

April 2017 *Multnomah Lawyer Ethics Focus*

Reciprocal Discipline North and South of the Columbia

**By Mark J. Fucile
Fucile & Reising LLP**

Many Oregon and Washington lawyers today are licensed in both states. The relative ease of cross-border admission provides an opportunity for lawyers to practice seamlessly on both sides of the Columbia. At the same time, the increase in cross-border admission has also increased the frequency of reciprocal discipline. Under their respective versions of RPC 8.5(a), the disciplinary authority of the Oregon and Washington Supreme Courts extends to licensee conduct wherever it occurs. This is by no means novel—with both the Oregon and Washington formulations of RPC 8.5(a) patterned on their ABA Model Rule counterpart.

In this column, we'll look at two central facets of reciprocal discipline for lawyers practicing in Oregon and Washington. First, we'll survey the reporting requirements in each state. We'll then turn to the mechanics of reciprocal discipline in Oregon and Washington.

Reporting

Although reciprocal discipline procedures in Oregon and Washington share many common traits, there is one key area where they differ significantly: the timing of the duty to report.

Oregon RPC 8.1(b) requires OSB members to report at the beginning of any disciplinary proceeding against them regardless of the eventual outcome:

“A lawyer admitted to practice in this state shall, within 30 days after receiving notice thereof, report in writing to the disciplinary counsel of the Oregon State Bar the commencement against the lawyer of any disciplinary proceeding in any other jurisdiction.”

By contrast, Washington Rule for the Enforcement of Lawyer Conduct 9.2(a) requires WSBA members to report at the end of any disciplinary proceeding against them but only if they have been sanctioned:

“Within 30 days of being publicly disciplined . . . , a lawyer admitted to practice in this state must inform disciplinary counsel of the discipline[.]”

Mechanics

Reciprocal discipline procedure is governed, respectively, by Oregon Bar Rule of Procedure 3.5 and Washington ELC 9.2. The former is available on the OSB web site and the latter is posted on the Washington courts' web site.

In Oregon, when discipline has been imposed in another jurisdiction against an Oregon lawyer, the OSB Disciplinary Counsel notifies both the State Professional Responsibility Board and the Supreme Court. The Bar then files the disciplinary sanction from the other state with the Supreme Court along with the SPRB's recommendation for discipline in Oregon. The lawyer has the right to contest the imposition of reciprocal discipline, but that right is tightly

circumscribed to two questions: (a) was the lawyer afforded notice and the opportunity to be heard in the other jurisdiction? and (b) should the Supreme Court impose discipline in Oregon? Under BR 3.5(e), the Supreme Court has the discretion to: (a) issue a decision based on the paper record; (b) order briefing and oral argument; or (c) refer the case to the Disciplinary Board for a hearing limited to the two questions noted above.

In Washington, when discipline has been imposed in another jurisdiction against a Washington lawyer, the WSBA Disciplinary Counsel files the disciplinary sanction from the other state with the Supreme Court. The Supreme Court then issues an order to the lawyer involved to show cause why the same discipline should not be imposed in Washington. At that point, either the WSBA or the lawyer can challenge the imposition of identical discipline in Washington. The challenge can be based either on the lack of procedural due process in the other jurisdiction or that a different outcome would be appropriate under Washington standards. Although the Supreme Court has the option to refer the matter for further proceedings or a hearing, the most common outcome is a decision on the existing paper record.

Absent the unusual circumstance of a due process challenge and an accompanying hearing on that issue, the facts underlying the discipline in the first

venue may not be re-litigated in either state under, respectively, Oregon BR 3.5(b) and Washington ELC 9.2(f). Although the most common scenario in both states is to impose the same discipline as the first jurisdiction, both the Oregon and Washington rules contemplate exceptions. As the Oregon Supreme Court put it in *In re Lopez*, 350 Or 192, 198, 252 P3d 312 (2011):

“In reciprocal discipline cases, this court has an independent obligation to determine the sanction merited by a lawyer’s violation of this state’s professional rules. . . . As a factual matter, this court frequently has found that the sanction that another jurisdiction has imposed is sufficient to vindicate Oregon’s interests. We are, however, free to impose a different sanction, if appropriate, and on occasion have done so.”
The Oregon Supreme Court has, for example, on occasion increased the sanction (*see, e.g., In re Page*, 326 Or 572, 955 P2d 239 (1998) (30-day suspension followed public reprimand in Washington)) and on other occasions decreased the sanction (*see, e.g., In re Coggins*, 338 Or 480, 111 P3d 1119 (2005)) (Oregon Supreme Court declined to impose reciprocal discipline on a lawyer reprimanded by the Tenth Circuit)).

Again in both states, the disciplinary counsel are not precluded from bringing direct charges against the lawyer involved rather than handling the conduct at issue as a matter of reciprocal discipline under, respectively, BR 3.5(j) in Oregon and *In re Immelt*, 119 Wn2d 369, 831 P2d 736 (1992), in Washington.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.