

Ethics Q & A:  
By Peter Jarvis, Esq

January 2001 represents the start of a new year and, according to some, the true start of the millenium. This therefore seems like a good time to take stock of lawyer's ethics in general and the lawyer disciplinary system in particular.

This column provides an overview of several aspects of the disciplinary system in Oregon, including both strengths and weaknesses. In future columns, I hope to address not only these subjects but also specific ethics issues. If you would like to suggest one or more issues for future topics, please contact me at :Peter Jarvis via e-mail.

### 1. How Does Oregon's Disciplinary System Compare to the Systems in Other American Jurisdictions?

The prevailing national view is that Oregon has among the most aggressive disciplinary systems in the country. In other words, we discipline for more things and have more severe sanctions than most other states and the District of Columbia. Whether this is a good or a bad thing depends, inter alia, on one's opinions about whether the overall conduct of Oregon lawyers is better, worse or unchanged by this additional "deterrence".

### 2. Why Does Oregon Still Use the DRs When Most States Use the RPCs?

Most states now use some version of the 1983 ABA Model Rules of Professional Conduct, typically referred to as the RPCs. Although Oregon has adopted some of the RPCs, it has still kept the basic framework and much of the language of the ABA's 1969 Model Code, typically referred to as the Drs. This is largely the result of history. When the Oregon State Bar considered switching to the RPCs in about 1984 and 1985, only a minority of states had then switched, and it was not clear that the RPCs would come to have the general prominence that they have since achieved. I know of no present effort in Oregon to revisit this subject, and that is probably just as well since we now have a great deal of materials tied, inter alia, to our old DR numbering system. On the other hand, it is at least a bit ironic that the ethics test that future Oregon lawyers must take is not unique to Oregon but is the Multistate Professional Responsibility Exam.

### 3. How Does the Disciplinary System Work?

The best overall description of the system of which I am aware is George Riemer's Chapter 21 of *The Ethical Oregon Lawyer* (OSB CLE 1991 & Supp 1998). At the risk of some oversimplification, the process can be thought of as having three basic components: letter writing, investigation and prosecution.

**Letter Writing** Although the Bar can begin an investigation on its own initiative, most matters begin when the Bar receives a written complaint about a specific lawyer. If the complaint appears to raise an ethics issue, Bar counsel (full-time Bar employees) will send the accused lawyer a copy of the letter and will aske the accused lawyer to respond. The lawyer's response will then be shared with the complainant, who will be given an opportunity to reply, and the accused lawyer will then be given an opportunity to respond to the reply. This written game of ping pong can, in fact, continue for a number of rounds. It is important that lawyers take time not only to prepare timely responses (or obtain extensions) but also to make sure that the responses are accurate. Even if no underlying ethical violation exists, a lawyer can be disciplined for failing to respond and for dishonest responses. At the end of all the letter writing, Bar counsel can choose to dismiss the matter. If Bar counsel does so, the complainant has the right to appeal the dismissal to the State Professional Responsibility Board ("SPRB") but no further. The SPRB is comprised of volunteer lawyers and two volunteer nonlawyers. Bar counsel can also choose to

refer the matter to the SPRB rather than making an initial dismissal. In that case, a decision by the SPRB to decline to proceed is effectively final, although it is possible for a complainant to ask the SPRB to reconsider a dismissed matter. For at least a number of less serious violations, Bar counsel and the SPRB may offer to send an accused lawyer a letter of admonition. Such a letter, which admonishes the lawyer for a violation of the rules, does not constitute formal discipline but can be an aggravating factor in the event that formal discipline is later imposed on other matters. Letters of admonition do not get summarized in the Bar Bulletin but are publicly available in a lawyer's file at the Bar. If a lawyer refuses to accept a letter of admonition, the Bar will begin formal disciplinary proceedings.

Investigation If Bar counsel or the SPRB believes that more facts must be gathered before a decision how to proceed can be made, they may ask for the assistance of a Local Professional Responsibility Committee ("LPRC"). There are different LPRCs throughout the state, and the quality of their work (which is all done by volunteer lawyers) has historically been uneven. In addition, some LPRC investigations proceed speedily while others seem at times to drag on forever. At the end of the day, the LPRC writes up a report that contains both a factual summary and a legal analysis based on that summary. One aspect of the LPRC process that can be either frustrating or liberating to an accused lawyer is that Bar counsel and the SPRB are not bound in any way by the LPRC process and are free to reweigh not only the law but also the facts. Lawyers who are subject to potential discipline are entitled to see the factual portion of the LPRC report as well as the factual portion of any complaint summary submitted by Bar counsel to the SPRB. It is typically a good idea to ask for copies. If nothing else, this may help expose critical factual errors in Bar counsel's or the LPRC's analysis. Investigation can lead to outright dismissal of charges, to a letter of admonition, to a stipulation for discipline (if the Bar and the accused lawyer agree) or to a disciplinary prosecution (if they do not).

Prosecution Disciplinary cases are tried to a panel of two volunteer lawyers and a volunteer nonlawyer. Bar counsel will be present but the actual trial will be handled on the Bar side by a nonlawyer. The accused lawyer may appear pro se or may hire counsel but is not entitled to counsel at Bar expense. Formal discovery on both sides can occur once a formal Complaint has been filed by the Bar. Both the Bar and the accused lawyer have an automatic right to a direct appeal to the Oregon Supreme Court. In fact, the Supreme Court must review all disciplinary decisions (and all stipulations for discipline) which call for disbarment or for suspension in excess of six months.

#### 4. Can the Bar Discipline Me for Private Conduct?

Yes. Although some of the ethics rules are specifically limited to actions taken as a lawyer, others apply to lawyers on a 24/7/365 basis. This is true, for example, of DR 1-102(A)(3), which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." One can legitimately question the extent to which discipline for private conduct is appropriate. The primarily stated purpose of lawyer discipline is protection of the public and not the punishment of errant lawyers as such. That being so, there ought to have to be some sufficient connection or nexus between ostensibly private conduct and one's fitness or ability to practice law before discipline is imposed. In the case of DR 1-102(A)(3), for example, the nexus is presumably that individuals who are dishonest in their private lives may be more likely to be dishonest in their professional lives. Whether this is a sufficient nexus as applied to all instances of private dishonesty is a question that fortunately goes well beyond the limits of this column.

#### 5. Are Bar Counsel Biased Against Solo and Small Firm Practitioners?

I don't believe so. On the other hand, I do think that solo, small firm and large firm practitioners all err at times in thinking that Bar counsel know more about their particular practice areas than they actually do. As a general rule, accused lawyers who take more time and make more effort to explain to the Bar not only what they have done but why they have done it will typically do better with the system.

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