

OREGON STATE BAR

Policy and Governance Agenda

Meeting Date: June 27, 2024
From: Ankur Doshi
Re: BR 8.1 Reinstatement – BOG Involvement

Action Recommended

Submit the proposed changes BR 8.1 removing the Board of Governors from the reinstatement process as noted in Exhibit 1 for public comment.

Background

Prior to 2017, the Board generally held the role determine whether an applicant seeking reinstatement would be approved under Bar Rule of Procedure 8.1 (formal reinstatement procedure) and BR 8.2 (informal reinstatement procedure). This role was initially modelled like the Board of Bar Examiners (BBX), where the Board would review the qualification of applicants seeking formal (BR 8.1) or informal (BR 8.2) reinstatement. Due to the substantial number of reinstatements under 8.1, as well as changes to antitrust law, the Board delegated most reinstatements to the CEO in 2017. Additional changes to BR 8.1 in 2022 and 2023 have also reduced the number of formal reinstatements under BR 8.1. However, BR 8.1(f) still allows the CEO to refer an application to the Board for consideration. The CEO rarely refers a reinstatement to the Board, and such reinstatements are generally those that are highly contested. Additionally, the last such reinstatement heard by the Board was in 2020.

Options

1. Recommend the proposed changes to BR 8.1 be posted for public comment.
2. Decline to recommend the changes be posted for public comment, and submit back to staff for review.

Discussion

With the passage of the Bar Rules of Licensure, the Bar will be proposing a number of Rule Changes to the Bar Rules of Procedure to conform them to the Bar Rules of Licensure. This is the first of several changes to be proposed over the next few months. The recommended changes are submitted in Exhibit 1.

This change concentrates on the process for formal reinstatement under Bar Rule of Procedure 8.1. The Bar has several processes for reinstatement that vary in length and complexity. Some reinstatements can be completed with one form (BR 8.4), some require a minor review of an applicant's background (BR 8.2). Many of these simpler reinstatements will be moved to the Bar Rules of Licensure in the next few months. Formal reinstatement is the most

thorough process that requires a full evaluation of an applicant's character and fitness and learning and ability, The process is generally reserved for those applicants who are seeking reinstatement after being disciplinarily suspended for greater than 6 months (BR 8.1(a)(4)) or resigned more than 10 years ago (BR 8.1(a)(9)). Most reinstatement cases under BR 8.1 are those applicants seeking reinstatement after being disciplinarily suspended for greater than 6 months.

While most of the changes provided are technical in nature and move provisions to different parts of the Rule, there is one substantive change that is different in this draft from the current rules. A review by the Board is not an option in these draft amendments.

In the past, the Board reviewed whether an applicant achieved the requisite character and fitness and learning and ability to be reinstated to the Bar. The Board changed the process in 2017 due to several concerns, including anti-trust concerns,¹ about the process. The current process allows the CEO to approve reinstatements, and the CEO may opt to submit the reinstatement to the Board for review.

Additional changes to the reinstatement process in 2022 and 2023 have reduced the number of formal reinstatements for matters outside of discipline. Since 2017, there have been only a handful of reinstatement submitted to the Board, and none in the past two years.

Currently, the process for review involved the formal reinstatement application, review by staff and submission to the CEO, the CEO may opt to submit to the Board, the Board conducts a review and hearing. If the CEO or the Board submits to the Court an adverse recommendation, the applicant may petition the Oregon Supreme Court to challenge the adverse recommendation. A challenge may be resolved by the Court, submitted to the Disciplinary Board for a contested reinstatement hearing, or remanded back to the Bar for reconsideration. Most times, the Court submits the challenge to the Disciplinary Board for review. The Board's review adds an additional layer of review to the procedure that likely will be contested for at least two years.

Aside from the provisions in the reinstatement process, the Board's general oversight of the Discipline Process has always been systemic. The Board regularly reviews rules that govern lawyer ethics and control the disciplinary process. It does not intervene in specific cases. Cases are tried in front of the Disciplinary Board, consisting of the adjudicator and trial panel members, all of whom are appointed by the Oregon Supreme Court. The Board are not appointed but elected by lawyers throughout the state. Intervening in individual reinstatement proceedings as elected Board members could create tensions between a Board member's duty to the bar, and the membership.

Additional technical changes to BR 8.1 are

1. Section (b)(1) has been moved to a separate section, section (c).
2. The last sentence of Section (b)(3) has been moved to a separate section, section (i).

¹ *North Carolina Bd. of Dental Examiners v. FTC*, 574 U.S. 494 (2015) decision came out in 2015 and examined the issue related to a board's involvement with market participants within a licensed occupation.

3. Notice and comment period for applicants have been moved from section (e) to section (c)(1).

Staff recommends the Board move forward with the changes to BR 8.1 and post them for public comment.

Attachments:

Exhibit 1- Amendment to Bar Rule of Procedure 8.1

Rule 8.1 Reinstatement — Formal Application Required.

(a) Applicants. Any person who has been a member of the Bar, but who has

- (1) resigned under Form A of these rules prior to December 1, 2019, more than ten years prior to the date of application for reinstatement and who has not been a member of the Bar during such period; or
- (2) resigned under Form B of these rules prior to January 1, 1996; or
- (3) been disbarred as a result of a disciplinary proceeding commenced by formal complaint before January 1, 1996; or
- (4) been suspended for misconduct for a period of more than 6 months; or
- (5) been suspended for misconduct for a period of 6 months or less but has remained in a suspended status for a period of more than 6 months prior to the date of application for reinstatement; or
- (6) [Reserved].
- (7) been involuntarily transferred to an inactive membership status; or
- (8) been suspended under BR 7.1 for a period of more than five years prior to the date of application for reinstatement; or
- (9) been suspended for any reason and has remained in that status more than 10 years.

and who desires to be reinstated as an active member or to resume the practice of law in Oregon shall be reinstated as an active member of the Bar only upon formal application and compliance with the Rules of Procedure in effect at the time of such application. Applicants for reinstatement under this rule must file a completed application with the Bar on a form prepared by the Bar ~~for that purpose~~. The applicant shall attest that the applicant did not engage in the practice of law except where authorized to do so during the period of the applicant's suspension, disbarment, or resignation. A reinstatement to inactive status is not allowed under this rule. An applicant who has been suspended for a period exceeding 6 months may not apply for reinstatement any earlier than 3 months before the earliest possible expiration of the period specified in the opinion or order imposing suspension.

(b) ~~Required Showing; Effect of Noncooperation Duty to Cooperate.~~

- ~~(1) Each applicant under this rule must show that the applicant has good moral character and general fitness to practice law; that the applicant has reformed since engaging in earlier misconduct, if any; and that the resumption of the practice of law in Oregon by the applicant will not be detrimental to the~~
- ~~(2) administration of justice or the public interest. Reformation may be established by evidence, such as:~~
- ~~(3)(i) character evidence from people who know and have had the opportunity to observe~~

the applicant;

~~(4)(ii) evidence of the applicant's participation in activities for the public good; (iii) evidence of the~~

~~(5) applicant's forthrightness in acknowledging earlier wrongdoing; (iv) evidence of the applicant's adequate resolution of any previous substance abuse problem; and (v) evidence of the applicant's willingness to pay restitution to those people harmed by the applicant's earlier conduct. In determining whether the evidence is sufficient to establish reformation, the Supreme Court must be satisfied that the applicant has reformed in light of the earlier misconduct.~~

~~(6)~~

~~(7) Each applicant has a duty to cooperate and comply with requests from the Bar in its efforts to assess the applicant's good moral character and general fitness to practice law, including responding to a lawful~~

~~(8)(1) _____ demand for information; the execution of releases necessary to obtain information and records from third parties whose records reasonably bear upon character and fitness; and reporting promptly any changes, additions or corrections to information provided in the application.~~

~~(9)(2) _____ The Chief Executive Officer may recommend to the Supreme Court that the application be denied if refer to the Board any applicant who, during the pendency of a reinstatement application, the applicant engages in conduct that would violate RPC 8.1(a) if done by an attorney or LP, with a recommendation that the Board determine that the applicant has not made the showing required by BR 8.1(b) and recommend to the Supreme Court that the application be denied. No applicant shall resume the practice of law in Oregon or active membership status unless all the requirements of this rule are met.~~

~~(c) Character and Fitness. Each applicant under this rule must show that the applicant has good moral character and general fitness to practice law. The applicant must establish that they have reformed from engaging in earlier misconduct, if any; and that the resumption of the practice of law in Oregon by the applicant will not be detrimental to the administration of justice or the public interest.~~

~~(1) Notice of and requests for comment on applications shall be published on the Bar's website for a period of 30 days. The Bar shall consider comments about applicants received in its evaluation of the Applicant's character and fitness.~~

~~(2) In determining whether the applicant has reformed, the applicant may present evidence, such as~~

~~(i) _____ character evidence from people who know and have had the opportunity to observe the applicant;~~

~~(ii) _____ evidence of the applicant's participation in activities for the public good;~~

~~(iii) _____ evidence of the applicant's forthrightness in acknowledging earlier wrongdoing;~~

~~(iv) _____ evidence of the applicant's adequate resolution of any previous substance~~

abuse problem; and

(v) evidence of the applicant's willingness to pay restitution to those people harmed by the applicant's earlier conduct.

~~(c)~~ Learning and Ability. ~~In addition to the showing required in BR 8.1(b), e~~ Each applicant under this rule must show that the applicant has the requisite learning and ability to practice law in Oregon. The Bar may recommend and the Supreme Court may require as a condition precedent to reinstatement that the applicant take and pass the bar examination administered by the BBX, or successfully complete a prescribed course of

(d) continuing legal education. Factors to be considered in determining an applicant's learning and ability include, but are not limited to: the length of time since the applicant was an active member of the Bar; whether and when the applicant has practiced law in Oregon; whether the applicant practiced law in any jurisdiction since they were last an active member in Oregon; and whether the applicant has participated in continuing legal education activities since they were last an active member in Oregon.

~~(f)~~(e) Fees. In addition to the payments required in BR 8.6, an applicant under this rule shall pay an application fee of \$750 at the time the application for reinstatement is filed.

~~(g)~~(f) Review by Chief Executive Officer; ~~Referral of Application to Board. Notice of and requests for comment on applications filed under BR 8.1 shall be published on the Bar's website for a period of 30 days.~~ If, after review of an application filed under ~~BR 8.1~~ this rule and any information gathered in the investigation of the application, the Chief Executive Officer determines that the applicant has made the showing required by this rule, BR 8.1(b), the Chief Executive Officer shall recommend to the Supreme Court, ~~as provided in BR 8.7,~~ that the application be granted, conditionally or unconditionally. ~~If the Chief Executive Officer is unable to determine from a review of an application and any information gathered in the investigation of the application that the applicant has made the showing required by BR 8.1(b), the Chief Executive Officer shall refer the application to the Board for consideration, with notice to the applicant.~~

~~(h)~~—~~Board Consideration~~Denial of Application. If, ~~after a referral from the Chief Executive Officer, the Board determines from its review of the application and any information gathered in the investigation of the application that the applicant has made the showing required by BR 8.1(b), the Board shall recommend to the Supreme Court, as provided in BR 8.7, that the application be granted, conditionally or unconditionally.~~ If the Board determines that the applicant has not made the showing required by this rule BR 8.1(b), the Chief Executive Officer Board shall recommend to the ~~court~~ Supreme Court that the application be denied.

~~(g)~~ _____

~~(i)~~

If ~~either~~ the Chief Executive Officer ~~or the Board~~ recommends to the Supreme Court, ~~under paragraph (e) or~~

~~of this rule~~, that the application be granted conditionally or unconditionally, then the ~~Supreme Court~~ must determine whether the applicant has satisfied the burden of proof set out in BR 8.12. If the court determines that the

(h) applicant has not satisfied the burden of proof, the court may deny the application or it may remand to the Chief Executive Officer ~~or the Board~~, or take any other action that it deems appropriate.

~~(i)~~ No applicant shall resume the practice of law in Oregon or active membership status unless all the requirements of this Rule are met.

Rule 8.1 Reinstatement — Formal Application Required.

(a) Applicants. Any person who has been a member of the Bar, but who has

- (1) resigned under Form A of these rules prior to December 1, 2019, more than ten years prior to the date of application for reinstatement and who has not been a member of the Bar during such period; or
- (2) resigned under Form B of these rules prior to January 1, 1996; or
- (3) been disbarred as a result of a disciplinary proceeding commenced by formal complaint before January 1, 1996; or
- (4) been suspended for misconduct for a period of more than 6 months; or
- (5) been suspended for misconduct for a period of 6 months or less but has remained in a suspended status for a period of more than 6 months prior to the date of application for reinstatement; or
- (6) [Reserved].
- (7) been involuntarily transferred to an inactive membership status; or
- (8) been suspended under BR 7.1 for a period of more than five years prior to the date of application for reinstatement; or
- (9) been suspended for any reason and has remained in that status more than 10 years.

and who desires to be reinstated as an active member or to resume the practice of law in Oregon shall be reinstated as an active member of the Bar only upon formal application and compliance with the Rules of Procedure in effect at the time of such application. Applicants for reinstatement under this rule must file a completed application with the Bar on a form prepared by the Bar. The applicant shall attest that the applicant did not engage in the practice of law except where authorized to do so during the period of the applicant's suspension, disbarment, or resignation. A reinstatement to inactive status is not allowed under this rule. An applicant who has been suspended for a period exceeding 6 months may not apply for reinstatement any earlier than 3 months before the earliest possible expiration of the period specified in the opinion or order imposing suspension.

(b) Duty to Cooperate.

- (1) Each applicant has a duty to cooperate and comply with requests from the Bar in its efforts to assess the applicant's good moral character and general fitness to practice law, including responding to a lawful demand for information; the execution of releases necessary to obtain information and records from third parties whose records reasonably bear upon character and fitness; and reporting promptly any changes, additions or corrections to information provided in the application.

(2) The Chief Executive Officer may recommend to the Supreme Court that the application be denied if, during the pendency of a reinstatement application, the applicant engages in conduct that would violate RPC 8.1(a) if done by an attorney or LP.

(c) Character and Fitness. Each applicant under this rule must show that the applicant has good moral character and general fitness to practice law. The applicant must establish that they have reformed from engaging in earlier misconduct, if any; and that the resumption of the practice of law in Oregon by the applicant will not be detrimental to the administration of justice or the public interest.

(1) Notice of and requests for comment on applications shall be published on the Bar's website for a period of 30 days. The Bar shall consider comments about applicants received in its evaluation of the Applicant's character and fitness.

(2) In determining whether the applicant has reformed, the applicant may present evidence, such as

- (i) character evidence from people who know and have had the opportunity to observe the applicant;
- (ii) evidence of the applicant's participation in activities for the public good;
- (iii) evidence of the applicant's forthrightness in acknowledging earlier wrongdoing;
- (iv) evidence of the applicant's adequate resolution of any previous substance abuse problem; and
- (v) evidence of the applicant's willingness to pay restitution to those people harmed by the applicant's earlier conduct.

(d) Learning and Ability. Each applicant under this rule must show that the applicant has the requisite learning and ability to practice law in Oregon. The Bar may recommend and the Supreme Court may require as a condition precedent to reinstatement that the applicant take and pass the bar examination administered by the BBX, or successfully complete a prescribed course of continuing legal education. Factors to be considered in determining an applicant's learning and ability include, but are not limited to: the length of time since the applicant was an active member of the Bar; whether and when the applicant has practiced law in Oregon; whether the applicant practiced law in any jurisdiction since they were last an active member in Oregon; and whether the applicant has participated in continuing legal education activities since they were last an active member in Oregon.

(e) Fees. In addition to the payments required in BR 8.6, an applicant under this rule shall pay an application fee of \$750 at the time the application for reinstatement is filed.

(f) Review by Chief Executive Officer. If, after review of an application filed under this rule and any information gathered in the investigation of the application, the Chief Executive Officer

determines that the applicant has made the showing required by this rule, the Chief Executive Officer shall recommend to the Supreme Court that the application be granted, conditionally or unconditionally.

(g) Denial of Application. If the Chief Executive Officer determines that the applicant has not made the showing required by this rule, the Chief Executive Officer shall recommend to the Supreme Court that the application be denied.

(h) If the Chief Executive Officer recommends to the Supreme Court that the application be granted conditionally or unconditionally, then the Supreme Court must determine whether the applicant has satisfied the burden of proof set out in BR 8.12. If the court determines that the applicant has not satisfied the burden of proof, the court may deny the application or it may remand to the Chief Executive Officer, or take any other action that it deems appropriate.

(i) No applicant shall resume the practice of law in Oregon or active membership status unless all the requirements of this Rule are met.