

May 2009 Multnomah Lawyer Ethics Focus

**Sui Generis:
Oregon's Disciplinary System, Part 2**

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Last month we began our two-part look at Oregon's disciplinary system by focusing on the investigative phase before formal charges are authorized by the system's "grand jury," the State Professional Responsibility Board. This month we'll survey the system once formal charges have been authorized. Again like last month, we'll approach our survey from the perspective of three key questions lawyers often ask: (1) what are my odds? (2) what happens? and (3) how long does it take?

What Are My Odds? As with the investigative phase that we discussed last month, the "odds" in any given case once it reaches the trial phase turn on its own facts. Again as we did last month, however, we can make some statistical generalizations about the trial phase based largely on the Disciplinary Counsel's annual reports available on the OSB web site. As we noted last month, roughly one in every 100 Oregon lawyers are formally prosecuted each year. Their statistical odds of winning outright dismissal are long—typically on the order of five percent or less in a given year. "Winning," however, can be as relative in this forum as in other areas of litigation and for that reason many cases settle before trial.

What Happens? Once the SPRB authorizes formal charges, proceedings against a lawyer begin to look a lot more like litigation. At the same time, they retain the “sui generis” flavor noted last month and differ in many important respects from either civil or criminal procedure.

The differences begin with the pleadings. The Bar files a formal complaint based on the charges authorized by the SPRB. Under BR 4.1(c), the complaint must be sufficiently detailed “to enable the accused to know the nature of the charge” but is not necessarily as specific as Oregon’s familiar fact pleading under the ORCP. Answers, by contrast, must be specific (general denials are prohibited) and verified under BR 4.3. Motions against the pleadings are extremely limited by BR 4.4(a) and do not include motions to dismiss.

Discovery is patterned generally on the ORCP under BR 4.5(b) and includes depositions, requests for admission and requests for production. Unlike civil cases where discovery is often oriented around dispositive pretrial motions, however, there is no summary judgment mechanism in bar proceedings. Absent a settlement, therefore, a case must be tried to conclusion.

Trials are heard by a three-member panel of the regional Disciplinary Board (members of which volunteer and are appointed by the Supreme Court). Two of the trial panel members are lawyers and one is a public member. One member acts as the panel chair. The trial panel members are in some respects jurors and in other respect judges. Perhaps the best, albeit imperfect, analogy is

to a three-member arbitration panel. Witnesses typically appear in person. The rules of evidence do not apply. Expert testimony on whether the RPCs were violated is not permitted. Unlike either civil or criminal proceedings, it only takes a two-thirds vote to convict. Although the Bar bears the burden of proof by clear and convincing evidence, the Bar takes the position that motions to dismiss following its case are prohibited—in other words, it “gets to the jury” regardless.

Trial panels are required under BR 2.4 to issue their decisions in writing on both liability and any sanctions. The latter can range from a public reprimand to disbarment. Either side can appeal and the appeal is directly to the Supreme Court. The Supreme Court’s review is *de novo* (based on the factual record developed below).

The Bar is usually represented throughout by both an assistant disciplinary counsel and a volunteer prosecutor. Assistant disciplinary counsel are very conversant with both the unique procedure in bar cases and the substantive RPCs involved. The volunteer prosecutor, in turn, is often an experienced litigator. Accused lawyers have no right to appointed counsel but may retain counsel (and it is wise to do so).

How Long? Under BR 5.4, trials are to be conducted no more than 182 days after the pleadings are provided to the trial panel chair. But, both because a trial panel is not usually appointed concurrently with the initial pleadings and because it is very difficult to coordinate that many lawyers’ schedules (between

the trial panel members, Bar Counsel and accused), trials often take place at the outer edge of that range. If a Supreme Court appeal follows, disciplinary cases are typically reviewed along with all of the other cases the Court is handling at any given time.

Summing Up. The statistics available from both the ABA and the OSB starkly illustrate how common bar complaints and even bar prosecutions have become in Oregon. Given that, Oregon lawyers are well advised to understand the system that may judge them some day.

ABOUT THE AUTHOR

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