



**DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION**

December 10, 2014

David F. White, Chair
Board of Bar Examiners
Oregon State Bar
PO Box 231935
Tigard, OR 97281-1935

Re: Opinion Request OP-2014-2

Dear Mr. White:

You request our opinion regarding whether the Board of Bar Examiners is subject to the Oregon Public Meetings Law. Below we set out your question and our short answer, followed by a discussion.

QUESTION AND SHORT ANSWER

Question: Are any or all meetings of the Board of Bar Examiners subject to the requirements of the Oregon Public Meetings Law, ORS 192.610 to 192.690?

Short Answer: Meetings of the Board of Bar Examiners to discuss the Oregon bar examination are subject to the requirements of the Oregon Public Meetings Law. But the board may hold an executive session to consider examination materials that are exempt from public disclosure.

On the other hand, meetings in which the board or a hearing panel of the board hears or reviews evidence or arguments or deliberates about whether an applicant has the requisite good moral character or fitness to practice law are "judicial proceedings," which are exempt from the requirements of the Public Meetings Law.

DISCUSSION

A. Board of Bar Examiners

The Oregon Supreme Court (court) is responsible for determining who should be admitted to the Oregon State Bar (bar). *See* ORS 9.529 (providing that Bar admissions proceedings are within the inherent power of the court to control). To assist it in that task, the court appoints a fourteen-member Board of Bar Examiners (board) to evaluate whether

applicants possess the legal knowledge and good moral character and fitness necessary to practice law. ORS 9.120, 9.220.

1. Bar examination

To assess legal knowledge, the board prepares, administers, grades, and evaluates the Oregon bar examination. ORS 9.220; Rule For Admission (RFA) 2.10(1). The bar exam consists of questions developed for Oregon applicants only and questions prepared by the National Conference of Bar Examiners (NCBE) for multi-state use. RFA 5.15(4). Applicants with disabilities may apply to have testing conditions modified. RFA 5.10. The board evaluates those requests and fashions reasonable accommodations when appropriate. RFA 5.10(3). Applicants who fail the bar exam may request to examine certain test and grading materials, but responding to individual requests does not appear to be the subject of board meetings. RFA 5.20(3).

2. Character and fitness evaluations

The board investigates each applicant to determine whether he or she possesses the good moral character and fitness to practice law. ORS 9.210, 9.220(2); RFA 6.05. If a question arises, the board meets to review the facts concerning the applicant and to determine how to proceed. The board may require an applicant to appear before it. RFA 6.05(2). If the board determines that an applicant has failed to demonstrate the requisite character and fitness, it must notify the applicant and provide an opportunity for hearing. RFA 6.05(5), 9.01. The board may also convene an evidentiary hearing on its own motion. RFA 6.05(1), 9.10(1)(a).

Evidentiary hearings are called “character review proceeding[s]” and are conducted by hearing panels composed of three board members. RFA 9.10(1). The proceedings are conducted pursuant to Rules For Admission (RFAs) adopted by the court. RFA 9.35, 9.45. After the hearing, the panel submits a proposed decision to the board. RFA 9.25(1).

The board reviews the record and proposed decision and may also hear additional evidence or oral argument. RFA 9.55. It then issues a decision “in the form of a recommendation to the Court[.]” RFA 9.55(1), 9.30.

An applicant may petition the court to adopt, modify or reject the board’s decision. RFA 9.60(1). Whether or not an applicant petitions the court for review, the court must review de novo the record of a character review proceeding and determine whether the applicant should be admitted. RFA 9.60(5). The court may also remand the matter back to the board to conduct further evidentiary proceedings. RFA 9.60(6). In addition, if the board recommended admission without having held a character review proceeding and the court refuses to accept the board’s recommendation, the court may remand the matter to the board to hold a hearing. RFA 9.60(7).

B. Oregon Public Meetings Law

1. Generally

The Oregon Public Meetings Law (PML), ORS 192.610 to 192.690, requires with limited exceptions that meetings of Oregon governing bodies be open to the public. *See* ORS 192.630(1) (so providing). To encourage public attendance, the PML also requires governing bodies to provide notice and hold meetings in convenient and accessible places. *See* ORS 192.640 (imposing notice requirement); 192.630(4) (establishing where public meetings must be held); 192.630(5) (providing that meetings be accessible to persons with disabilities). The PML exempts certain matters from all PML requirements. ORS 192.690. Even if the PML generally applies to a governing body's meetings, ORS 192.660 permits the body to hold an "executive session," which is closed to the public, to consider specific confidential matters.

2. Applicability to board

The PML applies to "all meetings of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision in any manner." ORS 192.610(5). The definition of "public body" includes the state and any board thereof. ORS 192.610(4). The board is a "public body" as it is a board established by the legislature and appointed by the court to "act for the Court" in evaluating applicants for admission to practice law in Oregon. *See* ORS 9.120 (establishing board and authorizing court to appoint members); RFA 2.10 (providing that the board "shall act for the Court in the evaluation of an applicant's qualifications for admission to practice law in Oregon."); *see also*, 30 Op Atty Gen 170 (1961) (concluding that the board is a state body).

The board is also a "governing body," which is defined as "the members of any public body which consists of two or more members, with the authority to make decisions for or recommendations to a public body on policy or administration." ORS 192.610(3). The board consists of fourteen members with the authority to make decisions and to make recommendations to the court. The hearing panel also is a governing body because it consists of three members of the board with the authority to make recommendations to the board.

A quorum is required for both the board and the hearing panel to deliberate or make decisions. *See* RFA 9.55(5) (requiring the board to deliberate and a majority of non-recused members to make recommendation); RFA 9.25 (requiring hearing panel to deliberate and make decision); ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL at 137-38 (2014) (explaining that PML applies to meetings of a governing body if their decisions or recommendations are to be made by a group, whether by consensus or majority, rather than by individual members). Accordingly, we conclude that the PML applies to both board and hearing panel meetings unless a specific exemption applies.

3. Exemption

a. ORS 192.690

ORS 192.690 lists the matters that are exempt from the PML. We set out only those exemptions that either potentially encompass board or hearing panel meetings or provide pertinent context for construing such an exemption:

ORS 192.610 to 192.690 do not apply to the deliberations of * * * state agencies conducting hearings on contested cases in accordance with the provisions of ORS chapter 183, the review by the Workers' Compensation Board or the Employment Appeals Board of similar hearings on contested cases, * * * [and] *any judicial proceeding* * * *.

ORS 192.690(1) (emphasis added). Although character review proceedings resemble contested case hearings in many respects, they are not conducted in accordance with the provisions of ORS chapter 183, but pursuant to the court's Rules For Admission. *See* ORS 183.310(1) (excluding any state board within the judicial branch from definition of "agency" for purposes of ORS chapter 183). Therefore, the exemption for state agency deliberations on contested cases does not apply to deliberations of the hearing panel or board on character review proceedings. The exemption for "any judicial proceeding" potentially applies to at least some board meetings.

b. Meaning of "judicial proceeding"

The PML does not define "judicial proceeding" and no Oregon appellate case addresses the meaning of the phrase for purposes of ORS 192.690(1). This office, however, has issued three opinions that address the "judicial proceeding" exemption.

The first opinion addressed a meeting of the "county court (board of county commissioners)" for Baker County to deliberate on an appeal of a land-use decision. 40 Op Atty Gen 388 (1980).^{1/} We concluded that the meeting was not a judicial proceeding. We characterized the proceeding as "quasi-judicial" rather than "judicial." We then concluded that the judicial proceeding exemption did not encompass quasi-judicial proceedings. *Id.* at 391. Although we did not explicitly state it, the county court in that case was not engaged in a "judicial" function. *See* ORS 3.130(1)(a)(providing that "[a]ll judicial jurisdiction, authority, powers, functions and duties of the county courts * * * [in identified counties, including Baker Count] except * * * in the transaction of county business * * * are transferred to the circuit courts."). Hence, the meeting was not a proceeding within the judiciary.

The second opinion concerned the meetings of a committee formed by the Multnomah County circuit and district courts to establish panels of court-appointed attorneys. 41 Op Atty Gen 417 (1981). We concluded that those meetings were not judicial proceedings either. Based on the legislative history, we reasoned that the "judicial proceeding" exemption "was intended to grant only a limited exemption to courts while engaged in such judicial proceedings as juvenile hearings, grand jury hearings and appellate court deliberations; but not to exempt other meetings

within the judicial branch dealing with administrative or nonadjudicative matters.” *Id.* at 419 (citations omitted). Stated affirmatively, judicial proceedings are limited to adjudicative matters.

Both of those opinions predated the court’s adoption of the current statutory interpretation methodology in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). The third opinion was issued after *PGE* was decided, and applied the current methodology of examining the text, context, and legislative history to the extent that it is helpful.²⁷ Letter of Advice dated August 13, 1997, to Patrick Hearn, Executive Director, Oregon Government Standards and Practices Commission (OP-1997-4).

That opinion considered whether the meetings of the State Professional Responsibility Board (SPRB) were judicial proceedings. The SPRB is a body created by the Oregon State Bar Board of Governors to review the conduct of attorneys and to institute disciplinary proceedings against members of the bar. ORS 9.532(2). The SPRB does not hear formal charges, but determines as a preliminary matter whether complaints should be pursued. We determined that “the most persuasive interpretation of * * * [judicial proceeding] encompasses proceedings initiated within the judicial branch which are adjudicatory in nature, and which are part of a process which ultimately may result in a judicial decision.” OP-1997-4 at 4. We concluded that SPRB meetings were “judicial proceedings,” because “the SPRB is within the judicial branch * * * has a role in the adjudicatory process of attorney discipline, and * * * [its] decisions potentially culminate in a judicial decision by the Oregon Supreme Court.” *Id.*

In sum, for a board proceeding to qualify as a “judicial proceeding” for purposes of ORS 192.690(1), it must:

- Be initiated in the judicial branch;
- Be part of an adjudicative process; and,
- Potentially culminate in a judicial decision.

c. Character review proceedings

i. Initiated in the judicial branch

Applying that interpretation to board meetings, we first conclude that the board is within the judicial branch. As discussed, members of the board are appointed by the court and act for it in carrying out the court’s inherent power to control bar admissions. Hence, proceedings initiated before the board are initiated in the judicial branch.

ii. Part of adjudicative process

Our opinions did not expound on what an “adjudicative process” is except by way of concluding that evaluating bar complaints is adjudicative and establishing the court-appointed attorney list is not. The applicable ordinary meaning of an adjudicative process is the procedure or series of steps taken to make a determination or decision in a judicial action. *See WEBSTER’S THIRD NEW INT’L DICTIONARY* at 27 (pertinently defining “adjudicative” as “concerned with

adjudication” and “adjudication” as “a determination, decision, or sentence especially without interpretation of guilt (as a decree in bankruptcy or disposition of a juvenile delinquent”); *Id.* at 1808 (relevantly defining “process” as “the course of procedure in a judicial action”); *Id.* at 1807 (defining “proceedings” as “the course of procedure in a judicial action” or “a particular step or series of steps adopted for doing or accomplishing something.”).

The court has addressed the nature of an adjudicative proceeding in the context of construing the open-courts guarantee of the Oregon Constitution. Or Const Art I, section 10.³⁷ The guarantee is “limited to *adjudications*.” *State v. McBale*, 353 Or 789, 801, 305 P3d 107 (2013) (emphasis in original). In deciding whether a particular proceeding was an “adjudication” the court explained that “the fundamental function of courts is to determine legal rights based on a presentation of evidence and argument.” *Id.* (quoting *Oregonian Publishing Co. v. O’Leary*, 303 Or 297, 301-02, 736 P3d 173 (1987)). We further note that, in addressing whether disciplinary proceedings are a part of the “administration of justice,” the court observed that “Bar disciplinary proceedings, although *sui generis* in nature, strongly resemble judicial proceedings in that they primarily involve factual adjudications.” *In re Boothe*, 303 Or 643, 654, 740 P3d 785 (1987).

Applying those principles, we conclude that all steps in the character review process described above are part of an adjudicative process. The board’s initial review of the evidence concerning an applicant’s character and its pre-hearing interview of an applicant are steps in the process of determining whether an applicant should gain the privilege of practicing law in Oregon based on the evidence. Character review proceedings in which the hearing panel hears evidence and argument, too, are part of that process. The same is true when the board hears evidence or argument following a character review proceeding.

We also conclude that deliberations by the hearing panel and the board following hearings are part of the “adjudicative process” for three reasons. First, the deliberations are one step in the adjudication and fit within the ordinary meaning of adjudicative process. Second, in ORS 192.690(1), the legislature expressly exempted the deliberations of state agencies conducting hearings on contested cases and the review of similar quasi-judicial proceedings by the Workers’ Compensation Board and the Employment Appeals Board. The legislature clearly did not intend the PML to require deliberations in those quasi-judicial proceedings to be conducted in public. It is therefore unlikely that the legislature intended to require deliberations in judicial proceedings to be conducted in public. Third, the legislative history shows that appellate court deliberations, which would otherwise be subject to the PML as appellate courts deliberate as a group, were intended to be included in the exemption for “judicial proceedings.” *See* 41 Op Atty Gen at 419 (discussing legislative history to that effect). That, too, suggests that the deliberations of the board or a hearing panel should be encompassed in the “judicial proceeding” exemption.

iii. Potentially culminate in judicial decision

As discussed, the court in all cases ultimately decides who should be admitted to the bar. Consequently, board recommendations *always* result in a court decision about whether an applicant will be granted or denied the privilege to practice law in Oregon. Unlike the decision

of a state agency that may become final without ever being subject to judicial review, board decisions are never final, but are an integral part of the judicial decision-making process.

For the reasons explained above, we conclude that meetings in which a hearing panel or the board hears evidence or arguments about an applicant's good moral character and fitness to practice law or deliberates toward a decision based on the evidence are judicial proceedings exempt from the requirements of the PML.

d. Board meetings on the bar examination

Board meetings concerning the bar exam, on the other hand, are not judicial proceedings because they are not adjudicative in nature in that they do not involve the presentation of evidence and argument or factual adjudications. The meetings are, therefore, subject to PML requirements. But many of those meetings may involve review of test materials that are exempt from public disclosure pursuant to ORS 192.501(4).^{4f} The PML permits the review of confidential documents and information to take place in executive session. ORS 192.660(2)(f).

C. Interference with exercise of the judicial power

We address one last issue. The legislature may enact laws that prescribe the exercise of judicial powers, in fact, most judicial activity is regulated by statute. *See Circuit Court v. AFSCME*, 295 Or 542, 549, 669 P2d 314 (1983) (so observing). But if the legislature enacts a law that "unduly burdens or interferes with the judicial department in the exercise of its judicial functions" the law runs afoul of Article VII (Amended), section 1, of the Oregon Constitution, which vests the state judicial power in the courts. *Ramstead v. Morgan*, 219 Or 383, 399, 347 P3d 594 (1959). "[G]eneral institutional inconvenience is not enough to render legislation constitutionally defective. Only an outright hindrance of a court's ability to adjudicate a case * * * or the substantial destruction of the exercise of a power essential to the adjudicatory function will prompt an Article VII, section 1 violation." *Circuit Court v. AFSCME*, 295 Or at 551.

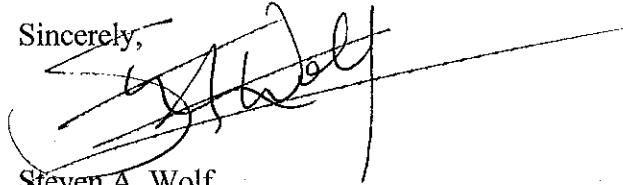
The court has held that the Public Records Law does not unreasonably encroach on the judicial function of disciplining lawyers. *Sadler v. Oregon State Bar*, 275 Or 279, 550 P2d 1218 (1976), *Frohnmayr v. Oregon State Bar*, 307 Or 304, 767 P3d 893 (1989). We have similarly opined that application of the PML to judicial branch meetings "does not unreasonably encroach on any judicial function, but rather insures that public business is disposed of in a public manner." 41 Op Atty Gen at 419.

Applying the PML to meetings in which the board discusses the bar examination does not affect the court's ability to "adjudicate a case" as those meetings are not part of the adjudicative process. Nor does application of the PML substantially destroy the exercise of a power essential to the adjudicatory function. It merely opens the process to the public while at the same time permitting the board to consider confidential examination materials privately.

CONCLUSION

In sum, we conclude that meetings of the board to discuss the Oregon bar examination are subject to the requirements of the PML. But if the board will examine confidential examination materials, it may do so in executive session. When the board or a hearing panel meets to hear evidence or arguments or to deliberate about whether an applicant has the requisite good moral character or fitness to practice law, those meetings are “judicial proceedings” and are exempt from the requirements of the Public Meetings Law.

Sincerely,



Steven A. Wolf
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c: Amy Alpaugh, DOJ

^{1/} Although denominated a “county court,” at the time, this body was what would come to be known as the board of county commissioners.

^{2/} In *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009), the court further refined the statutory interpretation methodology articulated in *PGE v. BOLI*, to permit courts to consider legislative history whether or not a statutory term is ambiguous. Although our 1997 opinion was issued before that refinement, we examined the legislative history.

^{3/} Article I, section 10, of the Oregon Constitution provides that “No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay.”

^{4/} ORS 192.501(4) provides that, unless the public interest requires disclosure in the particular instance “[t]est questions, scoring keys, and other data used to administer a licensing examination * * * before the examination is given and if the examination is to be used again * * * [including] [r]ecords establishing procedures for and instructing persons administering, grading or evaluating an examination * * * to the extent that disclosure would create a risk that the result might be affected” are exempt from public disclosure under Oregon’s Public Records Law.