

Oregon State Bar

Report
of the
Discipline System Review
Committee

November 19, 2015

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Introduction

Throughout the Oregon State Bar's history there have been assessments of the lawyer discipline system. Over the last 40 years, there have been seven comprehensive reviews, and several smaller, more focused reviews. Each time, changes have been made to create efficiencies or to implement new concepts.¹ The last comprehensive review took place in 2002.

The rules governing the current discipline system, Oregon's Bar Rules of Procedure, were adopted in 1984, and notwithstanding some modifications, they remain essentially the same today. In late 2013, the OSB Board of Governors ("the BOG") concluded that, in view of the doubling of the number of lawyers subject to the system over the last 30 years, the development of lawyer regulation as a recognized area of legal expertise, the length of time the process was taking, and concerns regarding consistency of decisions, a comprehensive review of Oregon's discipline system should be undertaken to ensure it operates efficiently, fairly and effectively. To that end, the BOG asked the Supreme Court to invite the American Bar Association Standing Committee on Professional Discipline to conduct an independent evaluation. The BOG then appointed a Discipline System Review Committee (the Committee) to study the ABA report and to make recommendations to the BOG and to the Supreme Court for possible updates and improvements to the lawyer discipline process.

Executive Summary

The Committee supports and proposes a number of changes recommended by the ABA evaluation team as well as several developed by the Committee. The most significant of the Committee's recommendations are:

- Streamline the role of the State Professional Responsibility Board (SPRB) to its most vital function of determining whether formal discipline proceedings should be pursued, and require that it authorize formal proceedings using an expanded standard of "cause for complaint" that incorporates both probable cause and the likelihood that the Bar will be able to meet its burden of proof by clear and convincing evidence.

¹ Among the changes that came from those reviews were: eliminating Board of Governors review of prosecution recommendations; disbanding the Disciplinary Review Board (an intermediate appellate body); the hiring and development of professional staff prosecutors; separation of the discipline function from General Counsel's Office; the creation of the Client Assistance Office, a central intake office separate from Disciplinary Counsel's Office; and implementation of diversion.

- Expand the authority of Disciplinary Counsel’s Office (DCO) to enter into diversion agreements, to mediate and settle cases, to make technical amendments to formal complaints, and to initiate temporary suspension proceedings.
- Sunset the Local Professional Responsibility Committees, but retain DCO’s authority to engage bar members to conduct field investigations as needed.
- In a proceeding before the SPRB, provide Respondents (or their counsel) with DCO’s complete memorandum recommending disciplinary action, including the factual assumptions and ethical analysis, and allow the respondent a short but reasonable time within which to submit a response to the SPRB.
- Create the office of Presiding Disciplinary Judge with a professional adjudicator appointed by the Supreme Court and funded by the Bar, to act as chair of every trial panel, to preside over and resolve pre-hearing matters, and to draft the trial panel opinion.

The Current Discipline Process

Discipline complaints against Oregon lawyers are governed by ORS Chapter 9 (“the Bar Act”), the OSB Bylaws (“the bylaws”), and by the Oregon State Bar Rules of Procedure (“the Bar Rules”). The Bar Act provides the basic framework for the discipline process. That framework is amplified and detailed in the bylaws and Bar Rules. The current Bar Rules were initially adopted by the Supreme Court in 1984, and while they have been amended from time to time, they have remained largely the same in their essential nature and structure for more than 30 years.

In 1984, there were about 7,000 active members of the OSB. Bar staff was small. Discipline was the responsibility of the General Counsel, but the investigation and prosecution functions were handled almost exclusively by volunteers. Today, there are about 15,000 active Oregon lawyers. The practice of law has changed greatly since 1984 and continues to do so at a rapid pace. Over that thirty-year span, Disciplinary Counsel’s Office has grown to accommodate the increasing size of the bar; simultaneously, professional responsibility and lawyer regulation have become recognized specialty areas of practice. Discipline 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 dwindled. Few volunteers have the specialized knowledge and expertise of professional discipline lawyers. Concerns about delay and inconsistency of outcomes continue to bedevil the system.

The current discipline process typically involves these steps:

- A complaint is received and reviewed by the Client Assistance Office (“CAO”); if CAO believes the complaint implicates the Rules of Professional Conduct, the lawyer will be asked to respond. Otherwise the complaint is dismissed.²
- If the complaint and the lawyer’s response indicate that misconduct may have occurred, the matter is referred to DCO for a full investigation and evaluation.
- If, after an investigation appropriate to the case,³ DCO does not find probable cause of a violation, it dismisses the complaint. The complainant may seek SPRB review of DCO’s decision.
- If DCO believes there is probable cause for a finding of misconduct, a Complaint Summary is submitted to the SPRB⁴ outlining the nature of the complaint, the accused lawyer’s response, an analysis of how the lawyer’s conduct violated one or more rules, and a recommendation of how to proceed.
- If the SPRB disagrees with DCO’s probable cause recommendation, it dismisses the matter.⁵
- If the SPRB agrees that probable cause exists, it may offer an admonition or diversion if appropriate, authorize the filing of a formal complaint, or decline to prosecute if it believes the interests of justice will not be served by a formal proceeding.
- When a formal complaint is authorized, DCO drafts and files it, the accused files an answer and discovery ensues.

² CAO dismissals are subject to review by General Counsel on request; General Counsel’s decision is final.

³ Most investigations are conducted by DCO staff lawyers or its investigator; as needed, Disciplinary Counsel may refer the complaint to a member of the appropriate Local Professional Responsibility Committee (LPRC) or to any member of the bar for investigation. LPRCs are panels of lawyers in the 7 BOG regions of the state, appointed by the BOG to conduct “field investigations” of disciplinary complaints at the request of DCO or the SPRB.

⁴ The SPRB is a volunteer body appointed by the Board of Governors, consisting of 8 lawyers from the BOG regions within the state, plus two public members.

⁵ Under the current Bar Rules, the term “dismissal” is used to refer to disposition of both client complaints submitted to the CAO and formal complaints approved by the SPRB. While not a formal recommendation, the Committee suggests that different terminology be used in the updated Bar Rules, to clarify the differences in the respective processes.

- If the accused lawyer wishes to resolve the complaint by consent, DCO presents the settlement offer to the SPRB for its approval.
- If there is no settlement, the matter proceeds to hearing before a trial panel consisting of two lawyers and one public member drawn from the Disciplinary Board (“DB”).⁶ If the accused fails to answer, the trial panel takes the allegations of the complaint as true; otherwise, there is a full evidentiary hearing.
- The trial panel issues its opinion. DCO reports the outcome to the SPRB, which decides whether to request review of the decision in the Supreme Court. If neither the bar nor the accused request review within 60 days, the trial panel’s decision becomes final.

The ABA Evaluation

In March 2014, the Supreme Court invited the ABA to conduct an evaluation of the OSB discipline system. The ABA team was comprised of two ABA staff lawyers and three discipline lawyers from different parts of the country. They began by reviewing the Bar Act, the bylaws and the Bar Rules of Procedure as well as reports and statistics about the number and types of complaints received and processed by the OSB over several years. In June 2014, the team spent three days at the OSB Center interviewing the Justices of the Supreme Court; the leadership of the BOG; representatives (including public members) of the SPRB, the DB and LPRCs; volunteer Bar Counsel; Disciplinary Counsel’s Office and Client Assistance Office staff lawyers; complainants and counsel for accused lawyers. Additional input was provided in writing by interested individuals. The ABA team also reviewed a selection of discipline case files.

The ABA Evaluation Report⁷ suggested 19 areas for improvement based on national standards and what the ABA committee considers “best practices” in the field of lawyer discipline. The recommendations followed a summary of the concerns expressed by the individuals interviewed during the evaluation process. Concerns expressed included redundancy, inefficiency and delay;⁸ a blurring of prosecutorial and adjudicative functions; a

⁶ The DB members are lawyers and public members appointed by the Supreme Court from the seven regions of the state; trial panels consist of two lawyers and one public member from the region in which the accused lawyer practices.

⁷ The ABA Report and all Discipline System Review Committee materials can be found at <http://bog11.homestead.com/DSRC/Homepage.pdf>.

⁸ The ABA Report included the average time for completion of the various stages of the OSB disciplinary process using data from 2013. While few members of the DSRC were convinced that those specific numbers were either statistically meaningful or particularly helpful, they all agreed there are unnecessary delays built into the current system that must be addressed with structural change.

lack of consistency in outcomes; a lack of clarity about the scope of Disciplinary Counsel's role; and the allocation of responsibilities to volunteers.

The ABA team had its own concerns as well. Principal among them was the continued heavy reliance on volunteers to perform critical functions. In the view of the ABA team, the costs of maintaining that status quo (delay, inefficiency and inconsistency) outweighed the recognized benefits of volunteer involvement.

The team also noted that, while Oregon has long had a professionalized DCO, it has not been used as effectively and efficiently as its national counterparts. Instead, Oregon has continued its tradition of volunteerism to what the team considered an unhealthy degree, vesting in volunteers decisions and actions that modern jurisdictions entrust to an office of lawyers who are trained in and possess expertise in the increasingly complex field of professional responsibility law. In doing so, Oregon has accepted delay, inefficiency and inconsistency as natural but unavoidable consequences of its particular disciplinary process. In a word, the ABA team found the Oregon system antiquated. At the same time, the ABA team expressed confidence that efficiency and consistency could be enhanced without sacrificing entirely the important role that volunteers play in a self-regulating profession.

The Discipline System Review Committee

In November 2014, in anticipation of the ABA's report, OSB President Tom Kranovich appointed a diverse Discipline System Review Committee ("the Committee") chaired by OSB member Mark Johnson Roberts. The committee members brought perspectives from all parts of the state and all facets of the discipline system, including SPRB, DB, LPRC and Bar Counsel volunteers; counsel for accused lawyers; criminal prosecutors; liaisons from the Supreme Court and the BOG; and a few other bar members who had expressed interest. Staff support was provided by OSB Disciplinary Counsel and Deputy Disciplinary Counsel, the General Counsel and the Executive Director.

The Committee met thirteen times between January and November 2015. Several temporary working groups developed proposals for consideration by the full group. Meetings were well-attended and all attendees participated, ensuring that the Committee heard views from all perspectives. Committee members had diverse views and strongly held opinions about issues. While some of the Committee's decisions were made on close votes, many were unanimous. Areas of strong disagreement are discussed in the minority reports filed in conjunction with this report.

The Committee began its work at the January 2015 meeting with a vigorous discussion striking at the heart of the most fundamental issue raised by the ABA's assessment of Oregon's

discipline system-- the appropriate role of volunteers in a system that has become more complex and specialized at the same time that increasing demands on lawyers' time have decreased their availability for volunteer service. Given those constraints, the Committee inquired how authority should best be allocated between the DCO and the SPRB. Specifically, the Committee asked the following questions: What is the proper role of the SPRB? What is the proper amount of independence and authority of DCO? Is the SPRB the "client" of DCO as lawyers understand the term? Is the SPRB an independent, arms-length "gatekeeper" for deciding what complaints to pursue? To what extent should the SPRB supervise DCO?

The Committee next turned its attention to process. At the suggestion of the Chair, the Committee addressed each ABA recommendation briefly, discussing in general terms whether the recommendation was a "no-go," "needed discussion," or was a "good idea, no discussion needed." The latter category included ideas that the Committee knew were already in place or that it decided were more appropriately handled by OSB staff than promulgated by rule. It was also the unanimous agreement of the Committee that it would recommend general concepts to the BOG and the Supreme Court and not undertake the drafting specific rule changes. It was presumed that once the Supreme Court determines which, if any, of the Committee recommendations to adopt, staff would draft language appropriate to implement the concepts for BOG and Supreme Court approval pursuant to ORS 9.490(1).

DSRC Recommendations and Response to ABA Report

To aid in understanding the Committee's recommendations, they are presented as responses to each of the ABA's 19 recommendations.⁹ The Committee's recommendations that did not arise from the ABA report are listed under "Other Recommendations." The Committee's recommendations are numbered consecutively, not with regard to the section of the outline in which they appear.

ABA Recommendation 1. Define the Role and Responsibility of Disciplinary Counsel's Office

The ABA recommends a separate provision in the Bar Rules setting forth the role and duties of Disciplinary Counsel and DCO. As indicated, however, the Committee did not undertake drafting specific rules before general concepts were approved.

⁹ The Committee's actual Work Plan flowed through the discipline system comprehensively and is appended hereto.

A. Autonomy of DCO.

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

The ABA's report reflects its preference for an "independent" (specifically, independent from the Bar) lawyer discipline system operated under the direct oversight of the Supreme Court. In the unified model that is the OSB, discipline is by intention a core function of the Bar. DCO clearly works on behalf of the OSB rather than for the court or as an independent entity, although neither the Executive Director ("ED") nor the BOG play any role in individual cases. Nevertheless, the Committee recommends having the SPRB appointed by the Supreme Court on nominations from the BOG. It also believes that consistency in outcomes can be furthered by allowing members to be reappointed for non-consecutive terms.

The Committee does not recommend any change in the authority of the ED to hire and supervise the Disciplinary Counsel, but encourages the Executive Director to continue the informal practice of conferring with the Chief Justice when making decisions about the employment of the Disciplinary Counsel.

Clarifying the appropriate relationship between DCO and the SPRB was much more complex. Despite many discussions on the issue, the Committee was never able to agree on whether the SPRB is DCO's "client" as lawyers understand that relationship. The Committee did discuss whether agreement on that point was required, concluding that the more important task was to identify who should be responsible for what actions. Ultimately, the Committee concurred with much of what the ABA recommended regarding DCO's prosecutorial discretion.

B. DCO's Prosecutorial Discretion.

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

****DSRC Recommendation (3)*** *DCO should have sole authority to enter into diversion agreements for lesser misconduct. [unanimous]*

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

***DSRC Recommendation (5)** DCO should have sole authority to amend formal complaints to correct scrivener errors, drop charges, delete factual allegations, or add new non-substantive allegations,¹⁰ subject to the discretion of the appropriate DB authority.¹¹ [10-2-3]

***DSRC Recommendation (6)** DCO should have sole authority to initiate temporary suspension proceedings because of a lawyer's disability or to protect the public during the pendency of discipline investigations and proceedings.¹² [unanimous]

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

Despite expressing some initial concern about reducing the SPRB's traditional involvement in these decisions and after lengthy probing discussion and debate the Committee came in due course to the view that such decision-making authority should be transferred to DCO. The Committee did not question the value of the SPRB's role over the years, but believed the change was required because of the evolution of disciplinary proceedings. As a general proposition, and as further discussed below, the Committee concluded that the highest and best use of the SPRB's valuable time was in the evaluation of DCO's probable cause recommendations and in the deciding of whether formal charges should be brought against a lawyer. Transferring authority to professional staff for other aspects of the process will enhance efficiencies and will preserve this critical aspect of our discipline system intact.

The Committee concluded that the SPRB's review of dismissed complaints was redundant, given that any complaint reviewed by DCO has already been subject to preliminary review by CAO. It is exceedingly rare that a complaint rejected by DCO is resuscitated by the SPRB to become a formal charge against a lawyer. The public appears to be adequately protected without this cumbersome additional review of unfounded complaints.

In a similar vein, the Committee agreed that DCO should be empowered to negotiate and enter into diversion agreements for lesser misconduct without the involvement of the

¹⁰ This recommendation is part of a package of "pleading recommendations," the remainder of which is not based on ABA recommendations and is discussed under the "Other DSRC Recommendations" portion of this report.

¹¹ As used here and elsewhere, "appropriate DB authority" means either the trial panel chair, if a trial panel has been appointed, the regional chair prior to appointment of a trial panel, or the state chair if the regional chair is disqualified or is self-appointed to the trial panel. Alternatively, it may refer to the Presiding Disciplinary Judge if the Committee's recommendation on that issue is adopted.

¹² See further discussion under DSRC Recommendations 20 and 21.

SPRB. Diversion is an administrative resolution for low-level misconduct that is remediable by supervision or other components of a diversion program. DCO staff has the knowledge, judgment and expertise to determine whether a matter is appropriate for diversion rather than prosecution. The matter gets resolved quickly and easily without extended review, and if the diversion is completed successfully, the system has worked well for the lawyer while also ensuring protection of the public.

Similar reasoning led the Committee to conclude that DCO should have the authority to negotiate and to settle cases that the SPRB has previously approved for prosecution. The current practice of presenting all settlement proposals to the SPRB for approval is slow and cumbersome and serves no apparent policy function. Currently, when a settlement offer is made, DCO must prepare a report and a recommendation for consideration at the next monthly SPRB meeting. If there are offers and counter-offers, the negotiations can take months. The Committee could find no evidence that this process was improving the quality of discipline settlements in our state.

As to non-substantive amendments to formal complaints, granting DCO authority to make such amendments will enhance efficiency and is consistent with the Committee's recommendation that SPRB jurisdiction over a case should end with the filing of a formal complaint. SPRB authority would still be required for an amendment to add new substantive allegations that would otherwise require the filing of separate proceedings.

The Committee concluded that DCO should have sole authority to seek certain temporary suspensions that are intended to address exigent circumstances where public harm is believed to exist. For the same reasons, DCO should report possible criminal conduct uncovered in an investigation to the appropriate prosecuting authority without regard to what action the SPRB subsequently may take subsequently in the case, and without SPRB involvement in the decision to make such a report.

ABA Recommendation 2. Increase Coordination Between CAO and DCO

The ABA suggests that increasing the communication and coordination between CAO and DCO will help both offices better perform their duties and will enhance continuity and consistency. Staff from both offices provided detailed explanations of their respective processes to the Committee, along with information about their regular meetings and trainings. After consideration, the Committee made no recommendation to change current structures or processes.

ABA Recommendation 3. Require Regular Training for DCO

The Committee makes no specific response to this suggestion, as it inquired and was satisfied that the Disciplinary Counsel and her staff engage in regular training and education, and participate in a national electronic mailing list that allows for quick, informal collaboration with their colleagues throughout the country.

ABA Recommendation 4. Streamline the Responsibilities of the SPRB

A. Size and Composition

The ABA recommends reconstituting the SPRB so that one-third of the members are lay persons. The ABA also suggested it might be more efficient for the SPRB to act in panels of three, rather than having all ten members review, deliberate and vote on all matters. After discussion, the Committee declined to make a recommendation for change, in view of the Committee's other recommendations to transfer to DCO many functions currently requiring SPRB consideration and approval.

B. Limit SPRB Function to Making Probable Cause Determination

****DSRC Recommendation (8)** SPRB jurisdiction over a matter should end once it authorizes the filing of a formal complaint or a letter of admonition. [14-1-4]*

This was one of the Committee's early decisions, adopted by a strong majority, and forms the basis for several other, more specific recommendations (see, for example, Committee recommendations (3) through (5)). This recommendation represents a critical principle that guided the Committee and is important to future understanding and explanation of some of the most basic structural changes recommended.

C. Discretion to Decline Prosecution Notwithstanding Probable Cause

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

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

Currently, the Bar Rules give the SPRB discretion to dismiss a complaint or direct that no further action be taken, notwithstanding a determination that probable cause exists to support a finding of misconduct, with express but somewhat nebulous criteria. The ABA recommended eliminating that discretion as being “outside the purview of a probable cause finding body.” The Committee respectfully disagrees. When DCO makes a probable cause recommendation for the SPRB’s review, there is more to the SPRB’s role than merely evaluating DCO’s work product. Determining whether formal proceedings are appropriate under all the circumstances is an essential function of a volunteer-driven charging process.

The SPRB’s discretionary authority to dismiss notwithstanding a determination that probable cause exists is contained in two subparts of Bar Rule 2.6(f). One authorizes “direct[ing] no further action” depending on the Respondent’s circumstances;¹³ the other allows for “dismiss[al]” of a complaint depending on the nature and seriousness of the conduct and where dismissal would “further the interests of justice and would not be harmful to the interests of clients or the public.”¹⁴ Misconduct that reflects adversely on the lawyer’s honesty, trustworthiness or fitness to practice is not subject to dismissal under this rule. The Committee’s consensus was that the Bar Rules should express SPRB’s discretionary authority more simply and clearly, reflecting that all the different specified bases for not proceeding notwithstanding a probable cause finding are subsets of the over-arching standard that a decision not to proceed would “further the interests of justice and would not be harmful to the interest of clients or the public.”

The Committee then discussed whether and to what extent the lapse of time since the misconduct occurred and the cost of a prosecution should be considerations in deciding whether to proceed with a formal complaint and voted unanimously to include them as additional factors.

¹³ For example, the lawyer is no longer an active member and would be required to show good moral character and fitness in order to be reinstated; other disciplinary matters are pending that are likely to result in the lawyer’s disbarment; or formal proceedings are impractical in light of the circumstances or likely outcome.

¹⁴ Factors to consider in that regard include the lawyer’s mental state, whether the misconduct is an isolated event or part of a pattern of misconduct, the potential or actual injury caused by the misconduct, whether the lawyer cooperated in the investigation, and whether the lawyer has previously been admonished or disciplined for misconduct. Misconduct that reflects adversely on the lawyer’s honesty, trustworthiness or fitness to practice is not subject to dismissal under this rule.

D. Mandatory Training for SPRB Members

The Committee supports appropriate training for all volunteers in the discipline process. This is an issue best handled at the staff level and is not a topic of regulation in the absence of a more clearly articulated problem.

ABA Recommendation 5. Revise the Role of Local Professional Responsibility Committees

****DSRC Recommendation (11)** The Local Professional Responsibility Committees should be eliminated. [unanimous]*

The LPRCs were designed to conduct “field investigations” of discipline matters, a vital role in a pre-Internet world where the OSB had only a small staff handling discipline matters. Until about ten years ago, the LPRCs functioned as true investigative committees, to which a matter would be referred either by DCO or the SPRB. A committee member would be assigned to investigate, the findings would be reviewed and analyzed by the full committee, and the committee would then issue a report and recommendations. That process had many virtues and was, perhaps, well-suited to its time, but it was slow, and the quality of investigations and conclusions was inconsistent. These have always been problems, not just recently

As DCO matured into a stand-alone office with an experienced professional staff, including a licensed investigator, the LPRCs began to operate as panels from which an individual committee member would be assigned to investigate and submit a report to DCO or the SPRB directly. Elimination of the committee review process improved response time to some degree, but overall the LPRC investigations continued to be slow and of inconsistent quality. In recent years, DCO has used LPRC investigators rarely, and the SPRB not at all. Rather, DCO relies on its own staff lawyers and in-house investigator, or, when appropriate, appoints a suitable person to conduct the investigation pursuant to its authority under Bar Rule 2.2.

The ABA proposed eliminating the LPRCs for the same reasons—to eliminate delay and inconsistency that can be a consequence of time constraints, inexperience, and local bias. The Committee’s recommendation reflects its unanimous conclusion that, despite the commitment of many volunteers, the LPRCs are no longer the best model and that most discipline complaint investigations can be handled more efficiently and effectively by DCO professional staff. DCO has a long history of recruiting volunteer help as needed, and presumably will continue to do so where it will add value to the process.

ABA Recommendation 6. Streamline the Trial Process

A. Reconstitute the Disciplinary Board into a Single Statewide Panel and Reduce its Size.

****DSRC Recommendation (12)** Retain the regional Disciplinary Board panels and the State Chair, but eliminate the Regional Chairs. [16-1]*

The Committee rejected the ABA's recommendations to substitute a single statewide panel for the current regional DB panels and to hold all discipline trials at the OSB Center. The ABA suggested that such a change would eliminate inconsistent results and address voiced concerns about local bias, impartiality and potential conflicts of interest. It would also, in theory, allow for appointment of panels on a random basis that would even out the caseloads. The Committee acknowledged the theoretical value of a statewide panel, but concluded that the increased costs would outweigh any likely benefit, and was concerned that requiring all hearings to be held at the OSB center would be a substantial hardship on respondents and witnesses from remote locations.

The ABA also suggested reducing the size of the DB from its current 74 members (spread among the seven in-state BOG regions). The Committee disagreed, not being persuaded that a member's lack of opportunity to serve on a trial panel during his or her term was a problem. Additionally, the current rules permit the appointment of trial panelists from other regions if the caseload is uneven or if members within a region are unavailable or disqualified.

The Committee's recommendation to eliminate the Regional Chairs while retaining the State Chair was based on its recommendation to engage a professional adjudicator who will assume many of the responsibilities of the regional chairs. The State Chair would appoint panels and handle other administrative responsibilities. See additional discussion under DSRC Recommendation 16 below.

B. Improve the Efficiency and Consistency of the Hearing Process

****DSRC Recommendation (13)** Trial panels should be appointed promptly upon the filing of the answer or upon the expiration of the time allowed to answer. [unanimous]*

The ABA expressed considerable concern about the lapse of time between the SPRB's authorization of a formal complaint, the filing of the formal complaint and the appointment of the trial panel. The Committee did not further address the length of time required to prepare and file the formal complaint, but rather focused its attention on the time of appointing the trial panel. Currently, the Bar Rules require the panel to be appointed when DCO notifies the DB

Clerk that the formal complaint has been served. In practice, that notice does not always come immediately upon service, but only later when DCO has completed discovery and concluded that the case will not settle. The Committee shared the ABA's assessment that appointing panels promptly upon the filing of the answer (or when the time to answer has elapsed) will create an appropriate "sense of urgency" by the early setting of a deadline for exercising challenges and starting the trial scheduling process. Knowing what case is assigned to which adjudicators will allow the trial panel to take charge of the case to ensure that everyone's time is used efficiently and that the case is brought to a timely resolution.

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

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

The ABA noted an apparent inconsistency in the Bar Rules. Bar Rule 2.4(h) authorizes the trial panel chair to confer with the parties to address all pre-hearing motions and matters "that may facilitate an efficient hearing." At the same time, Bar Rule 4.6 provides for a different sort of prehearing conference at the request of either party for the purpose of narrowing the issues in dispute and "to facilitate discussion regarding" a settlement. Under the latter rule, the State Chair appoints a DB member to conduct the conference, but it may not be any members of a trial panel appointed to hear the case. The Committee concurred with the ABA's suggestion that the rules be clarified to provide for the panel chair (or the Presiding Disciplinary Judge) to handle all pre-hearing motions and trial management issues. The Committee also recommends that settlement conferences be conducted either by members of the DB not appointed to the hearing panel or by mediators selected by mutual agreement of the parties, and that DCO solicit and maintain a list of qualified individuals to perform that function.

****DSRC Recommendation (16)*** *Oregon should establish a professional adjudicator position. [6-4-3]*

Although it made no recommendation on the point, the ABA pointed out that Colorado and Arizona have created "presiding judge" positions for discipline proceedings and that California has a full-time disciplinary court. The presiding judge resolves all prehearing motions and matters, chairs every trial panel, and writes every panel opinion. The Committee was persuaded that a Presiding Disciplinary Judge would help to ensure an orderly trial process in every case and to assure that panel opinions are consistent and are issued in a timely manner.

As envisioned by the Committee, the Presiding Disciplinary Judge would be a permanent paid employee of the OSB, full- or part-time as warranted, appointed by the Supreme Court, but would not be a “judicial officer” within the meaning of ORS 9.1.210. The Presiding Disciplinary Judge could be a lawyer or a former judge.¹⁵

Three-person hearing panels would still be used, with the presiding adjudicator joined by one lawyer and one lay member. The creation of the Presiding Disciplinary Judge would eliminate the need for the DB Regional Chairs, but the Committee recommends retaining the State Chair role to handle panel appointments and otherwise assist the presiding adjudicator with administrative matters.

In making this recommendation, the Committee considered several factors: the current system takes far too long; volunteer panel members have to juggle preparation, attendance at the hearing, and drafting the opinion with their professional obligations to clients; volunteer panel members do not all have experience adjudicating disputes and often have to “reinvent the wheel” on issues a professional adjudicator would know how to handle; and the participation of a professional adjudicator will help address the widely-held perception that the current system yields inconsistent results and a spotty quality of opinions.

ABA Recommendation 7. Amend References to “Accused” and “Guilt”

**DSRC Recommendation (17) The neutral terms “Respondent” and “finding of misconduct” should be substituted for “Accused” and “guilt” throughout the discipline process. [unanimous]*

These were the Committee’s first decisions. They were non-controversial and unanimous. The ABA’s view, with which the Committee agreed, is that “accused” and “guilt” are terms most commonly associated with criminal proceedings and are unnecessarily punitive in the context of professional discipline. The purpose of discipline is to protect the public and deter future misconduct, not to punish the lawyer. The change will align Oregon usage with national standards. “Respondent” and “finding of misconduct” are the terms used in nearly every other jurisdiction.

¹⁵ The State Court Administrator’s Office advised the Committee that performing this function would not meet the service requirements for Plan B judges and that there is an insufficient number of senior judges available.

ABA Recommendation 8. Make the Discipline System More Accessible to the Public

A. A Stand-Alone Webpage and Separate Stationery for DCO

The ABA's concern here was to assure the public's understanding of the inherent and exclusive authority of the Supreme Court over the regulation of the legal profession, which is not reflected or explained as clearly on the bar's web site as it could be. Similarly, the ABA recommended that DCO have "stationery," or really, a print and online identity package that does not refer to the OSB.

The Committee agreed that the information about lawyer discipline on the OSB website should be clarified and enhanced to explain the role of the Supreme Court and the bar's relationship to the court, but it made no specific recommendations as to content, which viewed as an inappropriate subject of regulation or process.

The Committee disagreed with the ABA's suggestion about the stationery. DCO is part of the bar, as it is in nearly every unified bar jurisdiction, and its identity package should reflect that relationship. Accordingly, the Committee made no recommendation on this point.

B. Enhance the Transparency of the Appointment Process

The ABA team recommended that the Supreme Court work with DCO and the Executive Director to enhance the process for nominating and appointing discipline system volunteers, believing that the increased transparency would promote greater public trust in the system. The Committee didn't have sufficient information and understanding about the appointment process to make a recommendation on this point, and also viewed it as unrelated to efficiency and effectiveness of the discipline system.

ABA Recommendation 9. Streamline the Diversion Process and Clarify DCO's Role

See DSRC Recommendation 3 and related discussion.

ABA Recommendation 10. Retention of Discipline Records

****DSRC Recommendation (18)** Records of dismissed complaints should be retained for only three years and then should be considered "expunged." [14-4]*

Currently, CAO and DCO retain discipline records in accordance with an established OSB Records Retention Policy approved by the Supreme Court. The ABA recommends that the Supreme Court formalize and incorporate the records retention requirements into the Bar Rules. It is not clear whether the ABA team understood that the Supreme Court approved the

retention requirement for discipline records when it approved the policy. In any event, the Committee did not recommend incorporating a records retention policy into the Bar Rules.

Substantively, the ABA recommended that complaints dismissed by DCO or the SPRB be retained for three years instead of the current ten, and should be considered “expunged” so that inquirers would be told there is no record of such a matter. It agreed with the policy of maintaining indefinitely the records, including trial panel opinions, of matters that have proceeded to prosecution and records relating to reinstatement proceedings.

The Committee discussed the relative merits of a shorter versus a longer retention period for dismissed matters. Those supporting the shorter period expressed concern about the negative reputational impact the retained records can have on practitioners and candidates for public office. Ultimately, the Committee’s strong recommendation was to have only a three-year retention period for discipline complaints dismissed by CAO, DCO or the SPRB. After that, the matters should be considered expunged.

ABA Recommendation 11. Streamline the Reciprocal Discipline Process

****DSRC Recommendation (19)** DCO should have sole authority to initiate reciprocal discipline proceedings; there should be a rebuttable presumption that the sanction in Oregon will be of the same severity as in the original jurisdiction;¹⁶ [unanimous]*

- a. The lawyer’s should have 14 days to answer and request a hearing, followed by 14 days for DCO’s reply;
- b. If no answer is filed by the lawyer, the DB should issue an order imposing the presumptive sanction;
- c. If there is a challenge based on lack of due process or the nature of the sanction, a hearing panel should be appointed to resolve the issues.
- d. The DB’s decision should be reviewed by the Supreme Court on request of either party.

¹⁶ As discussed in the “Other Recommendations” section of this report, the Committee recommends that reciprocal discipline not apply to lawyers who have resigned without a hearing on charges pending in the other jurisdiction.

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

Currently, when informed of discipline imposed in another jurisdiction, DCO notifies the SPRB, which makes a recommendation as to the sanction that should be imposed in Oregon. DCO then files with the Supreme Court the final discipline order in the other jurisdiction, together with the SPRB's sanction recommendation. The responding lawyer cannot challenge the underlying factual findings that support the ruling in the other jurisdiction, but has 21 days to file a response either asserting a denial of due process or arguing that the sanction in Oregon should be different, or both. Upon receiving DCO's reply, the Court can set the matter for oral argument and decide the matter on the record, or refer it to a trial panel of the DB for hearing.

The Committee concurred with the ABA view that Oregon's reciprocal discipline process was unnecessarily cumbersome and lengthy. Accordingly, the Committee recommends that DCO have authority to initiate reciprocal discipline proceedings without involving the SPRB and that there be a rebuttable presumption that identical discipline will be imposed unless either party makes a case for a different sanction.

The Committee disagreed, however, with the ABA's suggestion that reciprocal proceedings go initially to the Supreme Court. Rather, the Committee recommended that reciprocal matters be handled by the DB, and that the Supreme Court be involved only if either party requests Supreme Court review of the DB decision. The Committee believed that resolution before the DB will be quicker than the full Supreme Court review process currently in place, particularly if the Committee's recommendation for a Presiding Disciplinary Judge is adopted.

ABA Recommendation 12. Streamline the Reinstatement Process to Enhance Efficiency and Eliminate Redundancy

The Committee acknowledged that there may be some inefficiencies and redundancies in the reinstatement process, but also believed that reinstatement is a complicated process beyond the scope of the Committee to address in its review of the discipline system. Accordingly, the Committee made no recommendations regarding reinstatement.

ABA Recommendation 13. The Court Should Adopt a Rule for Appointment of a Custodian when a Lawyer Dies, Disappears, is Suspended or Disbarred

Existing rules allow the Supreme Court to appoint a custodian over a lawyer's practice if the lawyer suffers from addiction or mental illness, is incapacitated or disabled from practicing, or during a temporary suspension while formal proceedings are pending. The ABA expressed concern, however, that there is no similar rule for a lawyer who has died, disappeared or is suspended or disbarred. Staff explained to the Committee that, in addition to the custodianships provided for in the Bar Rules, the Bar Act authorizes the BOG to initiate custodianships when a lawyer is disbarred or otherwise fails to attend to his or her practice. While it acknowledged that there may yet be gaps in the system, the Committee believed this was an issue best dealt with by staff under the current rules.

ABA Recommendation 14. Clarify the Appropriate Use of Evidence of Prior Acts of Misconduct and Prior Discipline

The Committee found -that the evidentiary rules that apply in disciplinary proceedings work well and allow appropriate flexibility while offering sufficient protection from irrelevant or redundant evidence. The Committee did not disagree with the ABA's suggestion that the rules could be clearer and better organized. Because the Committee was not drafting rules, however, it was comfortable leaving improvements in this area to the eventual drafters. The Committee made no specific recommendation.

ABA Recommendation 15. Streamline the Process for Bar Rule 3.1 Temporary Suspensions

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

- a. DCO should be authorized to seek an *ex parte* TRO after reasonable notice to the respondent, on a showing of a probable violation and that clients or others will suffer immediate and irreparable harm;
- b. The application should be filed with the DB Clerk and heard promptly by the State Chair.¹⁷ If the TRO is granted, a hearing to a trial panel

¹⁷ As discussed elsewhere in the report, the DSRC recommends the creation of a Presiding Disciplinary Judge position to perform the duties that currently reside with the State Chair or Regional Chairs of the Disciplinary

should be scheduled within 3-10 days on whether an interlocutory suspension should be ordered and DCO should have the burden of proving the need for the interlocutory suspension by a preponderance of the evidence;

- c. If DCO does not seek a TRO it may still petition for an interlocutory suspension. On that petition, an expedited hearing should be held before the State Chair (or Presiding Disciplinary Judge), at which DCO would have the burden to show a probable violation and irreparable harm.
- d. After hearing, either the bar's petition should be dismissed or an appropriate order of interlocutory suspension should be entered, tailored to balance and protect both the interests of the public and the those of the respondent's existing clients;
- e. On request of either DCO or the Respondent, the Supreme Court should conduct a *de novo* review on the record on an expedited basis and, unless otherwise ordered by the court, the interlocutory suspension should remain in effect until the court renders its decision;
- f. The interlocutory suspension should remain in effect until completion of formal proceedings or for 45 days if the SPRB has not authorized the filing of a formal complaint, but the 45-day period could be extended for good cause shown or on stipulation.

Under current Bar Rule 3.1, a lawyer can be suspended during the pendency of discipline proceedings only after a two-thirds vote of the SPRB. Upon the SPRB's authorization, a petition for temporary suspension is filed with the Supreme Court, which can either refer the matter for hearing before a special master or enter an order on the record. There is no ability for DCO to seek a temporary suspension before the SPRB has authorized the filing of a formal complaint, regardless of the exigency of the circumstances.

The Committee concurred with the ABA's view that the public is better protected by a streamlined process initiated by DCO without having to fully prepare its case on the merits for

Board. References here to the State Chair herein should be read to mean the PDJ if that recommendation is adopted.

trial, or even for submission to the SPRB. The Committee's recommendation for a two-step process was not part of the ABA's suggestion, but the sense of the Committee was that having the DB (or the PDJ) make the initial decision would allow for a more efficient resolution, while allowing for Supreme Court on request of one of the parties.

ABA Recommendation 16. Streamline the Procedure for Temporary Suspension on Conviction.

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

Bar Rule 3.4 requires DCO to notify the SPRB and the Supreme Court when a lawyer has been convicted in any jurisdiction of a misdemeanor that may involve moral turpitude, a crime that is a felony in Oregon, or one that is punishable by death or imprisonment under federal law. The SPRB submits a recommendation to the Supreme Court regarding temporary suspension, and the lawyer is given time to respond. The Supreme Court can suspend the lawyer immediately and, whether or not an immediate suspension is ordered, can refer the matter to the DB for a hearing to determine what, if any, discipline should be imposed. The SPRB may authorize a formal proceeding independent of the conviction, in which case the new charges are consolidated with the conviction matter for hearing.

Consistent with its other recommendations relating to temporary suspensions, the Committee shares the ABA view and recommends that DCO have authority to initiate the temporary suspension proceedings when a lawyer has been convicted of a crime, without the necessity of seeking the SPRB's authority. The Committee also recommends that a petition for temporary suspension based on a conviction be submitted and resolved by the DB, subject to review by the Supreme Court on request of either party. Although not part of the ABA's suggestions, the Committee recommends that a temporary suspension for conviction should be available only where immediate and irreparable harm to the lawyer's clients or the public is likely to result if the suspension is not ordered.

ABA Recommendation 17. Enhance the Use of Probation as a Sanction and Provide More Guidance for its Application and Monitoring

**DSRC Recommendation (23) Statutory immunity should be extended to volunteer probation and diversion monitors. [unanimous]*

The Committee expressed no particular concern about the extent to which probation is ordered in disciplinary cases, but recognized that concern about the availability of qualified monitors and the existence of a structured monitoring process, coupled with uncertainty as to whether lawyers will cooperate, makes it a challenging option in practice.

The Committee believed that probation can be an effective public protection mechanism and that concerns about its use can be addressed by enhancements to the rules and the creation of a good pool of experienced lawyers who are willing to serve as monitors. To that end, the Committee recommended that the bar seek an amendment to the Bar Act to expand the statutory immunity to volunteers who serve as monitors for probation and diversion.

ABA Recommendation 18. Eliminate the Option of Resigning During the Pendency of an Investigation or During Formal Proceedings

A resignation during the pendency of a disciplinary investigation or prosecution—referred to in the Bar Rules as a “Form B” resignation—has the same effect as disbarment after a full evidentiary hearing. It is a permanent bar to reinstatement to active practice. The ABA disfavors resignations with charges pending, suggesting that the case against a lawyer who does not wish to defend against discipline charges should be resolved through a stipulated agreement. The ABA rationale is that lawyers whose misconduct is sufficiently severe to warrant disbarment should not be allowed to tell the public that they “voluntarily resigned” from practice.

The Committee was not persuaded that the ABA’s concerns warrant a change in policy. The bar can do little to control how a lawyer who has resigned describes his or her departure from practice. Nevertheless, the Committee suggested that the name be changed from “Form B” to something that better informs the public of the circumstances, such as “Resignation with Charges Pending.”

The discussion about process raised the further question of whether a resignation with charges pending should continue to be treated as disbarment. It was suggested that resignation would be a more attractive option to lawyers facing serious charges, especially where the misconduct was a consequence of addiction or mental health issues, if they were eligible for reinstatement at a later date. A motion to allow reinstatement after a Form B resignation failed and the Committee made no substitute recommendation.

ABA Recommendation 19. Enhance and Clarify the Rule Setting Forth the Duties of Disbarred or Suspended Lawyers

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

The Committee acknowledged that the current rules do not give clear guidance to disciplined lawyers about their obligations on suspension or disbarment. The Committee also recognized that the duties will differ depending on such things as the nature of the charges at issue, the length of the suspension, the nature of the lawyer's practice, and whether the lawyer is in solo practice or a firm. Accordingly, the Committee did not attempt to fashion a rule that will work in every situation, but recommended the development of rule containing a list of basic requirements applicable to all suspended or disbarred lawyers, together with a menu of other requirements could be imposed depending on circumstances. The basic list would operate as a default if the trial panel or Supreme Court did not impose specific requirements.

The ABA also recommended that rules be implemented prohibiting suspended or disbarred lawyers from certain employment. Here, too, the Committee acknowledged the difficulty in drawing bright lines that will limit the options of the many compliant lawyers in an effort to control those few who continue to practice after suspension or disbarment. After discussion, the Committee suggested that limits on activities be part of the menu or checklist discussed above.

Other DSRC Recommendations

The Committee made several recommendations for enhancing the discipline process that did not come from the ABA report, but rather from the ideas and experiences of the committee members. They are offered here in no particular order.

****DSRC Recommendation (25)*** *In making its decision to pursue formal proceedings, the SPRB should find "cause for complaint," which incorporates both probable cause and a reasonable belief that the case can be proved by clear and convincing evidence. [unanimous]*

The Committee was in unanimous agreement that a decision to institute formal discipline proceedings should be based on more than just probable cause, but should include the SPRB's reasonable belief that the charges can be proved by clear and convincing evidence. The Committee recommends that the phrase "probable cause" be replaced with "cause for

complaint” as the basis for formal proceedings. As with its recommendation (17) regarding the terms “accused” and “guilt,” the Committee does not believe that terms associated with criminal proceedings are appropriate for bar discipline.

****DSRC Recommendation (26)*** *Amend the Bar Act to provide that complaints of misconduct and all information and documents pertaining to them are confidential and not subject to public disclosure until either (a) the SPRB has authorized the filing of a formal complaint, or (b) the complaint has been finally resolved without SPRB authorization to file a formal complaint. [9-0-6]*

The discussion about this recommendation acknowledged that Oregon is unique in the country for having a discipline system that has been fully open to public disclosure since the late 1960's, and that OSB's open system is credited with enhancing the integrity of the self-regulating system of lawyer discipline and providing the public with important information about lawyers they may be considering hiring. The counter-argument was that a complainants can use the mere fact of their filing a complaint to smear the reputation of a lawyer before there has been any determination whether misconduct may have occurred or is serious enough to warrant discipline.

****DSRC Recommendation (27)*** *Amend Bar Rule 4.1 to conform formal discipline complaints to Oregon civil pleading practice:*

- a. A formal complaint should allege “ultimate facts constituting the acts or omissions” of the respondent; [7-5-3]
- b. Motions to make more definite and certain should be allowed, and the rules should be clarified to establish that a motion challenging the sufficiency of the complaint is really a motion to dismiss for failure to state a claim, as the existing ground for insufficiency of service; [9-4-3]
- c. Allegations of misconduct by more than one lawyer should be able to be consolidated into one complaint if the lawyers are alleged to have acted in concert; a respondent in a consolidated complaint should be allowed to move to sever on a showing of prejudice; and respondents charged in separate proceedings should be allowed to move for consolidation of those proceedings. [*unanimous*]

The goal of these recommendations is to make discipline pleadings and procedures more similar to what is required in Oregon civil proceedings. The Committee noted language in a recent Supreme Court decision stating that “notice pleading” is the standard for discipline cases, but it expressed a strong preference instead for the transparency of Oregon’s modified “code pleading” standard. The committee also encouraged the adoption of specific rules regarding consolidation of cases where appropriate so as to increase efficiency and avoid inconsistent results. Consolidation would an opportunity to sever to avoid prejudice.

****DSRC Recommendation (28)*** *Eliminate from reciprocal discipline lawyers who resigned without a hearing on pending charges in another jurisdiction. [unanimous]*

Under the current rules, a lawyer who resigns with charges pending in another jurisdiction is subject to reciprocal discipline just as a lawyer whose finding of misconduct followed a full evidentiary hearing. In most states, a resignation with disciplinary charges pending is the legal equivalent of disbarment. Currently there is no presumption in the Bar Rules as to what discipline should be imposed based on the discipline in the other jurisdiction.

Oregon is one of a handful of jurisdictions in which disbarment is truly permanent, so that the lawyer is never eligible for reinstatement. In many other jurisdictions, a “disbarred” lawyer may seek reinstatement after a few years. Imposing a reciprocal disbarment in all circumstances struck a majority of the Committee as an unnecessarily rigid outcome in cases where the misconduct was not serious enough to warrant a permanent bar to practice in Oregon. Accordingly, the Committee recommends that resignations with charges pending in other jurisdictions not be subject to reciprocal discipline. Rather, DCO would need to seek SPRB authority to initiate an independent prosecution based on the facts from the other jurisdiction.

****DSRC Recommendation (29)*** *Authorize DCO to initiate transfers to Involuntary Inactive Status for Mental Incompetency or Addiction. [unanimous]*

Bar Rule 3.2 provides for summary transfer to inactive status (1) on ex parte application by the bar when a lawyer has been adjudged to be mentally ill or incapacitated; (2) on application by the bar for a determination by the Supreme Court that the lawyer is disabled from continuing to practice by reason of a mental illness or disorder, or addiction; or (3) during the pendency of a formal discipline proceeding on application of the respondent, when the respondent is disabled from understanding the proceeding or assisting in the defense due to a mental illness or disorder, or addiction. The applications in each case are made directly to the Supreme Court, which may act directly or order a hearing. Although it is not mandated by the rule, the practice of DCO has been to seek SPRB authority before seeking a transfer to involuntary inactive status.

Consistent with its recommendations to streamline the temporary suspension processes, the Committee believed that the interest of the public will be better served by eliminating the time required for DCO to seek and obtain SPRB approval to initiate an involuntary transfer to inactive status. It also suggested that DCO ask the Supreme Court to seal the pleadings when appropriate to protect the personal privacy of the lawyer.

****DSRC Recommendation (30)*** *In proceedings before the SPRB, the Respondent should be provided with the entirety of DCO's recommendation and an opportunity to submit a response to the SPRB. [10-9-1]*

Currently, DCO provides the SPRB with a written report (the "complaint summary") that outlines the facts resulting from its investigation, states its legal analysis and a makes a recommendation whether the SPRB should find probable cause of one or more violations. Respondents receive the factual summary, but not the legal analysis, which DCO considers to be attorney work product and subjective analysis.

Proponents of giving the respondent the entire complaint summary argued that the decision of the SPRB to authorize a formal complaint has direct and immediate harmful consequences to the respondent's reputation and finances, and in fairness the respondent should know fully the rationale behind the recommended charges. In addition, efficiencies will be gained if the respondent fully understands DCO's position. A respondent who better comprehends the basis on which DCO's recommendation rests, and has a clearer picture of DCO's case, might be inclined to negotiate an early settlement.

Opponents of the change were concerned with the potential consequence to DCO of having to reveal its analysis of the case, including the strengths and weaknesses of its position and the quality of the evidence. They also questioned whether this new step, allowing the respondent a reasonable time to submit a response to the complaint summary, would delay the SPRB's consideration of a case. A final issue raised but not resolved is whether sharing the complaint summary with the respondent might mean it is also subject to disclosure under the public records law. If this recommendation is adopted, that is an issue that will need to be addressed.

Ultimately, the Committee concluded that fairness and the potential efficiencies to be gained outweighed any harm to DCO's litigation position and that delay can be avoided by imposing and adhering to a strict schedule for DCO's delivery of the report to the Respondent and the Respondent's return submission.

****DSRC Recommendation (31)*** *Permit Respondents to waive a trial panel at the time of filing the answer. [16-1]*

Currently, Bar Rule 2.4(f)(3) provides for the appointment of a single DB member to serve as the sole adjudicator in a discipline proceeding, upon the stipulation of the parties. The Committee believed the Respondent should have the sole discretion to determine whether the case should be heard by a three-person panel or a single adjudicator (the Presiding Disciplinary Judge if that recommendation is adopted). To avoid “judge shopping,” the waiver of the panel would have to accompany the Respondent’s answer to the formal complaint.

Conclusion

The Committee submits these recommendations with confidence that the changes proposed will enhance the efficiency, fairness and effectiveness of the OSB discipline system.¹⁸ The Committee recognizes that some of the proposed changes may be viewed as inconsistent with Oregon’s long tradition of volunteerism. The Committee was mindful of the OSB’s ultimate obligation to protect the public, while simultaneously assuring that respondents are afforded due process in a timely manner, and it believes it has struck the right balance between those important principles. Practical realities have changed over the last several decades and the Committee believes strongly that the new balance struck in these recommendations neither degrades nor denigrates the important contribution and sacrifice of Oregon lawyers who volunteer to participate in the discipline process with the expectation that they will have a meaningful role in protection of the public.

The Committee trusts that the BOG, the Supreme Court, the OSB membership and the members of the public will consider these recommendations as carefully and thoughtfully as has the Committee, and will ultimately recognize them as appropriate modernizations and enhancements to our self-regulating profession.

Respectfully submitted,

Mark Johnson Roberts (Chair)

Chelsea Armstrong*

Kenneth Bauman

John Beckfield

William Blair

Richard Braun*

¹⁸ Some committee members, whose names are marked with an asterisk below, have indicated they will file minority reports identifying their concerns about some of the DSRC’s recommendations.

Nancy Cooper
David Elkanich
Barnes Ellis
Mark Fucile
John M. Haroldson
M. Walter Hicks
Carl "Bill" Hopp
C. Scott Howard
Jeffrey Howes
Wayne Mackeson
Mark Morrell
Arden Olson
Doug Querin
Bruce Rubin
Jana Toran-Crumpacker
Richard Weill*
Jane Yates
Hon. Martha Walters (Supreme Court Liaison)
Lisa Norris-Lampe (Supreme Court Liaison)
R. Ray Heysell (BOG Liaison)
Theresa Kohlhoff (BOG Liaison)
Sylvia Stevens (OSB Executive Director)
Helen Hirschbiel (OSB General Counsel)
Dawn Evans (OSB Discipline Counsel & Director of Regulatory Services)
Amber Bevaqua-Lynott (OSB Deputy Discipline Counsel)