serve the State Disciplinary Board. It is, in the team's view, a necessary step in streamlining the system.

Equally essential is some form of specialist legal advice to the adjudicative component of the disciplinary system. Although there is an inherent conflict of interest in General Counsel's office advising the Trial Panels, this is only so when there is no segregation of functions among the legal staff in the State Bar offices.

In a unitary system, both prosecution and adjudication are the responsibility of a single agency. Its constitutionality has been upheld: Withrow v. Larkin, 421 U.S. 35 (1975); In re Smeekens, 396 Mich. 719, 242 N.W.2d 391 (1976); State v. Turner, 217 Kan. 574, 538 P.2d 966 (1975).

Nevertheless, prosecutorial and adjudicative functions should be separated as much as possible within the unitary system to avoid unfairness and any appearance of unfairness. Persons who perform prosecutorial functions should neither perform nor supervise persons who perform adjudicative functions, and vice versa.

Within these constraints, and within our recommendation elsewhere that disciplinary functions be segregated within the General Counsel's office, it should be possible to designate one staff lawyer and one support staff person to serve the State Disciplinary Board. These staff members would have other duties in addition, and would not report to the General Counsel (so long as disciplinary functions are vested in that office).

Recommendation 4 - Publish Trial Panel Decisions

Those decisions of the Trial Panels that are not reviewed by the Supreme Court should be published and indexed.

The Oregon System

Those decisions of the Trial Panels that impose suspension longer than 60 days or that have been appealed become part of the record for review by the Supreme Court. The decision of the Court is then published and serves as precedent.

Decisions of the Trial Panels imposing lesser sanctions that are not appealed are not published in a manner easily accessible to the bar.

Effects of the Current System

The majority of disciplinary cases involve low level misconduct and low sanctions. Unless appealed, these cases are not reviewed by the Supreme Court. Thus, the majority of adjudicated disciplinary decisions are not published and have no precedential value.

Without published, indexed decisions, there is no mechanism for respondents, respondents counsel, or members of Trial Panels to compare facts currently under consideration to those of cases previously decided. The possibility is created that similar acts might be determined to constitute misconduct in one case and not in another, or that the level of sanction imposed might differ considerably.

Since there is no appellate review of Trial Panel decisions other than the Supreme Court, there is no other mechanism for bringing decisions of the individual Trial Panels into basic conformity.

The Recommendation

Decisions of Trial Panels should contain findings of fact, conclusions of law, and the rationale for imposition of the particular sanction to serve as useful precedent. Publication could be formal, as in the official reporter with state appellate and Supreme Court decisions, or less formal, as in separately published advance sheets bound in three ring binders. In either case, the decisions should be indexed by name and types of misconduct to be useful for legal research.

II. Investigation and Screening

Recommendation 5 - Reporting Criminal Convictions

The Supreme Court should promulgate a rule requiring the clerks of all courts to report criminal convictions of lawyers to the General Counsel.

The Oregon System

There currently is no requirement that clerks of court or other officials report convictions of lawyers to the General Counsel.

Effects of the Current System

While not all criminal convictions constitute a violation of professional ethics, the fact that a lawyer has violated even a technical provision of the criminal law is sufficient to justify a preliminary investigation by General Counsel. When a lawyer convicted of a crime involving dishonesty or other acts reflecting on fitness to practice continues to practice, the profession is demeaned in the public eye.

It is difficult, if not impossible, for General Counsel to monitor all criminal convictions in the state. The real possibility exists, then, that a lawyer might be convicted of a crime constituting misconduct and go undetected by the disciplinary system.

The Recommendation

As head of the judicial branch of the state government, the Oregon Supreme Court could by rule require a copy of any judgment of conviction of a lawyer, certified by the clerk, to be forwarded to the General Counsel.

Recommendation 6 - Eliminate Local Professional Responsibility Committees

The Supreme Court should eliminate Local Professional Responsibility Committees in all regions except the most populous, and should provide funds to hire a sufficient number of full-time staff investigators under the direction of the General Counsel to assume the work.

As soon as is practical, the Court should eliminate all Local Professional Responsibility Committees and provide sufficient funds to hire full-time staff investigators.

At a minimum, the Court should immediately amend the rules to forbid the use of grand jury style investigative proceedings at the Local Professional Responsibility Committee level.

The Oregon System

Local Professional Responsibility Committees investigate those allegations of misconduct in their counties referred by either the General Counsel or the

State Professional Responsibility Board. LPRCs vary by the lawyer populations they serve. Only 31 lawyers practice within the area of the Baker and Grant Counties LPRC's jurisdiction; only 33 lawyers within the Union and Wallowa Counties LPRC's jurisdiction; the Multnomah County LPRC has 3,639 lawyers practicing within its jurisdiction.

Because of the workload, cases assigned to most LPRCs are delegated to individual members for investigation and report. The LPRC then votes as a committee of the whole on the individual investigator's report. In a few LPRCs, the Committees attempt to investigate each case in the fashion of a grand jury.

The team was told that even where investigations are delegated to individual members, most are not completed within the time period mandated by the rules. In those LPRCs still attempting to operate by the grand jury method, delays are even longer. Generally, the team was told, LPRCs and their members are overloaded with cases.

Nonlawyer members are placed on the LPRCs in the spirit of keeping the system open to public scrutiny. The team was told, however, that nonlawyer members are rarely familiar enough with basic investigative or legal procedures to perform investigations without the assistance of a lawyer member, nor is there a specific training program to teach these skills.

Effects of the Oregon System

In a state with a small lawyer population, a system of volunteer lawyers serving as disciplinary investigators may be feasible because the demands on individual volunteers will be slight and the number of necessary volunteers will be small.

Oregon clearly has grown past this point. Demands on individual LPRC members in some areas are burdensome, and the number of volunteers needed is high. With many volunteers, effective centralized oversight is difficult or impossible. The team was told that the quality of investigations ranged from very good to poor.

While central oversight of volunteer investigators is not feasible in the present system, administration using General Counsel as a central intake point, dispatcher, and administrative secretary for the LPRCs imposes a major burden on that office.

The most serious problem, next to delay, is the possibility that local bias may affect the investigation of a disciplinary complaint. The team was told that there have been instances of "soft spots" in the system, i.e., local bias for or against a lawyer under investigation.

Discipline by local disciplinary officials is historically the one structural feature giving rise to the greatest abuse of the profession's power of self-regulation. The seminal work in the reform of professional regulation, the report of the Clark Commission, stated:

Decentralized disciplinary structures complicate the already difficult task of administering effective professional discipline. Neither the disciplinary agency member nor the judge who frequently works and meets socially with an attorney can judge him objectively.

.....
By permitting the local disciplinary agencies to maintain a role in the initial handling and disposition of complaints, moreover, this state's system hampers uniform discipline by permitting local criteria [i.e. local interpretation of the state's rules of

professional responsibility] to determine whether the specific misconduct warrants referral to the statewide disciplinary commission for court action.

The local component of Oregon's disciplinary system is more limited than those discussed in the Clark Report. Nevertheless, it suffers from the same inherent weakness. The procedures employed and the quality of work produced cannot be standardized or controlled; the potential for local bias is high.

Finally, while the team was told that "grand jury" style investigations have been disapproved by the SPRB, the team was also told that the practice was continuing in some LPRCs. Grand jury style investigations are cumbersome and waste resources. The historical reasons for the use of grand juries in a criminal context do not apply in a professional licensing action. Even in those states that do use such proceedings, they are employed at the State Professional Responsibility Board (probable cause determination) level, not during the initial investigation.

While the team found that untrained nonlawyer volunteers are not truly useful as investigators, they do potentially serve to reduce any possible favoritism by lawyer members toward accused lawyers. It is not necessarily true that nonlawyers will serve as a bulwark against bias against an accused lawyer, however.

The Recommendation

The team was told that the State Bar "could not afford to replace" the LPRCs with professional investigators. In light of the inability to control the procedures or quality of investigation, the delay, the administrative burden, and the continuing possibility that local bias may affect the initial stages of a disciplinary proceeding, it seems the State Bar

already pays a high price for not using professional investigators.

Many states that employ professional investigators use the services of retired law enforcement officers who already possess requisite skills. Full-time investigators are more efficient than volunteers, who must attend to their practices first. Full-time investigators are able to handle a much greater caseload.

While the LPRCs constitute in our view a serious flaw in the system, the actual and potential problems they present are buffered somewhat by General Counsel's investigative authority and by the authority of the SPRB to determine whether to file charges. We otherwise would recommend immediate elimination of this local component. However, to better determine actual costs, the team recommends a gradual phasing out of LPRCs, replacing those serving the least populous regions with a professional investigator on the General Counsel's staff. The ABA Survey on Lawyer Discipline Systems, 1986 shows that Oregon investigated 273 complaints during 1985. In that same year, Georgia (lawyer population 18,987) investigated 224 complaints using 5 full-time lawyers and 1 investigator. Indiana (11,565 lawyers) investigated 612 complaints using 3 full-time and one part-time counsel and 1 investigator. The New York 3rd Judicial Department (4,300 lawyers) investigated 146 complaints using 3 full-time lawyers and 1 investigator. Adding one full-time investigator, then, could possibly replace most or all of the LPRCs.

The team considered recommending as a stop-gap measure the removal of all nonlawyer volunteers (except any who happened to be trained investigators) from the LPRCs because of their lack of necessary training. However, we believe public members may serve as limited protection against favoritism toward accused lawyers by the lawyer members of an LPRC. Public members may not protect against local bias against an accused lawyer,

however, since such bias may be shared by the general local population. The team was told that some instances of local bias have occurred; hence, public members may offer no protection at all. Nevertheless, as long as Oregon retains the LPRC structure for investigation, public members should remain.

At a minimum, the Court should by rule eliminate the grand jury style investigation by the LPRCs. The delay created and waste of volunteer resources mandates that LPRCs, if they must be used, be a pool of individual investigators rather than a grand jury.

Recommendation 7 - Make Complaints Against Lawyers Confidential Until Formal Charges are Filed

The Court should promulgate a rule providing that prior to the filing and service of formal charges, the proceeding shall be confidential, except that the pendency, subject matter, and status of an investigation may be disclosed if:

- (a) the respondent has waived confidentiality;
- (b) the proceeding is based upon conviction of a crime;
- (c) the proceeding is based upon allegations that have become generally known to the public.

The Oregon System

Oregon is the only state in the country to make all proceedings on complaints of lawyer misconduct a matter of public record. This policy was established not by the Supreme

Court but by the legislature. Thus, any allegation, regardless of foundation or whether it even alleges facts constituting misconduct, becomes a matter of permanent public record. The Bar's statement that the allegation was determined to be without merit is also inserted in the record.

A lawyer who is the subject of a complaint, even one totally fictitious and not stating facts alleging misconduct, is unable to prevent the complaint from being made public and is unable to have the record of the complaint expunged upon subsequent dismissal of the complaint.

Also by statute, Oregon makes any complainant absolutely immune from civil liability for making the complaint. Thus, if a person intentionally makes a groundless complaint that does not even allege acts constituting misconduct with the sole purpose of harming the lawyer's reputation, the accused lawyer is helpless to prevent the matter from being made a permanent public record and is without remedy for libel.

The team was told that no other profession in Oregon is subject to the same exposure of complaints before investigation.

The Effects of the System

The team was told that no real harm has been caused to any lawyer by the fact that complaints are made public and the investigative file is open. Clearly, however, the potential for damage to an innocent lawyer's reputation is exceedingly high under the Oregon system.

The lawyer is stripped of all civil remedies against even the most blatant, malicious damage to his reputation. In return, he is offered not an iota of due process before the

allegations are made permanent public record. The only amelioration provided is the Bar's insertion in the record of its determination that the allegations are frivolous.

The fact that no lawyer has yet been harmed by public disclosure of unexamined complaints is consistent with the experience of other states that make matters public after a finding of probable cause. Except in unusual cases or those involving public figures who are lawyers, lawyer discipline is generally ignored by the public.

The lack of public interest in complaints made public negates the one justification for early disclosure -- that it protects the public. The rationale is that by the time a lawyer who is harming clients has been investigated and formal charges have been filed, many more innocent clients will have been harmed who could have been warned if the first complaint had been made public. In truth, because the public in Oregon mostly ignores the public record, no additional protection is gained.

Given this situation, the Oregon system still weighs the right of the public to be protected from unethical lawyers against the right of honest lawyers to protect their careers against unfounded complaints, and comes down completely against the innocent lawyer.

The Recommendation

The confidentiality that attaches prior to a finding of probable cause and the filing of formal charges is primarily for the benefit of the respondent -- to protect him against publicity predicated upon unfounded accusations. See State v. Turner, 538 P.2d 966 (Kan. 1975); Chronicle Publishing Company

v. California, 354 P.2d 637 (Cal. 1960); McLaughlin v. Philadelphia Newspapers Inc., 348 A.2d 376 (Pa. 1975); Molloy v. Whitmer, 519 S.W.2d 825 (Ky. 1975).

If the respondent waives confidentiality or if the nature of the accusation is already known to the public, the basis for confidentiality no longer exists.

Once a finding of probable cause has been made, there is no longer a danger that the allegations against the respondent are frivolous. The need to assure the integrity of the disciplinary process in the eyes of the public requires that from this point on, further proceedings be open to the public.

Upon a showing of good cause, any individual should be able to seek a protective order requiring that the hearing be conducted in such a way as to preserve the confidentiality of the information which is the subject of the request.

III. Probable Cause Determination

Recommendation 8 - Eliminate State Professional Responsibility Board

The Court should eliminate the State Professional Responsibility Board and should promulgate a rule providing that:

(a) after investigation of a matter, the General Counsel shall make a recommendation for case disposition (i.e., dismissal, admonition, probation, formal charges, or a stay pending civil or criminal proceedings);

(b) the chairmen of Trial Panels shall sit individually on a fixed, rotating basis [e.g., semi-monthly] to review General Counsel's recommendation and either determine the disposition of the matter or direct further investigation;

(c) General Counsel may appeal the decision of the first chairman to a second chairman designated by the State Disciplinary Board, who shall either approve the decision of the first chairman or that of the General Counsel; the decision of the second chairman shall be final; and

(d) a Trial Panel whose chairman reviewed the matter following investigation shall be disqualified from further consideration of the case.

If the Court does not adopt the above recommendation, it should promulgate a rule requiring the State Professional Responsibility Board to sit in [3] panels on a rotating basis at shorter intervals to determine case disposition after investigation.

Standards 8.10, 8.11, 8.12

The Oregon System

The State Professional Responsibility Board acts as a corporate prosecutor in reviewing the investigation of the General Counsel or LPRC and deciding whether to file formal charges, admonish, or order further investigation.

There is no neutral third-party adjudicator deciding whether probable cause exists. The General Counsel has no true prosecutorial authority but does make recommendations.

Because the SPRB meets approximately only seven times a year, and because investigations by the LPRCs are usually slow, the average time for determination of whether to file formal charges is six months.

The SPRB in fact determines, as would a prosecutor, whether it has a strong enough case to meet the standard of proof before the Trial Panel, rather than determining the threshold question of whether there is probable cause to believe misconduct was committed.

Effects of the Oregon System

The current system is cumbersome because it uses committee structures to investigate (we elsewhere recommend elimination of LPRCs) and to make the prosecutor's decision on filing charges. The SPRB meets on a schedule that permits General Counsel time to prepare enough cases to fill the Board's agenda, rather than meeting more often and handling fewer cases per meeting. This results in cases coming to LPRCs to investigate, to General Counsel to prepare formal charges, and to the State Disciplinary Board to try "in clumps," creating further delays and bottlenecks throughout the downstream system.

The Recommendation

The distinction between a corporate prosecutor deciding whether it can prevail at trial and a neutral adjudicator deciding whether probable cause exists is de minimus in the practical protection to lawyers and the

public each alternative provides. The problem is the inefficiency of a corporate prosecutor. Once a career disciplinary counsel is substituted for the SPRB, however, a neutral adjudicator is necessary to insure the check and balance formerly provided by the corporate body.

We elsewhere recommend the elimination of the LPRCs and the enhancement of General Counsel's authority to that of a truly independent disciplinary counsel. That accomplished, there is no need for a corporate body of volunteers to decide whether the case is sufficient to go to trial -- the decision is General Counsel's.

To provide a check against abuse of prosecutorial discretion by a sole disciplinary counsel, a volunteer should review the investigative report and the disciplinary counsel's recommendation for disposition (formal charges, admonition, probation, stay, dismissal). The actual determination of case disposition is made by a volunteer lawyer who is the chairman of a Trial Panel. However, instead of deciding whether the case will prevail at trial as the SPRB does now, the Trial Panel chairman merely decides whether the General Counsel has established probable cause to believe misconduct was committed. If so, the volunteer determines whether formal charges should be filed, or probation or admonition offered (in cases of minor misconduct and with respondent's consent), or a stay granted.

The use of a single volunteer instead of a board of volunteers has several advantages:

- 1) General Counsel can take cases up quickly instead of holding cases until the SPRB's agenda fills up, thus smoothing out the case flow throughout the system;

2) a General Counsel who has directed the investigation (per our recommendation elsewhere) will be able to determine whether a case should go to trial as well as or better than a board of volunteers, the SPRB, that has a limited amount of time to review the investigative report; the single volunteer (chairman of the Trial Panel) only determines probable cause, not whether he thinks Bar Counsel will succeed at trial--a much lower-threshold decision that avoids the "mini-trial" of the case that the SPRB engages in; thus, decisions on each case should be faster without a loss of quality or balance;

3) the administrative costs associated with the SPRB are eliminated and the disciplinary structure simplified;

4) while an entire level of structure has been eliminated, there will be little extra burden on individual Trial Panel chairmen because they will sit in rotation, the number of cases on any duty day will be few, and the fixed nature of the schedule will simplify accommodating volunteer duty to busy legal calendars.

At a minimum, if the Court does not adopt the main recommendation, the operations of the SPRB should be modified to reduce the delay in determining disposition after investigation. The SPRB should be split into permanent panels to sit on a fixed, rotating basis to review General Counsel's recommendation for disposition. The SPRB should determine probable cause as a neutral magistrate rather than determine chances for success at hearing as a corporate prosecutor. In this manner the benefits of our primary recommendation can be obtained with less rearrangement of the existing system.

IV. Trial

Recommendation 9 - Eliminate Volunteer Bar Counsel

The Court should promulgate a rule eliminating the use of volunteer Bar Counsel in hearings and all other phases of disciplinary proceedings and investing these functions in the General Counsel's office.

Standard 3.9

The Oregon System

General Counsel shares investigative functions with the volunteer LPRCs and litigation functions with volunteer Bar Counsel. General Counsel or the LPRCs investigate the matter. General Counsel drafts the formal charge. Volunteer Bar Counsel is then appointed to present the case, with assistance from General Counsel, to the Trial Panel. General Counsel then presents the case, if it is heard, to the Court.

The team was told that the Board of Governors directed General Counsel to present cases before the Court because of dissatisfaction with presentations by some Bar Counsel.

Effects of the System

Many persons from all levels of the disciplinary process interviewed by the team were critical of the Bar Counsel function. Finding, appointing, and familiarizing a suitable Bar Counsel creates delay. Most often General Counsel must provide substantial litigation support.

Often there is no real saving of resources over having General Counsel present the case. Volunteer Bar Counsel may actually cost more, considering the delay.

Volunteer Bar Counsel, because they do not specialize in disciplinary law, must necessarily rely on General Counsel's office not only to provide litigation support services but also to consult on case law and strategy. The use of volunteer Bar Counsel, then, neither reduces delay nor conserves the resources of General Counsel's office.

The Recommendation

Most persons interviewed by the team felt that while Bar Counsel service was an expression of the highest traditions of the bar, it was not an effective use of resources. As with the use of volunteers to investigate cases, the inefficiencies of using volunteers to present cases at hearing most often outweigh any savings that might obtain.

Because General Counsel's office offers considerable support to Bar Counsel, elimination of volunteers in this area might not require additional staff in General Counsel's office. At the same time, the delay caused by locating, appointing, and educating a volunteer for each case will be eliminated.

Some persons told the team that volunteer Bar Counsel had an advantage over General Counsel's staff, who tended to be less experienced in trial matters than the volunteers. This is, of course, true so long as General Counsel's staff does not present cases at hearing. In

fact, General Counsel stated to the team that his current staff consists of former deputy district and city attorneys with trial experience. The real point is that case volume is sufficient in Oregon to require full-time professional disciplinary counsel to direct investigations, prepare formal charges, present cases at hearing, and brief and argue cases on appeal.

Of course, there will be special cases involving complex facts, a high volume of transactions, or other matters that place the case beyond the resources of General Counsel's office to prosecute. Even in these large and complex cases -- especially in these cases -- volunteer lawyers acting as Bar Counsel are not as advantageous as appointing on a fee basis special counsel. In these special cases, a volunteer is often forced to choose between seriously neglecting a paying practice or doing a less than professional job on the volunteer case.

In both special and routine cases, the Oregon State Bar should not place this burden on a small group of practitioners; it should be shared by the general membership of the bar in the form of higher dues to fund a professionalized disciplinary system.

Recommendation 10 - Statewide Trial Panels on Fixed, Rotating Schedules

The Court should promulgate a rule eliminating the right of a lawyer to a disciplinary hearing in the locality of practice.

The rule should further provide that the State Disciplinary Board shall sit in pre-established,

fixed Trial Panels, the membership of which shall be determined on a statewide rather than local basis.

The rule should further provide that the panels shall sit on a regular schedule in rotation and at one location [Portland].

The Oregon System

The State Disciplinary Board is not a true statewide board, but rather a group of local pools of volunteers. Trial Panels are drawn from the pool of volunteers of the respondent's region of practice. A respondent not only is investigated at the local level by an LPRC, he or she is tried by volunteers from the locality, and he or she has a statutory right to have the hearing take place in the county of practice. Over this essentially local system is only the thinnest layer of statewide administrative oversight.

The Court automatically reviews only cases involving sanctions greater than sixty days suspension. In cases involving lesser sanctions, the local Trial Panels' decisions on questions of law are final unless appealed. Respondents rarely appeal minor sanctions. Thus, the only mechanism to enforce statewide uniformity in interpretation of the ethical rules in less serious cases is the State Professional Responsibility Board's right to appeal.

Effects of the System

As stated elsewhere in this report, local disciplinary systems are historically the greatest source of abuse of the profession's power of self-regulation. In less populous counties, a respondent can be almost guaranteed an investigation and trial by colleagues with whom he or she has professional and social relations. This arrangement encourages bias for or against a respondent. At best, it places a tremendously unfair burden on the volunteer LPRC and Trial Panel member who undertakes objectivity in sitting in judgment of someone he or she knows. The team was told by more than one person that local bias has affected the outcome of hearings under the current system of local Trial Panels. It is ironic that Oregon has the most public disciplinary system of any jurisdiction in the country; at the same time, local discipline, an historical abuse, is such a fundamental feature of the system.

The practice of constituting and scheduling Trial Panels ad hoc and on a local basis creates a great administrative burden on the chairmen of the Regional Panels of the State Disciplinary Board. The wheel is reinvented for each case: Bar Counsel, Trial Panel, date, and location all must be decided anew for every case that come to a hearing.

The Recommendation

The State Disciplinary Board should be reconstituted to be a truly statewide board. As such, it should divide into hearing committees of three members each, with membership on a statewide basis for both Board and

committees. Hearings should occur at a central location, the most obvious being Portland. In this way, all local components are eliminated from the hearing structure. All lawyers in Oregon would be judged under a statewide ethical standard by a statewide hearing body in a central location.

Hearing committees should have fixed membership. The committees should sit on a fixed, rotating schedule and cases should be assigned on the basis of which is the next committee to sit. Each committee should have one alternative member scheduled to sit (in case of illness, emergency, or conflict of a committee member). Under this system the majority of the administrative work in scheduling hearings under the current system would be eliminated.

Recommendation 11 - Submission of Briefs to Trial Panels

The Court should amend the rule providing for the filing of briefs with the Trial Panel to give the panel members more time to review the briefs.

The Oregon System

Under the current rules, parties must file briefs with the Trial Panel no later than seven days before the hearing date.

Effects of the System

Several persons interviewed indicated that seven days was not sufficient time for most Trial Panel members to carefully review and research submitted briefs.

The Recommendation

The briefs should be submitted by a date far enough in advance to give a Trial Panel member sufficient time to analyze legal arguments and perform independent legal research. It must be considered that all Trial Panelists are volunteers with law practices or other employment making demands on time as well. Even if a volunteer is able to make a brief the first priority, which is not a realistic assumption, seven days may be barely adequate time for review and research. The Court should solicit the opinions of experienced Trial Panel members and amend the rule to provide more time for review of the briefs.

Recommendation 12 - Aggravation and Mitigation Hearing

The Court should clarify its rule providing for consideration of sanctions to provide that after a Trial Panel has determined that the respondent has committed the misconduct charged, it shall then afford General Counsel an opportunity to present proof of any prior disciplinary record of respondent before determining the sanction to be imposed in the present case.

The Oregon System

Current Oregon rules provide evidentiary rules for admissibility and inadmissibility of prior disciplinary record. Current rules also provide that evidence on the issue of sanction shall not be heard until the Trial Panel has made a finding of misconduct, and that the sanction determination shall be made at the same hearing unless the panel is reconvened at the chairman's discretion.

Effect of the System

The rules as written provide fair standards for the introduction of potentially prejudicial evidence on a respondent's prior disciplinary record. The team was told, however, that at least on one occasion a panel did not take evidence on sanction after making a finding of misconduct and did not reconvene. Instead, the panel imposed a sanction without any evidence on respondent's prior record.

A close reading of the rules reveals that it is not mandatory that the Trial Panel consider respondent's prior record before it determines sanction. All that is required is that:

- 1) such evidence shall not be taken until a finding of misconduct is made, and
- 2) the issue (not necessarily evidence) shall be considered at the same hearing unless the chairman reconvenes.

The Recommendation

The rules were drafted with consideration of the prejudicial effect of evidence of a prior disciplinary record. Through an oversight in wording, it was not made mandatory that the Trial Panel consider prior disciplinary record in determining the sanction. Obviously, respondent's prior record is highly relevant to the issue of sanction in the current case and should be a mandatory consideration. The rule should be so amended.

A simple way of accomplishing this when a separate hearing on aggravation or mitigation is not needed, because prior discipline is a matter of public record, is for General Counsel to hand a sealed envelope to the Chairman before deliberation on the issue of misconduct begins. Respondent should be entitled to examine the contents prior to submission of the envelope. If there is no prior discipline, the envelope should contain a statement to that effect. The Chairman can then open the envelope at the appropriate time.

V. Supreme Court Review

Recommendation 13 - Speeding Up Supreme Court Review of Discipline Cases

The Court should give special priority to lawyer discipline cases over civil litigation on its docket.

The Court should review the record de novo on factual matters only after a party has demonstrated by clear and convincing evidence that the Trial Panel erred in a finding of fact.

The Oregon System

The Oregon Supreme Court, like many state high courts around the nation, suffers from a large backlog of cases in all categories. The team was told by many persons that the Court may take up to a year in deciding a disciplinary case, during which time the respondent usually continues to practice.

The Court's rule and its practice call for de novo review of the entire record of every case brought before it.

Effects of the System

Delay at all stages of the disciplinary system harms the public, the profession, and the administration of justice. The public is harmed when unethical practitioners are allowed to continue their misconduct and victimize additional clients. The profession is harmed when the public sees unethical practitioners allowed to continue practice, and when misconduct is condoned de facto by a cumbersome disciplinary system. The administration of justice is harmed when misconduct that directly affects it is not rapidly halted.

These harms are exacerbated when the delay occurs at a stage when there has already been an investigation and a hearing finding that misconduct was committed. When, as

in the Oregon system, delay occurs in the Supreme Court, the harm is especially exacerbated because only the most serious cases go automatically to the Court.

Clearly, there are civil cases that are very important. Nevertheless, private lawsuits as a category do not have the same repercussions to the whole society as does lawyer misconduct. To vindicate not only the professional status of lawyers but also the system of justice that lawyers represent, lawyers who commit misconduct must be disciplined as swiftly as due process permits.

The Oregon Supreme Court is the ultimate authority in licensing lawyers. The Court exercises this authority by de novo review of every disciplinary case record. The responsibility that the Court assumes and its thoroughness is exemplary, especially in light of its general backlog. However, in the present situation, the manner in which the Court is discharging its responsibility can only be adding to the backlog and the delay in deciding disciplinary cases.

The Recommendation

The unique dangers that unethical lawyers pose to the public, the profession, and the administration of justice fully support the notion that lawyer disciplinary cases should be given special priority on the Court's docket over civil cases. Devices such as a schedule of cases by age, similar to an aged accounts receivable schedule, may help the Court prioritize discipline cases and set older cases for conference or final decision.

While the Court certainly must retain the right to review the record de novo, it need not exercise that right where a competent Trial Panel has held a hearing and made finding of fact. If the Court does not have confidence in the Trial Panel structure it should change that structure. Assuming, however, that the Trial Panel structure is basically sound, there is no reason for the Court to review the entire record de novo.

The Court can instead rely on the Trial Panel's finding of fact unless a party shows by clear and convincing evidence that the finding was in error. In other words, the Court should adopt the standard for appellate review of a finding of fact in a civil case, with the important exception that the Court may at any time make its own determination without the issue being raised by a party.

De novo review by an appellate court has serious limitations, as the Court and any experienced trial lawyer know. Demeanor, attitude, body language, and other means by which human beings convey information (intentionally and unintentionally) are absent. A record is a flat and lifeless outline, a poor substitute for what actually occurred at the hearing.

Aside from the evidentiary deficiencies of reading a record de novo, the Court must consider the great expenditure of time. The Court's time is so limited and its backlog so large that the de novo review method cannot be justified, in the team's view, by requirements of fairness to the parties or of the Court's position as final authority.

VI. General Administration

Recommendation 14 - Tickler System

The General Counsel should install a uniform, office-wide tickler system to insure staff and volunteer entities perform their responsibilities within the time periods established by rule or statute.

The Oregon System

The General Counsel's office functions in many ways as an executive secretary to the several volunteer entities in the Oregon disciplinary system. It logs, routes, and tracks complaints, investigative reports, and other documents between the Local Professional Responsibility Committees (LPRC) that investigate, the State Professional Responsibility Board (SPRB) that decides whether to charge, and the volunteer Bar Counsel who present the evidence at hearing.

The General Counsel's office usually notifies volunteers on the LPRCs, for example, that investigative reports are overdue only when a deadline has passed. While the office has rudimentary docket software and a personal computer/word processing system, there is no tickler system in place. The existing system tracks cases but does not anticipate deadlines or filing dates or give notice of their approach.

Effects of Current System

The current caseload of the disciplinary system, approximately 900 complaints screened or investigated in 1985, is being processed with only the most basic listings of case status in chronological or alphabetical order by procedural stage. Staff counsel and volunteers are not automatically reminded of approaching deadlines at set intervals. Only through the diligence and self-discipline of individuals are cases being processed within or near mandatory time periods. Unfortunately, the team was told that delay and missed deadlines are frequent.

The Recommendation

A tickler system, even a basic card file tickler system, is a necessary component of any case management system. The lack of a systematic reminder system by practitioners has been a factor in many disciplinary actions. See, e.g., In Re Morrow, 927 Ore. 808, 688 P.2d 820 (1984); In Re Hereford, 295 Ore. 604, 668 P.2d 1217 (1983).

With a large caseload as currently exist in the General Counsel's office, systematic reminders in advance of approaching deadlines should be given to staff and volunteers. The reminder system should be formalized at the office level. Relatively inexpensive calendaring software may exist for the existing computer equipment.

Recommendation 15 - Workflow

The General Counsel and State Professional Responsibility Board should schedule their work so that the processing of cases is more constant, rather than episodic, at all stages of the proceedings.

The Oregon System

Once complaints are received by the General Counsel's office, screening and investigation or referral of cases to LPRCs is fairly constant. However, once cases are referred to the SPRB, case processing becomes episodic rather than constant.

The SPRB meets only seven times a year, the team was told. There are not enough prepared cases to justify meeting more often because the General Counsel's non-disciplinary workload takes him away from disciplinary matters.

After each meeting a group of cases is moved to the next step in the process, either further LPRC investigation, dismissal, or filing of formal charges.

Effects of the Oregon System

A workflow that is constant rather than episodic tends to create less strain on individuals, reduce bottlenecks and backlogs, and increase managerial control over the workload.

The immediate cause of episodic workflow in Oregon is the seven to ten week intervals between SPRB meetings. It clearly would be inefficient to have an eight-member statewide board meet every time a case was ready for determination. Yet the team was told that the grouping of cases every two months causes problems for volunteers and staff in trying to meet deadlines.

The Recommendation

We elsewhere recommend that the determination of probable cause be made by individuals who can be available at shorter intervals, rather than by a committee. We also recommend elsewhere that nondisciplinary functions be segregated to specific staff lawyers and that a Disciplinary Counsel position separate from the General Counsel be created.

While those recommendations are, in our view, the best solution to the problem discussed here, stop-gap measures might be taken to reduce the clumping of cases beyond the probable cause stage. General Counsel could prioritize disciplinary matters so that a set number of probable cause determinations are completed every few weeks. The SPRB could break into subcommittees and meet in rotation on a monthly or semi-monthly basis so that cases flow to succeeding stages in smaller groups and at shorter intervals.

Recommendation 16 - Volunteer Training

The General Counsel and State Professional Responsibility Board should create a permanent orientation and training program for volunteers at all levels of the disciplinary system.

The Oregon System

There currently is no formalized, ongoing training program or materials for volunteer LPRC, SPRB, or Trial Panel members. Most members are "trained" by other members. The Chairman of the State Disciplinary Board sends new members a copy of the rules and discusses procedures with them informally. In 1985, the General Counsel's office created a conference for LPRC members that was videotaped for later use. There also exists a Professional Responsibility Manual that could be the basis for orientation and training materials.

Effects of the System

While lawyer members of the voluntary bodies might be expected to learn the rules and procedures affecting their duties, the Oregon system is complex enough (as we can attest from studying it) that even the lawyer members are unlikely to gain a solid working knowledge of the overall system. In addition, for a member to be effective, he or she needs a working knowledge of the current state of affairs within the system, e.g., how many cases are backlogged, what happens when a report is late, and which people can be called on for information.

Many of the nonlawyer volunteers the team met with commented upon the lack of orientation or training. In some instances, nonlawyers are asked to investigate or write reports. We elsewhere recommend these practices cease. Here we only note that nonlawyer members have not been trained by the disciplinary system, nor could they be expected to know how to perform these functions by prior legal training. Some nonlawyer members the team talked with questioned the appropriateness of performing these tasks without training.

The Recommendation

Trained and oriented new volunteers will be more efficient and self-confident about their role in the disciplinary system. Annual conferences of all members and/or an annual newsletter (or distribution of an annual report that includes summaries of important cases, rule changes, etc.) would also increase the efficiency of all members of the system.

The General Counsel's staff is currently overburdened with nondisciplinary as well as disciplinary functions. We elsewhere recommend that nondisciplinary functions be segregated to specific staff members. General Counsel staff who deal with discipline are in the best position to create orientation/training programs. The efforts of General Counsel and staff on the LPRC orientation of 1985 were praised by the attendees the team interviewed. The additional workload to create an orientation program can, we believe, pay off in greater efficiency of the volunteer bodies. Once a program is created, annual updates should be minimal additional work.

Whether nonlawyer members continue to perform investigative and report writing tasks or not, they require special additional training. Instruction in basic legal research and evidence, due process, civil procedure as it applies to the disciplinary process, and professional responsibility should be provided.

Obviously, only the most basic concepts in all these areas can be covered and in a highly abbreviated fashion; we are not suggesting orientation approach the level of a law school course. Nevertheless, an adequate orientation in these subjects will allow volunteer entities to proceed on the assumption that all members possess the requisite minimum level of skills.

In addition to basic instruction on legal research, nonlawyer members should be provided access to the same information on the disciplinary system as lawyer members, including a subscription to the state bar bulletin where cases are reported during their terms of office.

CONCLUSION

Evaluation Process

The ABA Standing Committee on Professional Discipline believes its evaluation process is beneficial to state lawyer disciplinary agencies for several reasons. The evaluation teams and the Committee (which reviews and approves all evaluation reports) have a national perspective and access to national statistical data compiled by the ABA Center for Professional Responsibility. The teams and Committee are objective in that members are not involved in Oregon politics or bar activities, nor influenced by the historical development of the disciplinary system in the state.

The evaluation process does use standards, the ABA Standards for Lawyer Discipline and Disability Proceedings. These standards are employed as a diagnostic tool to determine potential problem areas. If on-site interviews and inspection show the problems do in fact exist, the team and Committee then determine whether the Lawyer Standards are a workable solution, or if some other recommendation should be made. In several states where particular Lawyer Standards were not followed, the teams found that because of unique local factors, the expected problems did not exist. The team therefore did not recommend that the Standards be followed in those states.

The process is self-evaluating in the sense that the Lawyer Standards are reexamined with each evaluation performed to determine whether the Lawyer Standards should be modified. Thus, the Standing Committee can guarantee to host states that the evaluation process is not a mechanical comparison but a thoughtful examination of the relationship between the bar and the public it serves.

Ad Hoc Committee

The recommendations made herein are the best judgment of the team and the Committee as to improvements needed in the Oregon disciplinary system. However, the Committee recognizes that the evaluation process is inherently limited in scope. In the Committee's experience, this report will be most helpful if the Oregon Supreme Court appoints an independent Ad Hoc Committee to examine it.

To insure its objectivity, the Ad Hoc Committee should not contain members who currently are involved with the lawyer disciplinary process. This is very important, in our experience, to the success of the review. The Ad Hoc Committee should conduct its own examination of the disciplinary process and report to the Oregon Supreme Court.

Post Evaluation Assistance

As part of the evaluation process, the Standing Committee on Professional Discipline will make available members of the evaluation team for further consultation with Oregon officials. The Standing Committee will also provide legal and statistical research and other technical reports upon request to assist the Oregon Bar in drafting disciplinary rules.

5944K

Camille Greene



From: Ed Harnden
Sent: Wednesday, December 04, 2013 10:20 AM
To: Catherine Petrecca; Traci Ray; Judith Baker; 'Maya Crawford'; Sandra Hansberger
Cc: Guy Walden; 'Richard Vangelisti'
Subject: RE: NLADA Funding

This is awesome. I am sure that the OSB will want to match that. It would be great if they put in more given the statewide nature of this program, but I certainly understand if \$5,000 is the level. Thanks. Ed

Ed Harnden
Managing Partner

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From: Catherine Petrecca [<mailto:cpetrecca@osbar.org>]
Sent: Wednesday, December 04, 2013 10:10 AM
To: Traci Ray; Edwin A. Harnden; Judith Baker; 'Maya Crawford'; Sandra Hansberger
Cc: Guy Walden; 'Richard Vangelisti'
Subject: RE: NLADA Funding

That's great news! Thank you.
Cathy

Catherine Petrecca
Pro Bono and Loan Repayment Assistance Program Coordinator
503-431-6355
cpetrecca@osbar.org

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From: Traci Ray [<mailto:tray@barran.com>]
Sent: Wednesday, December 04, 2013 9:58 AM
To: Ed Harnden; Judith Baker; Catherine Petrecca; 'Maya Crawford'; Sandra Hansberger
Cc: Guy Walden; 'Richard Vangelisti'
Subject: NLADA Funding

Just wanted to give you all the AWESOME news that the MBA approved a \$5,000 sponsorship at our Board meeting this morning for the NLADA conference.
A big thanks to Guy and Richard for their support!!!!

Traci Ray, Esq. | Executive Director
Barran Liebman LLP | Employment, Labor & Benefits Law Firm
601 SW Second Avenue, Suite 2300 | Portland, Oregon 97204
Direct (503) 276-2115 | tray@barran.com Visit www.barran.com to learn about upcoming Seminars & Events

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OREGON STATE BAR

Board of Governors Agenda

Meeting Date: January 10, 2014
From: Sylvia E. Stevens, Executive Director
Re: Supreme Court Deferral of PC 8.4 Amendments

Issue

The Supreme Court has deferred action on the proposed amendments to RPC 8.4 approved by the HOD on November 1, 2013, and has asked the bar to submit a revised proposal.¹

Options

Staff recommends the formation of a small group to work on a revised proposal, to include at least two representatives designated by the Legal Ethics Committee as well as other interested parties, and Judge David Schuman, as suggested by the Court.

Discussion

As indicated in Phil Schradle's letter of December 19, 2013, the Court's concern is whether the proposed amendments impermissibly restrict the speech of members of the bar because the restrictions are not directed at any identifiable, actual harm. The letter notes the formulation of the ABA Model Rule, which provides in comment that the manifestation of bias or prejudice misconduct when it prejudices the administration of justice.

The Court has described "administration of justice" as follows:

The reach of this term is not well defined in our case law or elsewhere. Our previous opinions have assumed that judicial proceedings and matters directly related thereto are within the ambit of the term. This court has found that the rule encompasses conduct such as: The failure to appear at trial,...the failure to appear at depositions,...harassing court personnel,...filing an appeal without the consent of the clients,...repeated appearances in court while intoxicated, ...and permitting a non-lawyer to use a lawyer's name on pleadings....

By recognizing that Bar disciplinary proceedings "strongly resemble judicial proceedings in that they primarily involve factual adjudications," this court...concluded that the Bar disciplinary proceedings fell within the scope of the administration of justice. Other proceedings that contain the trappings of a judicial proceeding, such as sworn testimony, perjury sanctions, subpoenas, and the like, similarly would qualify as being within the confines of the administration of justice.²

¹ See attached letter from Phil Schradle, Oregon Supreme Court Staff Attorney.

² *In re Hawes*, 801 P.2d 818, 310 Or. 741 (1990) (citations omitted).

A significant concern of the drafters and supporters of the proposed amendments was that the rule capture inappropriate conduct that occurred in non-judicial matters, such as transactional work and other office practice. It is not clear whether an acceptable rule could be drafted that has a broader reach than “prejudice to administration of justice,” for instance, prohibiting such conduct where it “adversely affects the negotiation or outcome of a client’s legal matter.” That will be the challenge for the group that considers a revision of the proposal.

Another point in Mr. Schradle’s letter is the Court’s as-yet undecided position on whether bias and prejudice is an appropriate subject for a rule of professional conduct.

The Court suggested including Judge Schuman in the group to work on a revision of the rule proposal because of his expertise in constitutional law. The Court also suggested including one or more of the lawyers who submitted written opposition to adoption of the rule when it reached the court.³

In addition to two members to be selected by the Legal Ethics Committee, the following would comprise a broad-based group:

- Judge David Schuman (constitutional scholar)
- Tom Christ (constitutional scholar, author of opposing submission)
- Kelly J. Ford (author of opposing submission)
- Bonnie Richardson (representative of specialty bars; worked on current version)
- Diane Schwartz-Sykes (former chair of Diversity Section)

Once the group has a draft formulated, it should be published to the bar with an invitation to submit comments. Ultimately, whatever the final product is will have to be submitted to the HOD before it goes back to the Court.⁴

³ See attached submissions, one from Tom Christ and one from Kelly Ford on behalf of 52 other bar members.

⁴ ORS 9.490: “The board of governors, with the approval of the house of delegates given at any regular or special meeting, shall formulate rules of professional conduct, and when such rules are adopted by the Supreme Court, shall have power to enforce the same.”

Philip Schradle, Staff Attorney



Oregon Supreme Court

December 19, 2013

Sylvia Stevens
Executive Director
Oregon State Bar
PO Box 231935
Tigard, OR 97281

Re: Proposed Amendments to Oregon Rule of Professional Conduct 8.4

Dear Ms. Stevens:

At the Supreme Court's December 3, 2013 public meeting, you presented amendments to the Oregon Rules of Professional Conduct (RPC) proposed by the Oregon State Bar House of Delegates. As you know, the court engaged in substantial discussion about the amendments proposed to RPC 8.4. The court decided to defer action on the proposed amendments to RPC 8.4 at this time and to ask the Bar to consider changes to the proposed amendments before the court considers the amendments again. The court has asked me to provide you with some direction in light of the concerns expressed by the court at the public meeting.

At the outset, I do have to set out some disclaimers. I do not speak definitively for the court and the comments in this letter do not constitute determinations by the court, tentative or otherwise, about any of the issues discussed. I provide these comments by way of suggested considerations for those who may be involved in developing new proposed amendments along the lines of those brought to the court on December 3.

As you know, the Oregon Supreme Court has issued numerous opinions that address the contours of Article I, Section 8 of the Oregon Constitution. In its free speech opinions, the court has long expressed its view that Article I, Section 8 provides robust protection for the free speech rights of Oregonians. *See, e.g., State v Robertson*, 293 Or 402, 649 P2d 569 (1982) (determining that Article I, Section 8 forecloses the enactment of laws written in terms directed to the substance of opinions or communications).

From the discussion that occurred at the court's public meeting, it seems clear that the proposed amendments to RPC 8.4, as drafted, raise significant legal issues – in particular, whether the proposed amendments impermissibly restrict the speech of members of the Bar. The current version of the proposed amendments provides that it is a violation of the Rules of Professional Conduct for a lawyer to:

"(7) in the course of representing a client, engage in conduct that knowingly manifests bias or prejudice based on race, color, national origin, religion, age, sex,

gender identity, gender expression, sexual orientation, marital status, disability, or socio-economic status."

It is notable that this rule is addressed to the "manifestation" of bias or prejudice and that it does not by its terms require that there be any adverse impact from that manifestation of bias or prejudice. And it seems readily apparent that the "conduct" addressed by the proposed amendment includes the act of engaging in speech, either oral speech or written speech.

In *Robertson*, the court determined that government actions that restrain speech on matters that do not fit within an historical exception to the protection afforded by Article I, Section 8, must be focused on identifiable, actual harm, rather than on the communication itself. See, *Robertson*, 293 Or at 416-417 ("laws must focus on proscribing the pursuit or accomplishment of forbidden results rather than on the suppression of speech or writing either as an end in itself or as a means to some other legislative end"). The proposed amendments to RPC 8.4 appear to restrict (among other types of "manifestations") mere expressions of opinion, whether or not there are adverse effects caused by that expression of opinion.¹ It further appears that the speech restricted by the proposed amendments does not come within any historical exception to Article I, Section 8. Consequently, consideration should certainly be given to developing revisions to the proposed amendments that focus on the harmful effects from the conduct prohibited. In this regard, I note that some states have adopted rules addressed to the same type of conduct as that addressed by proposed Rule 8.4, but prohibit it only when the conduct is prejudicial to the administration of justice. That type of provision or limitation is also contained in the Commentary to the ABA Model Rules of Professional Conduct – but not in the ABA Model Rules themselves.

The structure of the ABA Model Rules and its Commentary provide a framework for discussion about a second consideration that the court will continue to face should revised proposed amendments to RPC 8.4 (or the current proposed amendments to RPC 8.4) come before the court again at some later point. ABA Model Rule of Professional Conduct 8.4 (d) provides that it is professional misconduct for a lawyer to:

(d) engage in conduct that is prejudicial to the administration of justice;

The Commentary to that rule explains that:

(3) A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice.

¹ I do not intend by this statement or any other statements in this letter to condone expressions of animus or bias against persons based upon characteristics such as those noted in the proposed amendments, and, in fact, I am strongly offended by them. But expressions of opinion, however offensive, still constitute only expressions of opinion. And, as one commenter noted, the proposed amendments address expressions of support that manifest bias in favor of those persons in the categories noted as well as expressions of bias against those persons.

The framework set out in the ABA Model Rules thus subsumes the prohibition on conduct manifesting bias when it is prejudicial to the administration of justice within the general rule that prohibits conduct that is prejudicial to the administration of justice. Consequently, the ABA Model Rules do not have a completely separate rule addressed to conduct manifesting bias, but rather address it as part of the rule prohibiting conduct prejudicial to the administration of justice.

As you know, RPC 8.4 currently prohibits conduct that is prejudicial to the administration of justice. RPC 8.4 (a) (4) provides that it is professional misconduct for a lawyer to:

(4) engage in conduct that is prejudicial to the administration of justice;

If new proposed revisions to this rule or the current proposed revisions to this rule come before the court for its consideration, the court will need to determine the efficacy of having a separate rule apart from the prohibition on conduct that is prejudicial to the administration of justice.

This letter has focused on the potential *constitutional* issues related to the proposed amendments to RPC 8.4. Aside from those issues, if these or other proposed rule changes are presented to the court, the court also will have to make a *policy* determination as to whether the proposed changes should be adopted.

I hope that these comments prove to be of some help as consideration is given to developing possible amendments to RPC 8.4.

Sincerely,



Philip Schradle
Oregon Supreme Court Staff Attorney

THOMAS M. CHRIST
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Portland, OR 97204
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(503) 323-9000

November 25, 2013

The Honorable Thomas A. Balmer
Oregon Supreme Court
Supreme Court Building
1163 State Street
Salem, OR 97301

Re: Proposed Amendment of Oregon Rule of Professional Conduct 8.4

Dear Chief Justice Balmer:

I'm writing to comment on the new ethics rule proposed by the Oregon State Bar's House of Delegates. It would amend RPC 8.4 to read as follows (new language in bold):

“(a) It is professional misconduct for a lawyer to:

“ * * * * *

“(7) In the course of representing a client, engage in conduct that knowingly manifests bias or prejudice based upon race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, disability or socioeconomic status.

“ * * * * *

“(c) Notwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein, or from declining, accepting, or withdrawing from representation of a client in accordance with Rule 1.16.”

I oppose this rule because it doesn't do what its proponents say, and what it actually does is, in my view, both unwise and unconstitutional.

The proponents say that the rule prohibits discrimination, intimidation, and harassment in the practice of law. Those three words, *discrimination*, *intimidation*, and *harassment*, or some variant of them, appear a half dozen times in the short background statement to the rule, as presented to the House of Delegates. But those words appear nowhere in the rule itself. Nor does anything like them.

In fact, the rule does *not* prohibit a lawyer to discriminate against anyone, or to intimidate or harass anyone. What it does, instead, is prohibit a lawyer to “engage in conduct that knowingly manifests bias or prejudice based upon race, color, national origin,” or other classifications that are usually described as “suspect” under federal anti-discrimination laws. There is no requirement that the conduct *harm* anyone, or even that it be directed *at* someone. The rule doesn’t require an injury or a victim to expose a lawyer to discipline. All that it requires, as set out in paragraph (a)(7), is that the lawyer “engage in conduct” that reveals his or her “bias or prejudice” based upon on the designated classifications.

Conduct, of course, can be verbal or nonverbal. Verbal conduct is pure speech. Nonverbal conduct includes writing. It also includes other forms of expressive behavior: attending a rally or meeting, marching, distributing flyers, soliciting signatures, flying a flag, burning a flag, sitting when others stand, standing when others sit, clapping or not clapping depending on the circumstances, and so forth and so on. The list is endless. The rule, then, applies whenever a lawyer says, writes, or does something that reveals the proscribed bias.¹

I believe this prohibition is ill-advised, because it intrudes on freedom of conscience and expression. In my view, people are entitled to be biased. I wish no one was, of course. But everyone is entitled to his opinion, no matter how much the rest of us might disagree with it. And everyone is entitled to speak her mind, no matter how much the rest of us might not want to hear it. Everyone is entitled to hold and express points of view with which others disagree, even vehemently, or which are “politically incorrect” under contemporary standards, keeping in mind that what is correct today might be incorrect tomorrow, and vice a versa. They are not entitled to *act* on their views in a way that causes harm to someone. But, again, this rule requires no harm.

In that respect, the proposed rule is different than the laws to which some of its proponents liken it – the laws that prohibit discrimination in employment or housing or public accommodations upon the same classifications. Those laws have an injury requirement. They don’t simply prohibit non-injurious conduct that manifests bias. It’s not unlawful, for example, for an employer to hold racist views, or even to express them, in the workplace or outside of it, but only to act on them in a way that causes injury to a current or prospective employee – by, for example, paying a black worker less than a white one in the same job, or by refusing to hire a black worker in the first instance. See, e.g., ORS 659A.030.²

¹ The rule prohibits bias based on race, color, national origin, etc., but doesn’t require that the bias be *against* minorities within those categories. As written, the rule proscribes favoritism in either direction. It prohibits conduct that manifest bias *for* blacks, women, homosexuals, immigrants, the disabled, etc., to the same extent that it prohibits bias *against* them. In that respect, the rule would seem to apply to the activities of lawyers involved in affirmative action or “diversity” programs, including those run by the Bar itself. That probably wasn’t what the drafters of the rule intended, but that’s what the rule plainly says.

² ORS 659A.030 provides in part:

“(1) It is an unlawful employment practice:

Without an injury requirement, the proposed rule is really just a prohibition on “bad” thought about the described topics. To be sure, it requires some revealing conduct. But thought is never revealed *except* through conduct, verbal or nonverbal, and it almost always *is* revealed that way eventually. It’s just a matter of time. A homophobe, misogynist, or racist will inevitably out himself. Which means a rule banning prejudice alone would, in time, trip him up. A bigot could keep his views only if he stayed forever closeted, not ever saying or doing anything that lets on how he really feels. That rarely happens. In this respect, the proposed rule is the functional equivalent of a thought crime – or a rule that simply proscribes socially undesirable ideas upon particular subjects.

I don’t doubt that there is some bias in our profession, as there is in society at large. I am sure, for example, that some lawyers believe that same-sex couples should not be permitted to marry, perhaps because their religion tells them that. I don’t share that view. But I respect their right to hold it, and to express it. And if they do, I’ll express my contrary view, in hope of changing theirs. But this rule, if adopted, would require, instead, that I report them to the Bar for discipline.

The rule is qualified, of course, by the requirement that the bias-revealing conduct occur “in the course of representing a client.” This on-duty, off-duty distinction doesn’t lessen the rule’s impact on freedom of thought and expression. Lawyers should not be compelled to check their conscience at the law firm door.

Another qualification appears in paragraph (c), which says that “[n]otwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy” or from declining to represent someone. The key term here – “legitimate advocacy” – is hopelessly vague. It’s not defined by the rule, nor explained in the background statement. Apparently, the drafters of the rule believe that some advocacy is *illegitimate*. I have no idea what they are talking about. I doubt most lawyers would understand it either, if they were required to abide by it.

Far from fixing the problems with paragraph (a)(7), paragraph (c) actually makes it worse, in my view. I don’t believe that lawyers should ever decline to represent someone based upon race, color, national origin, or the like. We should, instead, take all comers. That responsibility comes, I believe, with a license to practice law. We are the only people authorized to provide legal services in this state and, therefore, we should guarantee that everyone who needs those services gets them, regardless of

“(a) For an employer, because of an individual’s race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older, or because of the race, color, religion, sex, sexual orientation, national origin, marital status or age of any other person with whom the individual associates * * * to *refuse to hire or employ the individual or to bar or discharge the individual from employment.* * * *”

“(b) For an employer, because of an individual’s race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older, or because of the race, color, religion, sex, sexual orientation, national origin, marital status or age of any other person with whom the individual associates * * * to *discriminate against the individual in compensation or in terms, conditions or privileges of employment.*” (Emphasis added.)

race, color, national origin, etc. We might disapprove of our clients or what they are trying to accomplish in court. But if that were grounds for turning them away, unpopular people or people with unpopular views might never find counsel. In my own practice, I have sometimes brought free-speech claims on behalf of people whose speech I disapproved of. But I believe they were entitled to counsel regardless, and if I were to turn them away, maybe other lawyers would do they same, and then they would have to proceed unrepresented, which isn't right. I don't believe that a lawyer's biases entitle him to turn away a client who needs his help. But the proposed rule, strangely, takes the opposite view.

To return full circle, if the goal is to prohibit intimidation and harassment in the practice of law, upon the grounds described in the proposed rule, then the rule should say *that*, in just so many words, though I'm hard pressed to understand why we should permit intimidation and harassment on *any* grounds. And if the goal is to prevent discrimination against someone upon those same grounds, then it should say that too, just as clearly. It should identify the persons to be protected (clients? witnesses? opposing counsel?), and the harm to be avoided. Without the requirement of an injury or a victim, the proposed rule is just a free-standing prohibition on "bad" thought and speech – or, more precisely, on what most of us, but not necessarily all of us, deem to be bad. For that reason, the rule is ill-advised, in my opinion.

For the same reason, the rule is also unconstitutional. Article I, section 8, of the Oregon Constitution provides that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatsoever." As construed by the Oregon Supreme Court, Article I, section 8, "forecloses the enactment of any law written in terms directed to the substance of any 'opinion' or any 'subject' of communication." *State v. Robertson*, 293 Or 402, 412, 649 P2d 569 (1982). The prohibition is not limited to speech and writing, but also to expressive conduct, including, for instance, nude dancing. *State v. Ciancanelli*, 339 Or 282, 121 P3d 613 (2005). For less exotic but equally expressive conduct, see note 1 above.

The proposed rule clearly runs afoul of Article I, section 8. It is, in fact, what the courts call a "first category" law – a law that focuses on the content of speech, not on its undesirable effects. See *State v. Plowman*, 314 Or 157, 164, 838 P2d 558 (1992), *cert den*, 508 US 974, 113 S Ct 2967 (1993). As noted, the rule doesn't require undesirable effects. It simply requires conduct that "manifests," *i.e.*, expresses, an undesirable point of view. First-category laws violate Article I, section 8, "unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Ibid.* (citing *Robertson*, 293 Or at 412). No one has cited, and I have not found, any historical support for this proposed rule.

In addition to the "historic" exception to Article I, section 8, there is also an "incompatibility" exception. See *Oregon State Policy Assn. v. State of Oregon*, 308 Or 531, 540, 783 P2d 7 (1989) (Linde, J., concurring) (coining the term). The speech of a "public servant" can be restrained to the extent it would be "incompatible" with the servant's "official function." *In re Fadely*, 310 Or 548, 563, 802 P2d 31 (1990). Thus, in *In re Lasswell*, 296 Or 121, 126, 673 P2d 855 (1983), the court held that, notwithstanding Article I, section 8, a district attorney could be disciplined for

commenting publicly on the merits of a case he was prosecuting. The court explained that it would not be compatible with his official duties to make extrajudicial statements of that sort, which might adversely affect the prosecution. The incompatibility exception does not save the proposed rule here, because the rule is not limited to lawyers in public office, and because holding and expressing bias on the topics covered by the rule is not necessarily incompatible with providing competent and otherwise ethical legal services.³

In addition to violating Article I, section 8, the proposed rule appears to contravene the First Amendment, which protects expressive conduct, even if displeasing, distasteful, or even offensive, so long as no other injury is inflicted. Two years ago, in *Snyder v. Phelps*, ___ US ___, 131 S Ct 1207 (2011), the Court held that members of a church could not be sued for picketing near a soldier's funeral service, holding signs which reflected their view that "God hates and punishes the United States for tolerance of homosexuality, particularly in the military." 131 S Ct at 1213. The signs said, among other things: "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You." *Ibid*. This speech was truly outrageous to any sensible person, and particularly hurtful to the soldier's family, who had already suffered incalculable grief. Even so, the First Amended protected the picketing. "Such speech," the Court said, in an 8 to 1 decision,

"cannot be restricted simply because it is upsetting or arouses contempt. If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. * * * Indeed, the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful. * * *"

Id. at 1219 (citations and internal quotation marks omitted).

I agree with the House of Delegates⁴ that speech which manifests bias based on race, color, national origin, and so on, is misguided, if not also offensive, disagreeable, and even hurtful. But, under the state and federal constitutions, it cannot be prohibited for those reasons alone.

Nor should it. The remedy for mistaken speech is always – and only – more speech, explaining the error.

³ To be sure, conduct manifesting bias could, in a particular setting, prejudice the administration of justice, even when engaged in by lawyers who are not also public servants. Imagine a trial lawyer who, for reasons of bias, uses peremptory challenges to keep minorities off of juries. But it is already unethical to "engage in conduct that is prejudicial to the administration of justice." See RPC 8.4(a)(4).

⁴ Fair disclosure: I am an elected delegate to the House, and I spoke against the proposed rule at the meeting in which it was debated.

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November 25, 2013
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For all of these reasons, the court should reject the proposed rule, at least in its present form.

Thank you for the opportunity to comment.

Very truly yours,

/s/ Thomas M. Christ

Thomas M. Christ

TMC:ejm

cc: Justice Kistler
Justice Walters
Justice Linder
Justice Landau
Justice Brewer
Justice Baldwin

IN THE SUPREME COURT OF OREGON

In Re: Proposed Amendment) JOINT COMMENT IN OPPOSITION TO THE
 To Oregon Rule Of) OREGON STATE BAR’S PROPOSAL TO
 Professional Conduct 8.4) AMEND RPC 8.4

We, the undersigned concerned Oregon attorneys whose names appear below, submit this Joint Comment in Opposition to the Oregon State Bar’s Proposed amendment to Oregon Rule of Professional Conduct 8.4.

We do not challenge the conclusion reached by the committee that developed the proposed rule to the effect that invidious discrimination exists within the bar membership, whereby some members of the bar intimidate and harass other bar members based on their sex, race or other characteristics. We have no data to support nor deny that conclusion.¹ These comments are directed to the substance of the proposed rule the Bar submits to the Court for approval at this time, over which the House of Delegates (HOD) was sharply divided.

In summary, the proposed amendments to RPC 8.4 fail to protect fundamental rights of Oregon attorneys - and those of their respective clients - to engage in speech protected by the Oregon and United States constitutions, including a great deal of speech appropriate to the role of attorneys representing clients on cutting edge public policy issues of the day. The amendments are also ill-advised for other important reasons and should not be adopted in their present form. Whether a disciplinary rule can or should be drafted to prevent attorneys from deliberately

¹ However, after a two year study, the OSB only came up with one example of actual bias or prejudice exhibited by an attorney in the course of representing a client. (Indeed, the OSB makes the curious statement that “No evidence exists that would suggest Oregon is uniquely free of bias in our legal system” – thereby arguing not that there is, in fact, evidence of existing bias or prejudice in the Oregon legal profession, but that there is no evidence that there’s not bias or prejudice – a fallacious argument.) And in the one case the OSB does cite, the offending attorney was, in fact, professionally disciplined by the OSB despite the absence of the provision the OSB now states is necessary to deal with the perceived problem.

causing others to actually become intimidated or feel harassed by their speech is not before the court at this time because the proposed amendment does not even pretend to do that.

I. The Current Rule

The current Rule 8.4 (a) of the Oregon Rules of Professional Conduct provides as follows:

It is professional misconduct for a lawyer to:

- (1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respect;
- (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;
- (5) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law; or
- (6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. (Subsection (b) omitted).

The current Oregon Rule 8.4 essentially mirrors Rule 8.4 of the ABA Model Rules of Professional Conduct, which has been adopted in one form or another in every state except California. However, the ABA Model Rule 8.4 contains no provision similar to the provision the OSB is proposing to add to Oregon's Rule. Rather, the current Comment [3] to the ABA Model Rule 8.4(d) (which Oregon has purposely never adopted) provides:

[3] A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio economic status violates paragraph (d) [RPC 8.4(a)(4)] when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).

II. The Proposed Amendment

The Oregon State Bar ("OSB" or "Bar") has proposed to amend Rule 8.4 by adding to it a new rule that reads as follows:

- (a) It is professional misconduct for a lawyer to:

* * *

(7) in the course of representing a client, engage in conduct that knowingly manifests bias or prejudice based on race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, disability, or socio-economic status.

The proposal also adds:

(c) Notwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein, or from declining, accepting, or withdrawing from representation of a client in accordance with Rule 1.16.

III. The Proposed Amendment Does Not Survive Scrutiny under Article I, Section 8 of the Oregon Constitution.

This court's well known rubric for analyzing constitutionality of laws under Oregon's free speech provision found in Article I, Section 8 of the Oregon Constitution, was set forth in *State v. Robertson* 293 OR 402, 649 P.2d 569 (1982), where the court said, in relevant part:

Article I, section 8, for instance, forbids lawmakers to pass any law "restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever," beyond providing a remedy for any person injured by the "abuse" of this right. This forecloses the enactment of any law written in terms directed to the substance of any "opinion" or any "subject" of communication, unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach. Examples are perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants. 293 Or. at 412.

Oregon's free speech protection is often characterized as broader than that of the First Amendment of the United States Constitution.

Proposed Rule 8.4(a)(7) is aimed directly at the content of attorney speech. The text of paragraph (7) on its face would make a wide range of attorney speech a disciplinary offense *per se*, without any requirement the Bar prove the attorney intended any prohibited result from engaging in the speech. Indeed, the background comment to the proposed amendment in the HOD proceeding justified the lack of an intent requirement to find a violation has occurred with the remark, "Moreover, civil rights laws do not require a showing of intent to prove

discrimination.”

Oregon law is to the contrary. This court has held, for example, that lack of knowledge by an employer that repeated proselytizing of an employee was resulting in the employee feeling distressed and harassed prevents the employer from being liable for violating ORS 659A.030. *Meltebeke v. BOLI*, 322 Or.132, 903 P.2d 351 (1995). See discussion under Section IV, *infra*. While much of the justification for the rule in comments before the HOD suggests an intent to prevent harassment and intimidation based on the twelve listed categories, the proscribed speech is breathtakingly broad; nowhere does the rule address itself to preventing the result for which its enactment is supposedly intended. That is a problem under *Robertson*. It appears, rather, the Bar has proposed a general speech code for attorneys acting in that capacity.

This comment will not analyze in detail the court’s cases discussing the historic exceptions to prohibitions on speech that were well established by 1859 (the second part of the *Robertson* test for finding a statute directed at the content of speech may be facially constitutional). *State v. Henry*, 302 Or. 510, 732 P.2d 9 (1987). We proceed on the basis that speech manifesting bias or prejudice based on criteria such as gender identity, gender expression, and socio-economic status are not among them, since even now they are not protected categories under Oregon’s nondiscrimination statutes in ORS Chapter 659A:

If the enactment does not restrain or restrict speech historically intended to be excepted from Article I, section 8, a third inquiry is necessary. "That question is whether the focus of the enactment, as written, is on an identifiable, actual effect or harm that may be proscribed, rather than on the communication itself." *In re Fadeley*, 310 Or. at 576, 802 P.2d 31 (Unis, J., concurring in part, dissenting in part); see *Moyle*, 299 Or. at 697, 705 P.2d 740; see also *Oregon State Police Assn. v. State of Oregon*, 308 Or. 531, 541, 783 P.2d 7 (1989) (Linde, J., concurring) ("law must specify expressly or by clear inference what 'serious and imminent' effects it is designed to prevent"), *cert. den.* 498 U.S. 810, 111 S.Ct. 44. If the answer to the third inquiry is that the enactment proscribes expression or the use of words, rather than harm, it violates Article I, section 8, unless there is a claim that infringement on otherwise constitutionally protected speech is justified under the "incompatibility exception" to Article I, section 8.

Meltebeke v. BOLI, supra, 322 OR at 155-156 (Unis, concurring)

Under the third step of the *Robertson* analysis, the court could sustain a prohibition directed at the content of speech if either the express terms, or clear inference, demonstrates the serious and imminent effects it is designed to prevent. The proposed rule utterly fails to do so. Rather, it imposes a speech code on Oregon attorneys - and their clients speaking through the attorney - that is a prior restraint on protected speech in an attempt to sanitize law practice from speech that may be deemed offensive by some listeners, regardless of their sensibilities. That goes too far, pursuing a purpose the law cannot address, particularly given an attorney's duty to represent the interests of the client in a vigorous and effective manner.

Our cases under Article I, section 8, preclude using apprehension of unproven effects as a cover for suppression of undesired expression, because they require regulation to address the effects rather than the expression as such." *State v. Moyle*, 299 Or. 691, 695, 705 P.2d 740 (1985)

For example, suppose if in a private conversation between opposing counsel in a matter not in litigation, one attorney says to the other "the dumb woman didn't even read the contract" referring to opposing counsel's client. Should that be a matter for discipline? It may manifest bias based on sex; it was not necessary to advocate the matter, thus might not be "legitimate advocacy" under proposed section 8.4(c), and it might or might not have intimidated opposing counsel (whether male or female). The speaker will not learn if intimidation was the result. Attorneys would not typically accuse opposing counsel of attempting intimidation, since that would be perceived as a sign of weakness. But it strains our understanding of the limits of effective representation to suggest an attorney could, or should, be disciplined for making this kind of statement.

It might be argued that *Robertson's* fourth test – that it is permissible to prohibit expressive activity based on content when the subject matter is incompatible with the speaker's official public role – permits the Bar to prohibit knowingly biased and prejudiced speech by

attorneys in their capacity as attorneys, as the proposed amendment tries to do. But prohibitable speech can only be speech that is incompatible with an attorney's official function, it cannot prohibit a broad array of protected speech as proposed 8.4(a)(7) does.

This court has applied the incompatibility exception to a Bar disciplinary rule prohibiting attorneys directly involved in criminal cases from making certain types of comments concerning the case while it is pending. In *In re Lasswell*, 296 Or 121, 673 P.2d 855 (1983), the court analyzed whether former DR 7-107, which prohibited attorneys from publicly commenting on any of six specific topics directly concerning a pending criminal case, was constitutionally sound although it failed the first three elements under *Robertson*. The court upheld the rule on the basis that public speeches about any of the 7-107 criteria by attorneys directly involved in a case would so likely cause effects prejudicial to the administration of justice that the rule was constitutionally permitted. In upholding the rule, the court said:

The point of the disciplinary rule, therefore, is not restraint of free expression by lawyers because they are lawyers. That could not survive the constitutional principles we reviewed in *In re Richmond*, 285 Or. 469, 474-75, 591 P.2d 728 (1979). Rather, the rule addresses the incompatibility between a prosecutor's official function, including his responsibility to preserve the conditions for a fair trial, and speech that, though privileged against other than professional sanctions, vitiates the proper performance of that function under the circumstances of the specific case. In short, a lawyer is not denied freedom to speak, write, or publish; but when one exercises official responsibility for conducting a prosecution according to constitutional standards, one also undertakes the professional responsibility to protect those standards in what he or she says or writes. We conclude that DR 7-107(B) survives the accused's constitutional challenge if it is narrowly interpreted so as to limit its coverage, in the words of article I, section 8, to a prosecutor's "abuse" of the right "to speak, write, or print freely on any subject whatever. *Laswell, supra*, 296 Or. At 125.

Note the connection between violation of DR7-107 and prejudicing administration of justice. The broad limitation of attorney speech under proposed RPC 8.4(a)(7) is nothing like the "narrowly interpreted" disciplinary rule upheld in *Laswell*. Paragraph (7) contains a blanket prohibition on certain types of speech by attorneys while engaged in the practice of law,

regardless of the context or venue. It is expressly divorced from any requirement that the prohibited speech be detrimental to the administration of justice.² Such a sweeping constraint captures a great deal of speech that is entirely consistent with the role of licensed attorneys representing a client.

For example, the rule is not limited to conduct that manifests bias or prejudice of any specific person or group; it merely says “manifests bias or prejudice.” Since the proposed rule is not limited to conduct that manifests only the lawyer’s own bias or prejudice it could be unethical during *voir dire* or trial to ask potential jurors, witnesses or parties questions that may “manifest bias or prejudice” on the part of a potential juror, or the community, one’s own client, an adverse party, or a witness. Moreover, asking the questions in themselves could well be perceived as the attorney knowingly manifesting his or her own bias or prejudice.

Consider whether the Bar could find conduct that “manifests bias or prejudice,” thus violating the proposed rule, in the following sample *voir dire* questions an attorney may need to ask in the course of representing a client:

“Mrs. Jones, does the fact that my client is a young [black/Hispanic/or Asian] [male] create any feeling that he may be guilty of ...”

“Officer Doe, isn’t it true that your attention was first drawn to my client when you saw a car with {pick a number} young [black/Hispanic/ or Asian] [males] in Upper Heights, a predominantly all white neighborhood?”

Or

“Mr. Smith, there will be evidence that my client was assaulted/slandered/fired/ harassed/ demoted/ because [he/she] was [gay/lesbian/Jewish/Muslim/Catholic/white/black/Asian/ Hispanic/female/psychotic]. Tell us about reactions you feel when you personally encounter someone who you feel is or may be [gay/lesbian/Jewish/Muslim/Catholic/ white/black/Asian/Hispanic/female/psychotic/...]?”

² RPC 8.4(a)(4) forbids all attorney conduct that is prejudicial to the administration of justice. By inserting the proposed new RPC 8.4 (a)(7) in parallel to 8.4(a)(4), standard rules of construction compel the conclusion the rule is intended to forbid conduct *in addition to* conduct that is prejudicial to administration of justice. *See* discussion in Section VI, subsection 1, *infra*.

Similarly, one can envision all manner of instances when questioning about a minority witness' or party's ability to understand warning signs or contracts written in English (not their first language) may be perceived as manifesting bias or prejudice when such questioning is fundamental to the issues in the case.

Proposed new Section 8.4(c), which contains a savings clause for "legitimate advocacy" by attorneys, does not avoid this problem. That terminology comes directly from Comment 3 to ABA Model Rule 8.4, which is intended to provide examples of charged speech that may be prohibited only when it is prejudicial to the administration of justice. This "exception," whatever it means, provides no comfort to an attorney wishing to avoid the considerable expense in financial resources and time that results from a disciplinary prosecution, even if the defense is ultimately successful.

First, by segregating the exception into a separate section in Rule 8.4, the Bar demonstrates it intends the exception to be litigated as an affirmative defense to misconduct alleged under paragraph (a)(7). But if "legitimate advocacy" is not to be punished, the Bar should bear the burden to allege and prove the challenged advocacy was not "legitimate" as an element of the disciplinary offense rather than affirmatively requiring the attorney to plead and prove the attorney was engaged in "legitimate advocacy."

Why would this court enact a rule that requires an attorney to prove he or she was just doing his or her job to avoid being disciplined? To posit "legitimate advocacy" demands the conclusion there is such a thing as "illegitimate advocacy" – conduct that is advocacy on behalf of a client, but does not meet the standard of proving a defense against the general prohibition of uttering biased speech "on the job." By what criteria can an attorney know in advance of defending a disciplinary action that he or she has not engaged in advocacy that will ultimately be

deemed “illegitimate,” to the attorney’s financial and reputational harm or ruin?

The attorney’s sole means of avoiding prosecution is to self-censor any speech that might be deemed offensive by someone. Self-censorship involves the attorney foregoing legally protected speech solely for self-protection purposes. Such self-censorship is totally incompatible with the attorneys’ role as a zealous advocate for the client, but is the necessary and predictable result of enacting the proposed rule. This court should reject it.

IV. Proposed Rule 8.4 is Overbroad under the Court’s Interpretation of Article 1, Sections 2 and 3 of the Oregon Constitution.

Proposed Rule 8.4 makes it a disciplinary offense to engage in conduct that manifests bias or prejudice, including that based on religion or conscience. Initially, it should be acknowledged that virtually all advocacy involving matters regulated by religious opinion may be an expression of bias, whether based on Christian beliefs, those of another religion or no religion at all, with the expression necessarily accompanied by perceived prejudice against the tenets of other religious beliefs. The court should, therefore, be extremely careful before adopting a disciplinary rule that inhibits the free exchange of ideas based on those beliefs, particularly when society is engaged in an ongoing, decades-long debate about changing laws that invoke sharp public disagreement based on religious doctrine.

Attorneys are at the forefront of both sides of these debates. Enacting the proposed amendment would give opposing attorneys and parties an unwelcome arrow in their quivers – the threat of filing an ethical complaint against an attorney representing a client whose religious views are opposed to those of the other attorney (or the other attorney’s client). This is particularly problematic when the accused attorney advocates for the minority view.

Fortunately, this court has already spoken to this problem, and the proposed amendment

flunks the test. In the court's definitive interpretation of the limitations imposed by the Oregon Constitution on prohibiting religious expression in the employment context, this court held unanimously that an employer may not be held liable for so-called "religious harassment" of an employee, even if the employer's speech caused the employee to feel harassed, even if the perception of harassment may have been objectively reasonable, unless the speaker knows of the employee's reaction. *Meltebeke v. BOLI*, 322 Or. 132, 903 P.2d 351 (1995). In *Meltebeke*, the agency expressly found at hearing that the employer did not know that his repeated Christian witnessing activity made the workplace intimidating, hostile, or offensive to the complaining employee.

That is the operative fact in this case, whether or not a reasonable person might have inferred otherwise. Because sections 2 and 3 of Article I are expressly designed to prevent government-created homogeneity of religion, the government may not constitutionally impose sanctions on an employer for engaging in a religious practice without knowledge that the practice has a harmful effect on the employees intended to be protected. If the rule were otherwise, fear of unwarranted government punishment would stifle or make insecure the employer's enjoyment and exercise of religion, seriously eroding the very values that the constitution expressly exempts from government control. 322 Or at 153.

Since Article 1, Section 3 protects acts of conscience equally to acts based on religious beliefs, the court's protection of speech motivated by conscience, but not by the tenets of any particular set of religious beliefs, should receive the same degree of protection. Instead, the proposed rule prohibits attorney speech the attorney knows manifests bias or prejudice based on religion, regardless of its effect (or lack of effect) on hearers, and regardless of whether the effect was intended. Thus, it goes far beyond conduct based on religious beliefs this court found in *Meltebeke* may be sanctioned in the workplace. Attorneys should be entitled to the same protection as employers.³

³ To demonstrate the difficulty of applying the proposed rule in light of the *Meltebeke* doctrine, suppose (as actually occurred in the experience of these comments' primary author) attorneys A and B represent opponents in a breach of contract matter. Attorney B's client was known for his Christian beliefs. A called B to introduce himself and in

The Bar is attempting to enact a “speech code” for attorneys by prohibiting speech showing prejudice based on any of twelve categories (some of which are not even protected classes under the law). Despite earnest assurances that the rule will only be enforced in egregious cases to penalize conduct that is clearly intended to – and does – result in harassment and intimidation of captive listeners, twenty years’ history of attempted enforcement of similar codes enacted by public colleges and universities shows they are repeatedly applied to marginalize protected speech by students whose opinions are outside the political mainstream, with the predictable result that, when challenged, the speech codes have been routinely struck down in the federal courts.

Designed to broadly prohibit so-called “offensive” or “harassing” communications, these codes have chilled free speech at campuses from coast to coast. Facially vague and overbroad, they deter untold thousands of students from speaking freely on critical issues of race, gender, sexuality, politics, and religion. Arbitrarily enforced, they tend to become weapons of the dominant political culture, wielded against dissenters in an effort to replace the “marketplace of ideas” with a gated community. From the inception of speech codes in the 1980s, courts have uniformly rejected them, both facially and as-applied. *See McCauley v. Univ. of V.I.*, 618 F.3d 232, 250, 252 (3d Cir. 2010); *Temple Univ.*, 537 F.3d 301, 320 (3d Cir. 2008); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (Alito, J.); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir. 1995); *Coll. Republicans*, 523 F. Supp. 2d at 1021; *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp.

referring to B’s client, said to the effect of “just like most Christians, your guy is a hypocrite.” A and B had never met nor spoken before. A did not know B was also a Christian. A’s remark startled B as being bigoted and inappropriate, but it fell far short of “intimidating or harassing” him. Presumably A had no knowledge nor intent that his remark cause B to feel harassed. Yet A’s conduct facially violated the proposed rule (a)(7) and, at least arguably, did not fall within the affirmative defense of “reasonable advocacy.” Is A saved from formal discipline under *Meltebeke* or is he to be sanctioned for making that remark? Let it be the former.

2d 357, 370-71 (M.D. Pa. 2003); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 584 (S.D. Tex. 2003); *Booher v. Bd. of Regents, N. Kentucky Univ.*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. 1998); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 866 (E.D. Mich. 1989)

While one would hope for better from the Oregon State Bar office of attorney discipline, the point is that potential gatekeepers to enforcement, particularly if not schooled in the intricacies of Oregon and federal constitutional law, are limited only by the terms of the rule itself. This court should not give the Bar the tools to go down that path.

V. Proposed Rule 8.4 goes beyond what any other state has done.

To the best of our knowledge and belief, no other state bar has protected “gender expression” and only one other state – Arizona – has protected “gender identity.” These categories have not been protected by the Oregon legislature in ORS 659A.030 or 659A.403, so are not protected classes with respect to discrimination in employment or by public accommodations.

Moreover, recent attempts by bar associations in three states to broaden nondiscrimination prohibitions in their professional discipline codes have been rejected by their Supreme Courts. The Arizona State Bar recently attempted to add “gender expression” to that state’s list of protected classes in its Comment [3] and to elevate the Comment into its Rule 8.4, but the Arizona Supreme Court rejected both attempts. A copy of its order is attached as Exhibit A. The Tennessee Supreme Court recently rejected the Tennessee Board of Professional Responsibility’s attempt to add a non-discrimination provision as part of its Rule 8.4. A copy of its order is attached as Exhibit B. The North Carolina Supreme Court in March 2011 rejected without comment the North Carolina Bar’s attempt to add a non-discrimination

provision to the Preamble of its Code of Professional Conduct. *See* Exhibit C.

**VI. Objections to the Proposed Amendment Based on Policy
and on the First and Fourteenth Amendments to the United States Constitution**

The OSB's proposed Amendment has other defects and will have deleterious effects on Oregon attorneys, including the following:

1. It divorces the rule from its grounding in the prevention of prejudice to the administration of justice;
2. It contains terms so vague as to fail to provide attorneys with sufficient notice as to what behavior is proscribed, violating the due process provisions of the Fourteenth Amendment;
3. It unconstitutionally prohibits protected speech under the First Amendment;
4. It unconstitutionally discriminates on the basis of viewpoint under the First Amendment;
5. It unconstitutionally violates the rights of attorneys to the free exercise of religion and conscience under the First Amendment; and
6. It fractionalizes the profession and enables special interest groups to use the Bar to advance social and political agendas, extending protections beyond current law.

A discussion of each of the above-referenced issues follows below.

**1. The Proposed Amendment Divorces the Rule from its Grounding
in the Prevention of Prejudice to the Administration of Justice.**

As noted above, both ABA Model Rule 8.4(d) and Model Rule Comment [3] make clear that, in order for conduct to violate the rule, the conduct must prejudice the administration of justice. That is clear not only from the context, but also from the plain language of the Model

Rule's Comment [3]:

[3] A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio economic status violates paragraph (d) when such actions are prejudicial to the administration of justice (our emphasis).

The purpose of linking an attorney's biased and prejudiced behavior to actual prejudice to the administration of justice is that the legal profession should only be concerned about attorneys' noncriminal behavior that has a deleterious effect on the legal system. Attorneys may choose to engage in all sorts of questionable behaviors, but the profession does not concern itself with those behaviors – and certainly should not seek to professionally discipline an attorney for those behaviors – unless the behavior has a deleterious effect on the legal system itself or violates one of the other prohibitions of Rule 8.4(a), all of which are examples of conduct that prejudices the legal system.

However, it is clear that the OSB's proposed rule is completely divorced from any requirement that the "bias or prejudice" be prejudicial to the administration of justice. That is clear, first, from the fact that the OSB's proposed provision contains no language that the alleged bias or prejudice must prejudice the administration of justice in order for such conduct to violate the rule. Secondly, it is clear because Section 8.4(a)(4) of the rule (making it a separate offense for a lawyer to engage in conduct prejudicial to the administration of justice) is left entirely intact, thereby making clear that Rule 8.4(a)(4) and the proposed Rule 8.4(a)(7) are completely separate offenses.

What the OSB proposes is that the rules be changed in order to create an entirely new, free-standing offense that would subject Oregon attorneys to professional discipline for engaging in "bias or prejudice" regardless of whether or not such conduct results in any prejudice to the administration of justice. This is a monumental change in the rules, and one that

very few, if any, other states have embarked upon. This distinction also illustrates why the proposed rule fails the “incompatibility exception” test under Article 1, Section 8 of the Oregon Constitution. *See* discussion, *supra*. To further illustrate, consider that the attorney conduct set out in footnote 3, *supra* at 10, would not result in prosecution if the bias rule is tied to prejudice to administration of justice, because it was entirely private and inconsequential in its result.

2. The Proposed Amendment Contains Terms So Vague as to Fail to Provide Attorneys with Sufficient Notice as to What Behavior is Proscribed, in Violation of Due Process under the Fourteenth Amendment.

The language of the OSB’s Petition is so vague as to fail to provide Oregon attorneys with fair notice of what is and what is not prohibited conduct. An ethical requirement that “either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” *Cramp v. Bd. Of Pub. Instruction of Orange County, Fla.*, 368 U.S. 278, 287 (1961).

In particular, the terms “bias,” “prejudice,” and “manifest” leave attorneys having to speculate about the meaning and application of the OSB’s proposed amendment. Such terms fail to provide attorneys with sufficient notice of what behavior is prohibited, and vest in the OSB a virtually unfettered discretion to define the key terms in a manner it desires rather than in a manner that is objectively and fairly applicable. This, in turn, enables the proposed rule to be enforced in an arbitrary and capricious manner.

The scope of this problem is reflected in the OSB’s own explanation for promoting the rule change. The proposed rule change refers only to “conduct knowingly manifesting bias or prejudice.” But the OSB, in its explanation of the proposed rule, as well as most of the public testimony by speakers in favor of its adoption at the November 1, 2013 HOD meeting,

repeatedly referred to the rule as applying only to stop “harassment,” “discrimination,” and “intimidation.” Although discrimination might be a synonym for “bias or prejudice,” “harassment” and “intimidation” are clearly not. “Bias” and “prejudice” are terms that describe the offending attorney’s behavior, but the terms “harassment” and “intimidation” describe the alleged victim’s *perception* of another’s behavior. So, either the OSB cannot consistently explain what the terms of its proposed rule mean, or the OSB – in proposing the rule change – means something entirely different from what the actual language of the rule provides. In either case, how is an attorney supposed to know what the rule means?

Further, some of the protected classes cannot even be objectively defined or identified and, to that extent, are also unconstitutionally vague. Attorneys should not be threatened with discipline for allegedly discriminating against a class of people whose identity cannot even be objectively determined.⁴

⁴ For example, even scholars who regularly study “sexual orientation” cannot agree on a definition for or an understanding of that term. *See* Todd A. Salzman & Michael G. Lawler, *The Sexual Person* 150 (2008) (“The meaning of the phrase ‘sexual orientation’ is complex and not universally agreed upon.”).

Likewise, “gender identity” is objectively indeterminable. Both “gender identity” and “gender expression” are, by definition, completely subjective, depending entirely upon a person’s self-proclamation, which may have nothing to do with how they objectively appear to others. Indeed, one’s “gender identity” may be contrary to one’s “gender expression.” And the concept is also completely malleable. There is absolutely no requirement that someone have a temporally consistent “gender identity” or “gender expression.”

“The term [transgender] includes androgynous and gender queer people, drag queens and drag kings, transsexual people, and those who identify as bi-gendered, third gender or two spirit. ‘Gender identity’ refers to one’s inner sense of being female, male, or some other gender. . . Indeed, when used to categorically describe a group of people, even all of the terms mentioned above may be insufficient. . . individuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities.”

Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities, 12 Tex. J. on C.L. & C.R. 101, 103-104 (Fall 2006). (emphasis supplied)

The vagueness of the OSB’s proposed language chills attorneys’ valid speech for fear of offending a standard whose parameters are lost in the mists of ambiguity. Uncertain terms require attorneys “to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.” *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quotation and citations omitted).

2. The Proposed Amendment Prohibits Protected Speech under the First Amendment

The OSB’s proposed amendment also threatens to prohibit attorneys from advocating politically controversial views on behalf of their clients. These issues include, among others, that attempts to change the law defining marriage as being only between one man and one woman should be opposed (which some might argue “manifest[s] bias or prejudice” based on sexual orientation). The Constitution does not permit the Government to confine clients and their attorneys by excluding ostracized yet vital theories and ideas. *Cf. Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (dealing only with the litigation context). That, however, is precisely what the OSB’s proposed rule change threatens to do.

This silencing of attorney advocacy for publicly marginalized views runs directly counter to the purpose of the First Amendment. By branding these views as manifesting “bias” or “prejudice” (and thereby, under the OSB’s proposal, “professional misconduct”) the provision encourages public and private contempt, along with official punishment, of attorneys and clients who express such views and beliefs.

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3. The Proposed Amendment Discriminates On The Basis Of Viewpoint in Violation of the First Amendment

A legal provision proscribing expression must not exhibit, either explicitly or implicitly, viewpoint discrimination. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391 (1992). The OSB's proposed amendment suffers from this constitutional flaw. A few examples illustrate this defect.

First, suppose that an attorney writes a letter or presents legislative testimony for his client (in a context unrelated to a specific proceeding) arguing that Oregon ought to recognize same-sex marriage. That attorney would not be accused by the Bar of manifesting bias or prejudice based on sexual orientation. But consider the attorney who conveys the position that the state should continue defining marriage only as the union of one man and one woman. Recent history illustrates that some would conclude the latter expression manifests bias or prejudice based on sexual orientation.

Second, if a group lobbies the Oregon Legislature to remove "sexual orientation" from Oregon's nondiscrimination laws, the attorneys who advocate to retain current law certainly would not be charged with violating the proposed provision. But the attorneys whose clients want them to support that change risk punishment for allegedly manifesting bias or prejudice on the basis of sexual orientation.

Some may argue that these concerns are without merit because the OSB's proposed amendment specifically allows for "legitimate advocacy." However, the word "legitimate," modifying the word "advocacy," contains a worrisome and difficult-to-define restriction on what lawyers do by profession – namely, advocate. If there is "legitimate advocacy" there must also be, by definition, "illegitimate advocacy." Which is which, and who will decide the meaning of that vague and difficult to define term? If "bias" (for or against) or "prejudice"

against those who engage in homosexual behavior constitutes a disciplinary offense, the OSB may contend that any advocacy against such behavior is not “legitimate advocacy”? Since “marital status” is protected, who can say the OSB will not contend that advocating that marriage only be between one man and one woman is “illegitimate advocacy” manifesting bias and prejudice? Finally, how will the OSB referee clashes between those advocating “sexual liberty” and those advocating religious-based moral opposition to “sexual liberty”?

What is clear is that lawyers will not be allowed to think, advise or advocate *freely*. Lawyers will only be allowed to advocate in ways the powers-that-be determine are “legitimate” and may face punishment and substantial expense if they engage in advocacy the powers-that-be determine are not “legitimate.”

In short, under the OSB’s proposed amendment, attorney advocacy “in favor of . . . [so called] tolerance and equality” concerning sexual orientation would be free and unfettered, while the expression of “those speakers’ opponents” could be repressed. *See R.A.V.*, *supra*, at 391. That constitutes viewpoint discrimination. As the United States Supreme Court has recognized, the government “has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.’ *R.A.V.*, *supra* at 392.

With regard to the free speech issues raised above, the OSB attempts to justify the incursions its proposed rule would have upon the constitutionally-protected speech rights of Oregon attorneys by comparing its proposed amendment to rules requiring attorneys not to lie, regulating client solicitations, and addressing communications with represented and unrepresented parties. Those rules are clearly different from the OSB’s proposed rule. The first two simply prohibit attorneys from making false or misleading statements, while the last –

having to do with communicating with a person represented by counsel – merely limits to whom an attorney may express herself without prohibiting the expression entirely. The latter three rules are also objective and easy to apply, while the OSB’s proposed rule is neither.

4. The Proposed Rule Violates Free Exercise of Religion and Conscience Rights in Violation of the First Amendment

Unlike the proposed rule, the Model Rules of Professional Conduct recognize the rights and obligations of attorneys to exercise their personal ethical judgments in the practice of law. Paragraph [7] of the Model Rules’ Preamble provides: “Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience . . .” (our emphasis). Paragraph [9] of the Model Rules Preamble states: “Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person . . . [s]uch issues must be resolved through the exercise of sensitive professional and moral judgment” (our emphasis). Paragraph [16] of the Model Rules Preamble provides: “The Rules [of Professional Conduct] do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be competently defined by legal rules” (our emphasis).

The Oregon Rules of Professional Conduct are similar. For example, Rule 2.1 provides that “In rendering advice, a lawyer may refer not only to law but to other considerations such as moral . . . factors” (our emphasis). The Model Comment [2] to Rule 2.1 provides “It is proper for a lawyer to refer to relevant moral and ethical considerations in giving [legal] advice. . . moral and ethical considerations impinge upon most legal questions . . .” (our emphasis).

Many legal scholars have noted the conflict between religious liberty and sexual

orientation protection. See, for example, Michael W. McConnell, The Problem of Singling Out Religion, 50 DePaul L. Rev. 1, 43-44 (2000); see generally Same-Sex Marriage and Religious Liberty: Emerging Conflicts (Douglas Laycock et al., eds., 2008).

The “Free Exercise Clause [of the First Amendment] pertain[s] if the law at issue discriminates against some or all religious beliefs.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). The OSB’s proposed amendment discriminates against those attorneys who hold sincerely held religious beliefs about the morality of certain sexual behaviors by subjecting advocacy in favor of those beliefs to disciplinary action.

6. The Proposed Amendment Fractionalizes the Profession and Enables special interest groups to use the Bar to Advance Social and Political Agendas, Extending Protections Beyond Current Law

The OSB’s proposed amendment follows a worrisome trend of creating a growing list of specifically protected groups, a practice that fractionalizes the profession, excludes certain people from protection while protecting others, and encourages certain groups to use the OSB to advance their peculiar social and political interests rather than the interests of all Oregon attorneys and the profession as a whole. Such an approach renders the code exclusive, rather than inclusive.

If we, as a profession, are really concerned about the manifestation of bias or prejudice, then we should be concerned about bias or prejudice against any person, regardless of whether or not that person is a member of a certain group. Identifying certain groups for protection and not others implies that the Oregon State Bar is only concerned about acts of bias if those acts affect the members of specially favored groups. All others are excluded and may apparently be discriminated against with impunity.

Also, including a list of specifically protected groups results in the fractionalization of our profession – not to mention our society – by encouraging people to identify themselves in relation to or against other groups, rather than as distinct individuals who should be treated on the basis of their individual merits rather than their membership in some class (a form of stereotyping that is itself discriminatory). The truth of this observation is evidenced by the list of groups supporting the proposed rule change. Of the twelve groups listed, all but two are groups that advocate for special interests within the larger community.

Furthermore, there is apparent confusion over what some of the current classifications even mean. For example, under the proposed amendment, attorneys are prohibited from manifesting bias or prejudice based on “socio-economic status.” What does that mean? Does that mean that an attorney could not refuse representation on the basis that the prospective client cannot afford to pay the attorney’s fee? Other classifications also defy definition. *See* footnote 4, *supra*.

In addition, establishing a list of specially protected groups propels the OSB into the improper role of taking positions on contentious political and social issues, including issues of personal morality. The OSB is a public corporation that is an instrumentality of the Judicial Department. ORS 9.010(2). It is not appropriate for groups to use the OSB – to which all Oregon attorneys are compelled to belong – in order to advance their own political and social agendas, especially when there is wide disagreement among Oregon attorneys as to the merits of the positions and agendas of the groups seeking OSB support.

Even now there are additional groups who claim that their peculiar characteristics merit special recognition and protection. *See, e.g.*, The National Association to Advance Fat Acceptance (NAAFA) which has resolved “[t]hat ‘height and weight’ be included as a

protected category in existing local, state, and federal civil rights statutes”. *See also* the recently proposed Non-Discrimination Ordinance of Delta Township, Michigan, which proposes to protect “actual or perceived race, color, religion, national origin, sex, age, height, weight, marital status, physical or mental limitation, source of income, family responsibilities, sexual orientation, or gender identity/expression.” With the Bar’s amendment including no less than twelve protected classes, it is only a matter of time before additional groups come forward to press their peculiar interests on the OSB and to expand the list of protected classes to the point that the provision will be rendered meaningless.

Allowing itself to be used in this manner damages the credibility and effectiveness of the OSB. Rejecting this proposed amendment will prevent groups from attempting to use the OSB simply as a vehicle to advance their own political and social agendas rather than to advance the legitimate interests of the legal profession as a whole.

CONCLUSION

For all the reasons set forth herein, we the undersigned object to the Oregon State Bar’s Proposal to Amend Rule 8.4 of the Oregon Rules of Professional Conduct.

Respectfully submitted this 20 day of November, 2013.

[Signatures on Following Page]

The following Oregon attorneys have agreed to sign this comment. A few stated they support the objection but would not have included some of the arguments had they authored the comment.

<u>Name</u>	<u>OSB Number</u>	<u>Name</u>	<u>OSB Number</u>
Kelly E. Ford	872236	Sarah L. Gabin	812345
Herbert G. Grey	810250	Dale Anderson	730116
Kathryn Mary Pratt	941890	William A. Drew	952539
Scott C. Adams	990075	Cecelia Nguyen	043779
Joel Leonard	960810	Nicholas Heydenrych	061778
Allen L. Reel	742670	John R. Hemmerich	093791
Tyler D. Smith	075287	John E. Uffelman	733073
Karen W. Davis	032095	George E. Price	850778
James E. Leuenberger	891542	Adam D. Reed	103104
Dean J. Lederer	000698	Scott T. Cliff	871918
Gerald L. Warren	814146	Tyler D Smith	075287
Jeffrey A. Trautman	041090	Jonathan Clark	022740
David J. Riewald	880969	Ann Fisher	840459
Thomas O. Alderman	740127	Pamela Yee	873726
David E.C. Gettis	093659	Kristian Roggendorf	013990
Douglas S. Anderson	820230	Robert LeChevallier	782818
Mark J. Holady	900682	Kristen Waggoner	067077
Anna Adams	122696	Duane K Petrowsky	010850
Susan D. Isaacs	792771	Michael A. Schmidt	783659
Melanie Mansell	892992	Mario Ledesma	070543
Forest H. Millikin	106584	Douglas S. Anderson	820230
Brian D. Flagler	011264	Matthew D. Powell	024297
Luke Thiesen	115335	Mark F. Bierly	794605
John Gear	073810	Jan K. Kitchel	784712
Joshua Cools	096459	Robin E. Pope	813416
John-Michael Thiesen	124742	William J. Keeler, Jr.	070733
		Bradley J. Schrock	873385

EXHIBIT A

Order of the Arizona Supreme Court



Supreme Court

STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231

Rebecca White Berch
Chief Justice

Janet Johnson
Clerk of the Court

TELEPHONE: (602) 452-3396

August 29, 2013

RE: RULE 42, ER 8.4, RULES OF THE SUPREME COURT
Arizona Supreme Court No. R-13-0019

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on August 27, 2013, in regard to the above-referenced cause:

WOULD STRIKE A BALANCE BETWEEN LAWYERS' INDIVIDUAL FREEDOM AND ENSURING FAIR, IMPARTIAL AND NON-DISCRIMINATORY ADMINISTRATION OF JUSTICE

ORDERED: State Bar of Arizona Petition to Amend ER 8.4, Rule 42, Ariz. R. Sup. Ct. = DENIED.

Janet Johnson, Clerk

TO:

John A Furlong
Mark C Faull

Joe Domanico, Maricopa County Attorney's Office
Andre E Carman, Warnock MacKinlay & Carman PLLC
lr

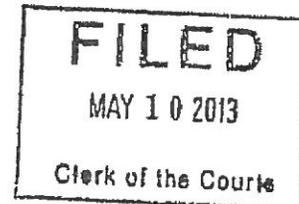
EXHIBIT B

Order of the Tennessee Supreme Court

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PROPOSED AMENDMENT TO TENNESSEE RULE OF
PROFESSIONAL CONDUCT 8.4

No. M2013-00379-SC-RL1-RL



ORDER

On February 6, 2013, the Board of Professional Responsibility ("BPR") filed a petition asking the Court to amend Rule 8, RPC 8.4, of the Rules of the Tennessee Supreme Court to add a new paragraph (h), making it professional misconduct for a lawyer to engage, in a professional capacity, in certain discriminatory conduct. By Order filed February 13, 2013, the Court published the BPR's proposed amendment for public comment with a comment deadline of April 1, 2013. By Order filed April 2, 2013, the Court extended the comment deadline to May 1, 2013.

The Court has received in excess of three hundred (300) pages of comments to the proposed amendment to Rule 8, RPC 8.4, from members of the bar, members of the public, and various organizations, including the Tennessee Bar Association, the Knoxville Bar Association and the Memphis Bar Association. The Court appreciates the interest of the bar and the public in this matter, as well as the comments received.

The current version of Rule 8, RPC 8.4(d), of the Rules of the Tennessee Supreme Court provides in pertinent part:

It is professional misconduct for a lawyer to:

...
(d) engage in conduct that is prejudicial to the administration of justice.

Comment [3] to RPC 8.4(d) provides:

A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status violates paragraph (d) when such actions are prejudicial to the administration of justice.

Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).

The current version of RPC 8.4(d) and Comment [3] are virtually identical to the version contained in the American Bar Association Model Rules. *See* ABA Model Rules of Professional Conduct 8.4(d), cmt. [3]. The BPR's proposed amendment would substantively alter the language of current Comment [3], and would include this altered language as a separate subpart of RPC 8.4.

The Court has carefully considered the BPR's proposed amendment, the comments received, including the points and issues raised therein, and this entire matter. Given the clarity and scope of RPC 8.4(d) and Comment [3] and their similarity to the corresponding ABA Model Rule and comment, the BPR's petition to amend Rule 8, RPC 8.4 is DENIED. The Chattanooga Chapter of the Christian Legal Society's motion for oral argument (filed March 28, 2013) is DENIED as moot.

IT IS SO ORDERED.

PER CURIAM

EXHIBIT C

March 18, 2011 Article in North Carolina Lawyers Weekly
Reporting Decision of North Carolina Supreme Court

NORTH CAROLINA LAWYERS WEEKLY

High court kills anti-bias measure, won't say why

By: Sylvia Adcock March 18, 2011

By SYLVIA ADCOCK, Staff Writer

sylvia.adcock@nc.lawyersweekly.com

An amendment to the Rules of Professional Conduct that said lawyers should not discriminate has been rejected without comment by the N.C. Supreme Court.

The move by the justices in an administrative meeting means the issue – which the State Bar hotly debated for nearly two years – is dead.

The amendment approved by the full State Bar council added two sentences to the preamble: "While employed or engaged in a professional capacity, a lawyer should not discriminate on the basis of a person's race, gender, national origin, religion, age, disability, sexual orientation, or gender identity. This responsibility of non-discrimination does not limit a lawyer's right to advocate on any issue."

The justices do not have to give a reason for their decision and did not provide one.



Parker

After Lawyers Weekly requested an interview with Chief Justice Sarah Parker about the issue, a spokeswoman released the following statement from Parker: "The court does not make comments on decisions made in conference."

G.S. § 84-21 explicitly states that when rules adopted by the State Bar council are amended, they are to be certified by the Supreme Court, entered upon its minutes and published in the North Carolina Reports. But it also provides that the court "may decline to have so entered upon its minutes any rules, regulations and amendments which in the opinion of the Chief Justice are inconsistent with this Article."

Representatives of groups that pushed for the amendment were disappointed that it was rejected and that the court did not give a reason for its action.



Katy Parker

"We're just incredibly disappointed that the Supreme Court rejected the language ... that the State Bar Ethics Committee and the full complement of Bar councilors approved," said Katy Parker, legal director of the state chapter of the American Civil Liberties Union.

"It's disappointing that we haven't been provided a rationale as to why. It's such an odd decision, and the court owes the Bar and the citizens of this state a reason for this decision that basically says lawyers can discriminate."

Brad Bannon, a Raleigh attorney who advocated for the amendment, said in an e-mail that he was amazed that the court did not feel that it owed an explanation.

"I understand why the court declines to discuss its judicial decision-making conferences, but those conferences end with a written opinion that explains their decision. By contrast, rejecting this amendment was a legislative exercise, governed by § 84-21, which presumes the validity of amendments unless they are inconsistent with the Bar's governing statutes at Chapter 84. ... I cannot imagine how any of it violated Chapter 84 or any other rule. If it did, as a self-governing profession, we deserve to know how and why."

Bannon continued, "We also deserve to know whether the Court was influenced by a lobbying effort that attacked the amendment solely because it included LGBT citizens within the class of human beings who deserve access to our courts. ... We deserve to know whether the Court's decision was about the law or simply about politics."

During the months of wrangling over the language in the amendment, the inclusion of sexual orientation and gender identity turned into a hot-button issue for the councilors, and some attorneys who opposed the amendment said it would impinge upon the freedom of religion of an attorney who felt that homosexuality was wrong on religious grounds.

In recent weeks, a number of attorneys who opposed the measure wrote letters to the justices urging them not to approve the amendment. Jere Royall, an attorney who works for the N.C. Family Policy Council, a conservative group that lobbied against the amendment, said he wrote to each justice and encouraged others to do as well.

Royall's letter said in part, "We should not 'aspire' to embrace, encourage, or facilitate behaviors that many attorneys understand from medical, scientific, social, moral, and historical research to be harmful to children and adults. Including the terms 'sexual orientation' and 'gender identity' would violate the United States' and North Carolina's constitutionally protected freedoms of speech and religion."

Some attorneys said during the debates that they were concerned that a lawyer who had been found to do something deemed discriminatory could be disciplined, but the Bar's ethics counsel said because the amendment was part of the preamble, it would not have the force of a rule. A second sentence was also added to clarify that the amendment would not limit a lawyer's right to advocate on any issue.

In a prepared statement, the N.C. Association of Women Attorneys said it was grateful to the many organizations that supported the measure, including the N.C. Advocates for Justice and the N.C. Association of Defense Attorneys.

"It is unfortunate that the Supreme Court's response was to summarily reject the idea that lawyers should not engage in discriminatory behavior in their professional lives – especially when this amendment was passed by the State Bar after so much opportunity for public comment, discussion and debate," Susan Dotson-Smith said in the statement.



State Bar President Anthony di Santi said he's disappointed in part because the amendment received "extensive debate before the Ethics Committee and extensive debate before the council." But, he said, "we recognize the supervisory position of the Supreme Court."

The ACLU's Parker said it is important to remember that the amendment had been designed to be aspirational.

"What leaders in the community lawyers are, and what a wonderful thing to have as an aspirational goal that they won't discriminate," she said. "The fact that the Supreme Court has a problem with that concerns me."

Tagged with: ANTI-DISCRIMINATION GAY GENDER LGBT MINORITY N.C. STATE BAR PREAMBLE RACE SUPREME COURT WOMEN

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October 8, 2013



OREGON STATE BAR

Memorandum to Board of Governors/SPRB

Memo Date: January 6, 2014
From: John S. Gleason, Disciplinary Counsel, Ext. 319
Re: Report on Regulatory Monitoring

In July 2013, I created a position directly responsible for coordinating the monitoring of all lawyers who are subject to terms of probation, diversion, conditional admission, or conditional reinstatement. Following an internal application process, we selected a member of the support staff for the Diversion and Probation Coordinator/Discipline Legal Secretary position. The selection did not require additional staffing. Rather, we changed the staff person's work assignment to include the monitoring and reassigned some of her legal assistant duties. Her primary duty is monitoring. This is a significant change from how DCO handled lawyers subject to monitoring in the past. Previously the trial lawyer and staff assistant assigned to the case were responsible for overseeing the monitoring. The prior system lacked the direct oversight and accountability necessary for a successful monitoring program. Under the new system, I am responsible for overseeing the monitoring.

Today we are monitoring 22 lawyers:

1. 12 Diversions (this number will quickly increase with pending diversions);
2. 3 Conditional Admission/Probations;
3. 2 Conditional Reinstatement/Probations; and
4. 5 Discipline Probations

We have set critical standards and goals and have implemented all of them:

1. *Immediate contact with the monitored lawyer and their counsel* (if represented). This is accomplished in writing with the terms of the diversion or probation set out in simple and understandable terms. The initial contact includes all of the due dates and deadlines required by the diversion or probation. The first contact also explains the nature of information expected in every report from the monitored lawyer. The expectation of absolute adherence to the monitoring terms is made clear to both the monitored lawyer and their counsel. The goal is to quickly establish an open and trusting relationship between the Monitor and the lawyer subject to monitoring. The monitored lawyer is encouraged to contact the Monitor with questions or concerns. The Monitor's approach is direct, respectful, and helpful. The Monitor and the lawyer who is subject to the terms share the same goal: successful completion of the probation or diversion.
2. *Immediate response to apparent breach*. Because every due date, requirement, or report is calendared and detailed, any breach is immediately apparent. The Monitor does not allow a day to pass without addressing a concern about adherence to the terms of the monitoring. The immediate and detailed nature of the Monitor's communication with the lawyer or counsel confirms that there is a zero tolerance policy for breach of monitoring terms.

3. *Coordination* with SLAC monitors and diversion supervisors (an attorney approved by DCO designated to meet with and supervise the monitored lawyer's practice) regarding guidelines on how to monitor/supervise the monitored lawyer.
4. *Involvement of Disciplinary Counsel.* All required test results, reports, and other required information goes directly to the Monitor rather than to the assigned trial lawyer. If the Monitor has any concern about the information she advises Disciplinary Counsel immediately. Depending on Disciplinary Counsel's determination of the appropriate action to take in response, the Monitor may assist with follow-up.

A recent case provides an example of how a possible breach of monitoring conditions was handled. A lawyer subject to random urinalysis testing had a "positive" lab result. The lawyer received the same notification as the Monitor and immediately contacted her, denying any use of prohibited drugs or alcohol and said he feared revocation of his probation. The lawyer had already arranged for a hair follicle test as well as a second urinalysis test to prove that he had not used prohibited drugs. Both tests came back negative for alcohol or prohibited drugs. The lawyer told the Monitor that it was a "false positive" related to his inadvertent ingestion of poppy seeds. The Monitor asked the lawyer to provide an affidavit as well as a note from his physician explaining how the "false positive" occurred.

The Monitor's quick and personal attention provided reassurance to the lawyer while at the same time ensuring that the lawyer did not breach the terms of his probation. The goal of protecting the public was fulfilled and at the same time the lawyer was treated respectfully.

The Monitor is in the process of creating written procedures for handling of files, and for tracking due dates, compliance letters, and a checklist for monitoring a file. She is also working with SLAC, OAAP, PLF, and other sources to enhance the monitoring process. The Monitor will receive professional training as it becomes available.

With this new system in place, the Supreme Court, the SPRB, and the Board of Governors can be assured that every lawyer subject to probation, diversion, conditional admission, or conditional reinstatement will receive the level of attention necessary to ensure their absolute adherence to the monitoring terms and to ensure the protection of the public.