

Inside Oregon Ethics: Quo Warranto?  
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"Quo warranto" is a Latin phrase that has been a part of Oregon law since before statehood. See, e.g., *Stephens v. Dennison*, 1 Or 19, 22 (Or Terr 1853). It translates to "by what authority," and a writ or proceeding in quo warranto seeks to establish whether a public or private official has the lawful power to act in particular circumstances. See, e.g., *State ex rel Adams v. Powell*, 171 Or App 81, 84, 15 P3d 54 (2000). Whether or not it would be technically appropriate to bring a quo warranto proceeding, I believe it is time that we begin to ask "by what authority" disciplinary counsel sometimes advance new and expanded views of the Disciplinary Rules.

Consider, for example, DR 1-103(C). It provides that :

"A lawyer who is the subject of a disciplinary investigation shall respond fully and truthfully to inquiries from and comply with reasonable requests of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers, subject only to the exercise of any applicable right or privilege."

This is clearly an important rule, and the Oregon Supreme Court has noted that lawyers can be disciplined for violating this rule even if the underlying complaint against them is dismissed on its merits. See, e.g., *In re Miles*, 324 Or 218, 923 P2d 1219 (1996). So far so good.

But what state of mind is required for a violation of DR 1-103(C)? The ABA Model Rules of Professional Conduct, which have been adopted in the vast majority of states, require intentional or knowing behavior. See ABA Model Rule 8.1(b) (1983). The legislative history of our rule is to the same effect if not, in fact, stronger. The rule's proponent at the Bar convention at which it was adopted stated that the rule "will apply to those who wilfully and without just cause refuse to respond to a complaint filed against a lawyer." 1982 Bar Convention at 165. This standard makes sense if one considers that DR 1-102(A)(3), which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation," can be violated only by intentional or knowing behavior.

All of us make honest mistakes. For example, we speak from memory only to find out later on that our memories are incomplete or inaccurate in some respect. If a negligently incorrect statement to a client, an opposing counsel or a judge cannot result in discipline under DR 1-102(A)(3), why should statements to Bar counsel be held to a more exacting standard? Nevertheless, there are an increasing number of cases in which the Bar has pursued a negligent-misstatement/failure-to-cooperate theory. (The Bar also pursued a negligence theory against clients of mine until we pointed out the legislative history of the rule; after that, the Bar pursued only a knowing or intentional failure argument in that case but did not change its position in other cases.)

By what authority are disciplinary counsel pursuing a negligence theory? Do they, in each such case, call the attention of accused lawyer to the contrary legislative history? Do they point out that while the Oregon Supreme Court has never expressly considered this issue, all of the court's failure-to-cooperate cases involve intentional or knowing violations? Will they argue next that

the "plain meaning" of the duty to cooperate "fully and truthfully" (emphasis supplied) permits discipline even for wholly innocent and nonnegligent mistakes?

In many ways, disciplinary counsel function as a legislative body. So many of the Disciplinary Rules are so briefly stated that filling in the gaps becomes all-important. That is what disciplinary counsel do when they decide which cases to bring and which theories to advance in those cases. They are, often quite deliberately, making new law. When they go too far, we ought to ask by what authority they do so. We might also wish to ask why we do not learn of these potential legislative developments before the Bar makes up its mind.

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If you would like to suggest one or more issues for future topics, please contact me at: Peter Jarvis via e-mail.

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